



Promoting fair and effective criminal justice

May 2018

Submission: Implementation of the UNGASS Outcome Document in regard to human rights

Introduction

Penal Reform International (PRI)¹ welcomes the opportunity to provide information for the High Commissioner's Report on the implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights, as requested by the resolution of the Human Rights Council 37/42, adopted on 23 March 2018.

This submission is structured around the human rights recommendations in regard to human rights contained in the UNGASS Outcome Document, highlighting challenges and drawing on existing jurisprudence from human rights bodies that provide guidance on how the commitments can be implemented.

It focuses on issues surrounding the criminal justice system and imprisonment. While some of the sections could be expanded on, we have focused primarily on proportionality of sentences, with some short commentary on other commitments. Each section has a list of recommendations. The information is drawn from a range of sources, including PRI and other civil society organisations, as well as press reports and UN /other international jurisprudence.

1. Proportionality of sentences

Operational recommendations: 4 k and l

Disproportionate responses to drug-related offences

It has been estimated that amongst the approximately 10 million prison population, at least one million people are in prison for a drug-related offence. Harsh drug policies, many implemented under the so-called 'war on drugs' has resulted in the prosecution of drug offences in many countries with lengthy sentences, often without differentiation, for those involved in trafficking, as well as for use and possession of narcotics. According to available UN data, 83 per cent of drug offences recorded by law enforcement and criminal justice systems are possession offences.² This is attributed to the prison overcrowding crisis globally. Minor drug offences (such as low-level dealing or smuggling) are often punished with harsher penalties than that cause such as murder

¹ Penal Reform International (PRI) is an independent non-governmental organisation with consultative status with ECOSOC that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide. PRI has a Regional Office based in Astana.

² Commission on Crime Prevention and Criminal Justice, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice*, 2013, E/CN.15/2013/9, www.unodc.org/documents/data-and-analysis/statistics/crime/World_Crime_Trends_2013.pdf.

and rape.³

For example, in most US States, possession is classed as a felony leading to harsh prison terms which in many cases is mandatory.⁴ In England and Wales figures from 2013-14 show that almost 2,000 people received immediate prison sentences for possessing Class C drugs which include tranquillisers, valium and anabolic steroids.⁵

Harsh drug policies have seen the unwavering application of punitive criminal sanctions for drug offenders, with little differentiation between use and possession, at one end of the scale, and large-scale trafficking with links to organised crime, at the other end. This has given rise to a dramatic increase in the number of persons disproportionately criminalised for small-scale drug offences.⁶ In the USA, for example, approximately 40 per cent of all drug arrests in 2005 were for simple possession of marijuana, and in the 1990s marijuana possession arrests accounted for 79 per cent of the growth in drug arrests.⁷ The majority of small-scale drug offenders have no history of violence or high-level drug selling activity.

Some other examples of disproportionate criminal law and sentencing practices include in Ukraine where the possession of minimal amounts of drugs (from 0.005g) can lead to three years in prison.⁸ In Russia, solution traces in a used needle can lead to one and a half years in prison. In Georgia, drug urine tests can lead to imprisonment.⁹ Under the notorious 'three strikes laws' that have become popular in the USA, drug offenders with no history of violence may face mandatory minimum sentences in excess of 25 years in prison. Thousands of low-level drug offenders have been sentenced to life imprisonment with no chance of parole as a result of such laws.¹⁰ In China new judicial interpretations of drug laws meant that more types and smaller amounts of drugs were criminalised, and penalties for online activities related to drugs and for abetting children to commit drug-related offences were also increased in 2016.¹¹

In Brazil, the 2006 law prohibited replacement of imprisonment with alternative sentences for drug offences, even though Brazilian law allows alternatives in the case of sentences up to four years for all other offences perpetrated without violence or grave threat, which would be the case for many instances of drug offences.¹² A ban on early release for drug offences (among other

³ International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012. P. 2.

⁴ 'Penalties and sentencing', <http://www.drugabuse.net/drug-policy/penalties-for-drug-abuse/>, <accessed 27 January 2015>.

⁵ UK Ministry of Justice, Drugs: Misuse, <http://www.theyworkforyou.com/wrans/?id=2014-09-09.208713.h&s=drugs#g208713.r0> <accessed 27 January 2015>.

⁶ Small-scale drug offences are usually taken to encompass both possession for personal use as well as possession for dealing, however there are no clear thresholds on what is considered 'small-scale'. Quantitative thresholds can become overly complex depending on whether you go by weight or by purity. Often 'small-scale' refers to what role and influence the individual plays in the supply chain. This is why judicial discretion is so critical.

⁷ Bryan Stevenson, Drug Policy, Criminal Justice and Mass Imprisonment, Working Paper Prepared for the First Meeting of the Global Commission on Drug Policies, Geneva, 24-25 January 2011.

⁸ Golichenko, M., and Merkinaite, S., In breach of international law: Ukrainian drug legislation and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Discussion Paper, 2011.

⁹ Otiazhvili, D., Kirtadze, I. and Tsertsvadze, V., How efficient is street drug testing?, Policy Brief, Alternative Georgia, Tbilisi, 2011.

¹⁰ Drug Policy, Criminal Justice and Mass Imprisonment, supra at n. 2.

¹¹ 'China's Top Court Steps Up Harsher Punishment for Drug-Related Crimes', *crienglish.com*, 8 April 2016, <http://english.cri.cn/12394/2016/04/08/3801s923441.htm>.

¹² Systems Overload: Drug Laws and Prisons in Latin America, supra at n. 11, p. 35

offences) was found to be disproportionate in comparison with other offences for which early release was possible by the Working Group on Arbitrary Detention.¹³

Penalties which are tougher on low-level drug offenders than on bank robbers, kidnappers and murderers raises concerns in terms of undermining both the notion of proportionality and of fairness of the law.

The principle of proportionality requires that any infringement to individual's rights must be limited to the extent that is appropriate and necessary for achieving a legitimate aim. Where measures restrict a right protected under the International Covenant on Civil and Political Rights (OCCPR), it 'must demonstrate their necessity and only take such measures *as are proportionate to the pursuance of legitimate aims* in order to ensure continuous and effective protection of Covenant rights', including the right to liberty.¹⁴ The Human Rights Committee has clarified that 'Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.'¹⁵ The principle has also been reflected in international jurisprudence, such as the Inter-American Court of Human Rights.¹⁶

With regard to sentencing policies, the principle of proportionality requires a range of available sentencing options, and that prison sentences are imposed only when no other sanction would be proportionate to the seriousness of the offence and the nature of its commission, taking into account any aggravating and mitigating factors.

The Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) clarify, in Rule 2.3 that, 'In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible' (see also Rule 2.7 and 9.1).¹⁷

In the words of the UN Working Group on Arbitrary Detention, 'All measures of detention should be justified, adequate, necessary and proportional to the aim sought.'¹⁸

In drug-related cases, a proportionate sentencing framework should therefore primarily target people playing high-level roles in drug supply operations and causing the most harm to communities, such as violence and control over organised criminal activity. Sentencing

¹³ UN Working Group on Arbitrary Detention, Mission to Mexico, E/CN.4/2003/8/Add.3, 17 December 2002, Para 44.

¹⁴ Human Rights Committee (2004), *General comment No 31 on the nature of the general legal obligation imposed on state parties to the Covenant*, U.N. doc. CCPR/C/21/Rev/1/Add.13

¹⁵ Human Rights Committee (1999), *General comment No 27 on freedom of movement (Article 12)*, U.N. Doc CCPR/C/21/Rev.1/Add.9

¹⁶ The Court has ruled, in the context of sentencing, that 'no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality', Inter-American Court of Human Rights, *Gangaram Pandey Case*, 21 January 1994, para. 48

¹⁷ See also European Rules on Community Sanctions and Measures, Rule 12.

¹⁸ Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, para 88.

frameworks should also aim to achieve improved outcomes for development, health, and human security, as well as protection of human rights.¹⁹

Pre-trial detention and the principle of proportionality

The principle of proportionality is also relevant in relation to pre-trial detention. In some countries pre-trial detention is mandatory for drug offences, like in Bolivia, Brazil, Ecuador, Mexico and Peru.²⁰ Excessive pre-trial detention is in violation of international law that requires it to be used only as a last resort²¹.

The UN Subcommittee for the Prevention of Torture has stated that '[I]t is a recognized norm of international law that pre-trial detention must be used as a last resort, for the shortest time possible, and only for the most serious offences.'²² The Working Group on Arbitrary Detention also underlined this norm stating unequivocally, that '[U]nder international law, detention prior to conviction must be the exception, not the rule'²³ and also finding that 'the non-application of alternatives to detention, lack of effective judicial review, and the excessive length of detention may render the detention of an individual arbitrary.'²⁴

Death penalty

The concept of proportionality of sentencing becomes essential when considering the application of the death penalty for drug offences. While it is not explicitly included in the UNGASS Outcome Document, during the Special Session more than 60 countries voiced their opposition to the death penalty for drug-related offences as a contravention of international law.²⁵

In international law, the death penalty is prohibited for all but the 'most serious crimes'. International human rights bodies have repeatedly emphasised that the 'most serious crimes' are limited to intentional killing only: in 2015, the UN Special Rapporteurs on Torture and on Extrajudicial Executions said that '[e]xecutions for drug crimes amount to a violation of international law and are unlawful killings'.²⁶ In 2005, the Human Rights Committee explicitly stated that drug-related crimes are not the most serious and cannot receive the death penalty.²⁷ Drug

¹⁹ International Drug Policy Consortium, *Drug Policy Guide*, 3rd edition, p79.

²⁰ Systems Overload: Drug Laws and Prisons in Latin America, *supra* at n. 11, p. 6. (Bolivia, Brazil, Ecuador, Mexico and Peru)

²¹ (Article 9 and 14 ICCPR, see also Rules 6.1 and 6.2 of the UN Tokyo Rules). See also Human Rights Committee, General comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, UN-Doc. CCPR/C/GC/35

²² Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, paras 76 and 77.

²³ Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, para 64.

²⁴ UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, Summary.

²⁵ International Drug Policy Consortium, *Why pointing a finger at countries with the death penalty for drugs is not enough*, 6 June 2016.

²⁶ UN OHCHR, 'Using the death penalty to fight drug crimes violates international law, UN rights experts warn World Day Against the Death Penalty – Saturday 10 October', OHCHR website, 10 October 2015

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16581&LangID=E>

²⁷ UN Human Rights Committee, 84th Session, Concluding Observations of the Human Rights Committee: Thailand, 27 July 2000, CCPR/CO/84/THA, para. 14

offences do not meet this threshold,²⁸ and executions for such offences are therefore in violation of international human rights law.²⁹

The International Narcotics Control Board (INCB) has also encouraged UN member states to refrain from imposing the death penalty for drug offences and to consider abolishing it,³⁰ while the Executive Director of the UN Office on Drugs and Crime (UNODC), Yury Fedotov, has expressed his organisation's opposition to the death penalty in all circumstances.³¹

In 2017 there were at least 33 countries that allow for the death penalty for drug offences in law, and at least nine countries retain it as a mandatory sanction (although three of these countries are abolitionist in practice). Excluding China where statistics are unreliable, at least 1,320 people are known to have been executed for drug-related offences between January 2015 and December 2017, although the number of executions has steadily declined from 718 in 2015 to 280 in 2017.³²

Reforms to meet the principle of proportionality in drug policies

There is a growing recognition of the disproportionality of current penalisation and the need to meet standards of proportionality for drug offences has been stressed repeatedly, including by the International Narcotics Control Board (INCB)³³ who has repeatedly called upon States to give due regard to the principle of proportionality in the implementation of criminal justice policy in their efforts to address drug-related crime. Furthermore, United Nations Office on Drugs and Crime (UNODC) have also reiterated the principle;³⁴

UNODC's human rights guidance note of 2012 emphasises the principle of proportionality, stating that: 'Responses to drug law offences must be proportionate' and that '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, including detention.'³⁵

²⁸ See UN document CCPR/CO/69/KWT, 27 July 2000, para. 13; UN document. CCPR/CO/84/THA, 8 July 2005, para. 14; UN document. A/50/40, 3 October 1995, para. 449; UN document E/CN.4/1997/60, 24 December 1996, para. 91; UN document E/CN.4/2004/7, 29 December 2007, paras. 51-53; press release of the UN High Commissioner for Human Rights, 10 March 2009; letter of the UN Special Rapporteurs on the question of torture and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Chairperson of the 52nd Session of the Commission on Narcotic Drugs, 10 December 2008.

²⁹ Rick Lines, A 'Most Serious Crime?' – The Death Penalty for Drug Offences and International Human Rights Law' *Amicus Journal*, No. 21, pp. 21-28, 2010

³⁰ International Narcotics Control Board, Report of the International Narcotics Control Board for 2014, 2015, piii, <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2014.html>

³¹ UNODC, 'Statement of the UNODC Executive Director Yury Fedotov on the use of the death penalty in Indonesia', UNODC website, 29 April 2015, <https://www.unodc.org/unodc/en/press/releases/2015/April/statement-of-the-unodc-executive-director-yury-fedotov-on-the-use-of-the-deathpenalty-in-indonesia.html>

³² Gen Sander, Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2017*, March 2018, pp6–7.

³³ International Narcotics Control Board (2008), Annual Report 2007, Chapter 1 (Vienna: INCB), <http://www.incb.org/incb/annual-report-2007.html>, and see: INCB Side Event on "The need for proportionality: State responses to drug-related offences", 2017, <http://bookofauthorities.info/documents/2017/incb-side-event-on-the-need-for-proportionality-state-responses-to-drug-related-offences/>.

³⁴ United Nations Office on Drugs and Crime, UNODC and the promotion and protection of human rights, UNODC Guidance Note – Human Rights, May 2012, http://www.unodc.org/documents/justiceand-prison-reform/HR_paper_UNODC.pdf

³⁵ United Nations Office on Drugs and Crime, UNODC and the promotion and protection of human rights, UNODC Guidance Note – Human Rights, May 2012, <http://www.unodc.org/documents/justiceand->

Many governments have taken steps towards a less punitive approach to drug cultivation and possession for use. New reforms have been proposed or adopted over 2017-2018 – including decriminalising cannabis or reducing sentences for minor offences – in countries such as France, Georgia, Norway and Canada, and in several US states.³⁶

In Myanmar, where approximately 48 per cent of the prison population are held under drug-related offences,³⁷ the National Narcotic Drug Control Policy was issued in February 2018 after years of deliberations shifting policy towards a less punitive approach.³⁸ Furthermore, the Tunisian Parliament amended a drug law that had imposed a mandatory prison sentence for narcotics use or possession, giving judges new discretion to take account of mitigating factors.³⁹ In Thailand, where 73 per cent of prisoners are detained on drug-related offences,⁴⁰ reforms have reduced the overall length of sentences for drug offences and further relaxation of the country's drug laws are anticipated in 2018 through the proposed Narcotics Control Bill.⁴¹ Ghana will become the first African country to decriminalise the personal possession and use of illicit drugs if the progressive Narcotics Control Commission Bill currently under consideration is adopted.⁴²

In the UK, the Sentencing Council developed new guidelines in 2011, advising the evaluation of an offender's culpability in committing the offence (role of the offender from a leading to a significant or lesser role) as well as the harm caused by the offence (introducing quantity thresholds). The review also took into consideration the fact that sentences based on quantity and purity of drugs resulted in 'vulnerable couriers receiving sentences at the same level as more serious, organised traffickers'.⁴³

Various bodies have attempted to develop proportionate sentencing rules for 'drug mules', as it is felt these cases should be distinguished from those involving 'professional traffickers'. The rules should recognise the low-level role and culpability in the drugs market as well as the fact that heavy sentences for 'drug mules' 'has little deterrent effect as criminal organisations can easily

[prisonreform/HR_paper_UNODC.pdf](#), quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 2.

³⁶ France: 'France to soften cannabis laws – but not legalise', *Yahoo! News*, 23 January 2018, uk.news.yahoo.com/france-soften-cannabis-laws-not-legalise-155418579.html; Georgia: Human Rights Watch, *World Report 2018*, January 2018, p242; Norway: 'Norway votes to decriminalise drugs and offer treatment instead of jail time', *i News*, 16 December 2017, inews.co.uk/news/world/norway-votes-decriminalise-drugs-offer-treatment-instead-jail-time/; Myanmar: Transnational Institute, 'Will Myanmar lead drug policy reform in Southeast Asia?', *International Drug Policy Consortium*, 7 September 2017, idpc.net/alerts/2017/09/will-myanmar-lead-drug-policy-reform-in-southeast-asia; Canada: Joan Bryden, 'Canada: Liberal MPs urge dropping criminal penalties for all illicit drug use', *International Drug Policy Consortium*, 19 January 2017, idpc.net/alerts/2018/01/liberal-mps-urge-dropping-criminal-penalties-for-all-illicit-drug-use; USA: 'State Marijuana Laws in 2018 Map', *Governing*, 8 January 2018, www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.

³⁷ '48pc of prisoners linked to narcotic drugs', *Eleven*, 28 February 2018, www.elevenmyanmar.com/local/13506.

³⁸ 'What next for Myanmar's new drug strategy', *IDPC*, 27 February 2018, <https://idpc.net/alerts/2018/02/what-next-for-myanmar-s-new-drug-strategy>.

³⁹ Human Rights Watch, *World Report 2018*, January 2018, p559.

⁴⁰ Department of Corrections of Thailand, Prison population as of 1 March 2018, www.correct.go.th/stat102/display/result_pdf_drug.php?date=2018-03-01.

⁴¹ Patcharavalan Akbar and Prin Laomanutsak, 'A sprint through a year of drug policy developments in Thailand', *International Drug Policy Consortium*, 15 January 2018, idpc.net/blog/2018/01/a-sprint-through-a-year-of-drug-policy-developments-in-thailand.

⁴² 'Could seismic changes in Ghana's narcotics laws herald a shift in Africa's drug policy', *Institute for Security Studies*, 13 October 2017, issafrica.org/iss-today/ghanas-bold-step-away-from-the-war-on-drugs.

⁴³ Sentencing Council (2011), *Drug offences guideline professional consultation*, http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf, quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 5.

replace them and do 'not address the desperate poverty and lack of socio-economic opportunities which motivate people to become "mules".⁴⁴

The concept of proportionality has been invoked occasionally by courts, however application has tended to be limited to cases of very long sentences and not necessarily relating to drug-related offences.⁴⁵ However, one case in Italy recognised the principle of proportionality after a 10-year imprisonment sentence and payment of a fine was the sanction for a significant quantity of drugs were found in his car. The higher court ruled that the conviction should be aimed at his re-education and should ensure the respect of the principle of proportionality, stated in Article 49.3 of the EU Charter (on principles of legality and proportionality of criminal offences and penalties) weighing the seriousness of the crime against the need for re-education.⁴⁶

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- Existing sentencing frameworks for drug offences should be reviewed to ensure proportionality of sentencing, and address the consequences resulting from disproportionate sentencing such as prison overcrowding, and ineffective use of criminal justice resources
- Differentiating between personal use and intent to supply should be done via indicative quantity thresholds, as well as an assessment of all evidence available on a case-by-case basis. Even if people are found in possession of quantities above the threshold, mechanisms should be in place to identify whether possession is for personal use or intent to supply
- A range of factors should be considered during sentencing to ensure that sentences are proportionate to the culpability and role of the offender, including the consideration of mitigating and aggravating factors, and the harms caused by the offence. In that regard, judges and prosecutors should adopt a gender perspective when imposing penalties and considering alternatives to incarceration
- Mandatory minimum penalties should be eliminated. Pre-trial detention should be used as a last resort and only in cases where the suspects is accused of the most serious offence(s).
- The death penalty should be abolished for drug offences, as an ineffective deterrent and a violation of international law.

2. Alternatives to conviction and punishment

Operational recommendations: 4 j and m

Research suggests that punishment has a limited impact upon reducing illicit drug use, with countries which impose severe penalties for possession and personal consumption of drugs no more likely to deter drug use in the community than countries imposing less severe sanctions.⁴⁷ For instance, a 2014 survey conducted by the UK government found that 'evidence from other countries show that levels of drug use are influenced by factors more complex and nuanced than

⁴⁴ International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 8.

⁴⁵ See Mary Rogan, 'Out of balance', August 2014, <http://www.penalreform.org/blog/balance-disproportionality-sentencing/>

⁴⁶ Italy / Court of Cassation, Third Criminal Section / 10095 N.M.G., 10 January 2013, see: <http://fra.europa.eu/en/caselaw-reference/italy-court-cassation-third-criminal-section-10095>

⁴⁷ UNODC, From coercion to cohesion: Treating drug dependence through health care, not punishment, Discussion Paper, New York, 2010.

legislation and enforcement alone'.⁴⁸ Evidence also shows that a high rate of relapse to drug use, drug overdose and recidivism among drug dependent individuals after they are released from prison, especially if there are no linkages to community services and no continuum of care.⁴⁹

Alternatives to imprisonment provide more effective and less costly ways to reduce drug-related crime than imprisonment. Non-custodial alternatives also promote the health and social inclusion of low-level drug offenders by addressing some of the root causes of their involvement in the illicit market. They can better serve the principle of proportionality, as discussed above.

Types of alternatives to imprisonment

There are different types of non-custodial sanctions available, as laid out in the UN Tokyo Rules. For drug-related cases these might include drug treatment, requirements to abstain from drugs and alcohol, payment of a monetary fine, prohibitions from moving or associating with others with criminal convictions; reporting to a probation officer regularly, work and community service requirements and house arrest.

Drug treatment remains the most common. This was a key finding of a study on alternatives to coercive sanctions (ACS) in response to drug-related offences; the study identified 13 different types of ACS across 28 member states with drug treatment as the most used. The research found that the use of alternatives was strongly influenced by the individual beliefs of those responsible for sentencing, such as prosecutors and judges.⁵⁰ This demonstrates there is a need for greater sensitisation of judicial actors.

Aside from drug treatment, there was an expansion in the use of 'drug courts'⁵¹, which are designed to offer drug treatment programmes under judicial supervision – particularly in Latin America, following a model from the US where there are around 3,100 drug courts.⁵² However, there are significant concerns about this expansion, including from the Inter-American Commission on Human Rights (IACHR). The Commission has criticised the lack of available data and monitoring mechanisms demonstrating effectiveness and noted that some drug courts have been used to criminalise non-problematic drug possession or use, rather than the stated intention of providing a public health alternative.⁵³

Community service has also been looked to, although not as commonly. For example, in Cambodia where 25,000 prisoners are in facilities designed to hold 8,500, and there were almost

⁴⁸ UK Home Office, Drugs : International comparators, October 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf,

⁴⁹ UNODC, From coercion to cohesion: Treating drug dependence through health care, not punishment, Discussion Paper, New York, 2010.

⁵⁰ European Commission, *Study on alternatives to coercive sanctions as a response to drug law offences and drug-related crimes*, Final Report, 2016, iii, iv and v.

⁵¹ For example, in Argentina, see David Gagne, 'Argentina to Expand Drug Treatment Program for Minor Crimes Nationwide', *Insight Crime*, 29 May 2017, www.insightcrime.org/news/brief/argentina-expands-drug-treatment-program-minor-crimes-nationwide/.

⁵² U.S. Department of Justice, Office of Justice Programs, *Drug Courts*, May 2017, www.ncjrs.gov/pdffiles1/nij/238527.pdf.

⁵³ Inter-American Commission on Human Rights, *Measures to Reduce Pretrial Detention*, OEA/Ser.LV/II.163 Doc. 105, 3 July 2017, p95.

18,000 arrests of suspected drug traffickers and drug users in 2017⁵⁴ – the Justice Ministry recently announced a pilot programme of community service.⁵⁵

The issue of ‘net-widening’ (widening the control of criminal justice control) needs to be borne in mind when implementing or expanding alternatives to imprisonment. While there is no reliable data on the use of community sanctions at a global level, evidence shows that there is not necessarily a correlation between reducing prison population rates and increasing community sanctions. This is seen in European countries and the US, where there is a trend towards ‘mass supervision’ of offenders, including people convicted of drug-related offences. For instance, in the US there are nearly five million people under a criminal justice supervision (parole or probation), a fourfold increase since 1980.⁵⁶

A study explains: ‘Probation and parole populations mushroomed alongside prison and jail populations, signalling that, with some exceptions, community corrections was serving as an add-on, rather than alternative to, incarceration’.⁵⁷ In Europe, the numbers of people under some form of supervision has also grown significantly in almost all jurisdictions in recent years. Research found that of 29 European countries, 17 have more people under supervision than in prison, and that the increase has not led to a reduction in prison populations.⁵⁸

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- A review of law and policy should be undertaken to provide for the design and implementation of comprehensive and contextualised alternatives to arrest, sentencing and imprisonment for drug-related offences.
- Non-custodial alternatives should be available for all non-violent drug offenders, such as low-level couriers and dealers, as well as drug dependent individuals who have committed economic/acquisitive offences.
- Coercive treatment as an alternative to imprisonment must be avoided, and referrals to harm-reduction services should be available.
- Promoting proportionate penalties and the use of non-custodial sanctions among judicial actors and prosecutors should be prioritised.

3. Legal guarantees and due process safeguards in criminal justice proceedings

Operational recommendations: 4 o (Including prohibition of arbitrary arrest and detention, and of torture, access to legal aid and right to fair trial).

Drug control efforts have sometimes been associated with lack of due process, including lack of a fair trial. In some places, people accused of drug offences can be held in pre-trial detention for months, sometimes years. In Mexico or Bolivia, pre-trial detention is mandatory for drug offences,

⁵⁴ ‘2017 in review: Cambodia’s tumultuous year’, *The Phnom Penh Post*, 26 February 2018, www.phnompenhpost.com/national-post-depth/2017-review-cambodias-tumultuous-year.

⁵⁵ World Prison Brief, Institute for Criminal Policy Research, Cambodia, www.prisonstudies.org/country/cambodia.

⁵⁶ Columbia University Justice Lab, *Too big to succeed: The impact of the growth of community corrections and what should be done about it*, 29 January 2018.

⁵⁷ *Ibid.*, p2.

⁵⁸ Fergus McNeill and Kristel Beyens, *Offender Supervision in Europe*, COST Action IS1106 Final Report, March 2016, p6, <http://www.cep-probation.org/wp-content/uploads/Final-Report-COST-Action-IS1106.pdf>.

whether the offence is serious or of a minor nature. In Bolivia, the percentage of people held in pre-trial detention for a drug-related offence is an alarming 67 per cent.⁵⁹

The overuse of pre-trial detention has contributed to prison overcrowding and violations of human rights as people are held without trial for lengthy periods of time. Pre-trial detention should only be used as a last resort, and only where there is sufficient evidence to deem it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses, or posing a clear and serious risk to others. Pre-trial detention should be avoided particularly for pregnant women and women with children, as their incarceration can have a significant impact on their family, especially when they are the sole care provider for their children. At trial, the offer of a reduced sentence if suspects plead guilty⁶⁰ risks encouraging innocent but poor defendants (such as many people who use drugs, low-level dealers or drug couriers) to plead guilty if they cannot afford legal counsel. It is therefore important that drug offenders should be offered legal aid to ensure that they know their rights and take informed decisions throughout their trial. Any defendant who does not speak the language(s) of the court should have access to translation and interpretation. This is particularly important for foreign nationals (such as drug couriers), and for Indigenous groups.

A significant trend in relation to sentencing is a growth in plea bargaining or trial waiver systems. Plea bargains are a negotiated process by which the prosecution puts forward reduced charges or requests a lighter sentence, and in return a defendant pleads guilty or incriminates others. A 2017 study on 90 countries by the NGO Fair Trials found that there was a 300 per cent increase in plea bargains worldwide since 1990.⁶¹ Most recently, the Supreme Court in the Philippines issued a framework on plea bargaining in drug cases (except those where the death penalty or life imprisonment could be imposed).⁶²

With most plea bargaining systems having no regulation, there are considerable concerns about its use, not least that defendants lack the procedural safeguards that are available to them during a trial. Also, easier convictions can encourage over-criminalisation and drive harsher sentences; there can be an inequality of 'arms' and a lack of transparency where 'deals' are done by prosecutors behind closed doors; and public trust in justice can be undermined.⁶³

The 'inequality of arms' is particularly evident in drug-related cases where the sentences are particularly harsh, and therefore there is a lot at stake for the suspect if they do not agree to the 'deal' proposed. For example, in US federal drug cases, mandatory minimums have contributed to a system in the US where defendants convicted of drug offences received sentences on average 11 years longer by going to trial rather than pleading.⁶⁴

There are also cases where innocent people pleaded guilty, for example in Houston, Texas, hundreds of convictions following plea deals in drug cases have been questioned in recent years, following the discovery that they were based on false positive results of unreliable roadside drug tests considered sufficient to establish probable cause to arrest, but not accurate enough to be used as evidence at trial due to high error rates. Despite their innocence, the now exonerated

⁵⁹ Washington Office on Latin America, Systems overload: Drug laws and prisons in Latin America, December 2010, http://www.wola.org/publications/systems_overload_drug_laws_and_prisons_in_latam_america_0.

⁶⁰ This is often the case in regions including Latin America, where a prison sentence can be significantly reduced if a person pleads guilty.

⁶¹ Fair Trials International, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, 2017, www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf.

⁶² 'SC issues guide to plea bargaining in drug cases', *Inquirer.net*, 4 May 2018, <http://newsinfo.inquirer.net/987672/sc-issues-guide-to-plea-bargaining-in-drug-cases>.

⁶³ Fair Trials International, *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, 2017.

⁶⁴ Fair Trials, *The Disappearing Trial*, 2017, p5.

defendants all accepted plea deals before the evidence was properly tested.⁶⁵ Furthermore, discrimination has been found to affect plea bargaining systems; in drug-related cases, research has found that prosecutors are more likely to offer Black and Latino defendants plea deals in misdemeanor drug cases that feature jail or prison time, as opposed to white defendants who are more frequently offered a plea deal involving a non-custodial sentence in such case⁶⁶

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- The full range of due process and legal procedural safeguards, as required in international standards, should be provided for any adjudication of drug-related offences.
- Pre-trial detention should be avoided unless absolutely necessary, as required in the UN Tokyo Rules, to protect the presumption of innocence.
- Trial waiver systems, or plea bargains, should be fully regulated and due process guarantees should be ensured for any suspect that is subject to such a system.

4. Health and treatment

Operation recommendations: 1 j, k, o and 4 b, k, m

Despite bans on the use of alcohol and drugs, in most prisons significant proportions of prisoners use such substances. While the scale of the problem and the types of drugs used in prisons vary from country to country, it is estimated that approximately one in three people have used drugs at least once while in prison and that many inject drugs for the first time while detained.⁶⁷

Prisoners who use drugs should be permitted access to evidence-based and, when relevant, gender-sensitive healthcare and harm reduction measures to reduce risks of transmission of infections such as HIV, hepatitis and tuberculosis, all of which are much more prevalent in prison than in the community.⁶⁸

The implementation of harm reduction measures – evidence-based interventions to prevent the transmission of HIV – remains politicised in states that adopt a prohibitionist stance towards drug use. Access to evidence-based harm reduction measures – such as Needle Syringe Programmes (NSPs) and Opioid Substitution Therapy (OST) – continue to be limited in prisons as outlined in the 2016 global report of Harm Reduction International.⁶⁹ Of the 158 countries reviewed, 90 currently provide NSPs outside of prison settings, while only eight provide it in at least one prison.⁷⁰ The provision of OST is more common in prisons. Forty-two of the 80 countries providing OST in the community make it available in at least one prison, an increase of 21 per cent from 2014. However, there are concerns about the quality of OST in prisons.⁷¹

⁶⁵ Fair Trials, *The Disappearing Trial*, 2017, p15.

⁶⁶ Fair Trials, *The Disappearing Trial*, 2017, p12, quoting: Kutateladze, B., Tymas, W. and Crowley, M., “Race and Prosecution in Manhattan”, Research Summary, Vera Institute of Justice (Jul. 2014). Available at: <http://archive.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-research-summary-v2.pdf>

⁶⁷ International Drug Policy Consortium (IDPC), *Drug Policy Guide*, 3rd edition, 2016, p98.

⁶⁸ Sanders G, ‘Preventing infectious diseases in prisons: A public health and human rights imperative’, Penal Reform International blog, 2015 www.penalreform.org/blog ; WHO Europe, UN Office on Drugs and Crime, International Committee of the Red Cross, Pempidou Group, Council of Europe & Schweizerische Eidgenossenschaft, Prisons and health, 2014.

⁶⁹ Harm Reduction International, *The Global State of Harm Reduction*, 2016.

⁷⁰ The eight countries are: Armenia, Germany, Kyrgyzstan, Luxembourg, Moldova, Spain, Switzerland, and Tajikistan.

⁷¹ Gen Sander, Harm Reduction International, ‘The global state of harm reduction in prisons: Inadequate, unreliable and unlawful’, *PRI Blog*, 6 February 2017.

There were some moves to adopt health-based approaches to drug use in prison. For example, in Kenya, following a harm reduction workshop for prison officers in February 2016, the Prison Service called for the introduction of treatment facilities for drug users in prisons.⁷² Between 2014 and 2016 five countries (India, Lebanon, Macau, Morocco and Vietnam) introduced OST in at least one prison and in Tajikistan guidelines on the provision of OST have been developed, although implementation is still under consideration.⁷³

Furthermore, some positive moves have been seen recently to reduce high rates of drug overdose in the immediate post-release period, including provision of naloxone kits (naloxone is used to treat a narcotic overdose) at release in Canada,⁷⁴ overdose prevention training in Moldova and Ireland.⁷⁵

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- Implement the UNODC, the International Labour Organization (ILO) and the United Nations Development Programme (UNDP) 'comprehensive package' of 15 key interventions for prison settings.⁷⁶ Overdose prevention and management advice is also essential, in particular upon release.⁷⁷
- Provide adequate healthcare and harm reduction programmes for drug users in prisons for the prevention, care and treatment of diseases such as HIV and hepatitis C, in order to fulfil their right to health and prevent ill treatment and ensure gender equality in access to such programmes as well as gender-responsiveness in line with Rules 14 and 15 of the UN Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the 'Bangkok Rules').

5. Women and drug policies

Operational recommendations: 4b, g, n and 1 k

Prison statistics show that a higher percentage of women than of men are in prison for drug offences. Worldwide statistics show that drug-related offending is particularly high among women prisoners, and punitive drug policies have been identified as one leading cause for the growing population of female prisoners (which is growing at a faster rate than the male prison population).⁷⁸

⁷² See report on the workshop from the Muslim Education and Welfare Association at <http://idpc.net/publications/2016/02/bringing-harm-reduction-to-prison-in-kenya>.

⁷³ Gen Sander, Harm Reduction International, 'The global state of harm reduction in prisons: Inadequate, unreliable and unlawful', *PRI Blog*, 6 February 2017.

⁷⁴ 'Correctional Service Canada expands take-home naloxone kit program for inmates', *CBC News*, 13 July 2017, www.cbc.ca/news/canada/saskatchewan/corrections-take-home-naloxone-kits-1.4202556.

⁷⁵ Thérèse Lynn, 'Launch of the evaluation of the HSE Naloxone Demonstration Project', *Drugnet Ireland*, Issue 60, Winter 2017, pp18–19; Moldova: Ina Tcaci, *The impact of adopting evidence-based HIV harm reduction programs in prisons*, UNODC, Presentation at the 25th International Harm Reduction Conference, Montreal, Canada, 16 May 2017.

⁷⁶ UNODC, ILO and UNDP, Policy brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions, July 2012, http://www.unodc.org/documents/hiv-aids/HIV_prisons_advance_copy_july_2012_leaflet_UNODC_ILO_UNDP_Ebook.pdf

⁷⁷ See, for example: WHO, Prevention of acute drug-related mortality in prison populations during the immediate post-release period, World Health Organization Regional Office for Europe, Copenhagen, 2010

⁷⁸ Institute for Criminal Policy Research, *Fourth edition of the World Female Imprisonment List*, 2017, see: <https://www.penalreform.org/blog/why-are-women-prisoner-numbers-rising-so-rapidly/>.

A 2017 UN report highlighted links between poverty, family roles and drug-related offences committed by women, raising concerns at their 'overincarceration' for 'transporting drugs (as mules), having a secondary role in the commission of crimes or performing low-level high-risk tasks, often at the request of their partners'.⁷⁹ Other research has indicated that more serious offenders, mainly male, escape imprisonment or have their sentences reduced by entering plea-bargaining deals and providing assistance to the prosecution, which women are usually unable to provide.⁸⁰ For example, in Argentina a report found that 'The harsh sentences imposed on drug mules – individuals, usually women, who are low on the drug cartels hierarchy who transport small amounts of drugs across borders – have led to an increase in the number of women in prison and length of pre-trial detention.'⁸¹

The complex and unique pathways that women involved in criminal justice systems, including violence and economic disempowerment, mean that women in prison have higher rates of mental health issues and histories of substance abuse than male prisoners. As discussed above, given that women often play a secondary role in drug-related crimes, they tend to be vulnerable when arriving at prison. The UN Bangkok Rules outline how women prisoners can be protected, and their treatment in line with the right to dignity. However, overall PRI has observed that the Bangkok Rules have been implemented in a few exceptional cases; there is a lack of sustainable and comprehensive reforms to address the multiple vulnerabilities of women drug offenders in prison.

Where access to drug treatment programmes is available, these are often discriminatory towards women, available only in men's prisons⁸² or in less advantageous conditions (e.g. without a separate 'clean zone'). For example, in Kyrgyzstan a planned methadone programme in women's prisons fell victim to funding cuts in 2008, and as a result opioid substitution therapy (OST) was only available in men's prisons.⁸³ When finally established, unlike the programme provided in eight men's prisons, no separate 'clean zone' was available to women, but those undergoing the treatment mixed freely with the other prisoners.⁸⁴ In Georgia, too, a survey in 2008 found that methadone as an opioid substitution therapy (OST) was available in some men's prisons but not in women's prisons, a common practice mirrored also in reports on discrimination against women regarding the accessibility of substance abuse programmes in the Russian Federation.⁸⁵

There have been several recent reforms, namely in Latin America, to address the vulnerability (and over-incarceration) of women offenders. For example, in Costa Rica, the law was amended to provide for women who were convicted of bringing drugs into prison when visiting family members. It allowed for women living in poverty, heads of households or custodians of minor children, older adults or persons with some form of disability to be granted home arrest, supervised release,

⁷⁹ UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, *Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding*, 21 August 2017, A/HRC/36/28, para. 13.

⁸⁰ Special Rapporteur on violence against women, A/68/340 (2013), para. 26.

⁸¹ Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic, Defensoría General de la Nación Argentina and The University of Chicago Law School International Human Rights Clinic, 'Women in Prison in Argentina: Causes, Conditions, and Consequences', (2013) p33.

⁸² Harm Reduction International, *The global state of harm reduction 2012: Towards an integrated response*, 2012, p129.

⁸³ Stoicescu C, *The Global State of Harm Reduction 2012: Towards an integrated response*, 2012, Harm Reduction International, p. 129.

⁸⁴ Penal Reform International, *Who are women prisoners? Kazakhstan and Kyrgyzstan*, 2014, p17.

⁸⁵ Penal Reform International, *Women in prison in Russia: at a glance*, 2010.

residence in a halfway house, or electronic monitoring.⁸⁶ Furthermore, a new reform in January 2017 provides for the possibility to wipe criminal records in cases where offences were committed in 'situations of vulnerability'.⁸⁷

Some reforms have been driven by efforts to reduce the impact of drug-related offending on children. The Inter-American Commission on Human Rights (IAHCR) have recommended: '... the incarceration of women who are mothers, pregnant, or have persons at special risk under their care – such as people with disabilities or older persons – should be considered a measure of last resort, and priority should be given to non-custodial measures that would allow them to provide for their dependents.'⁸⁸ In February 2018 the Brazilian Federal Supreme Court ruled that pregnant women and mothers of children aged 12 and under may be placed on house arrest instead of preventative detention. Judges are told this is to be the new rule and to deny house arrest, judges must provide grounds and inform the Supreme Court.⁸⁹

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- Address the gender disparities in sentencing policies and provide for gender-sensitive non-custodial alternatives in the community in line with Rule 62 of the UN Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the 'Bangkok Rules'). Alternatives for drug-related female offenders should take account of previous victimisation and typical backgrounds.
- Non-custodial alternatives should be preferred for women (per the Bangkok Rules), particularly those with young children, based on the negative impacts of women's imprisonment as well documented, as well as to protect the best interests of the child, in line with the UN Convention on the Rights of the Child.
- Drug-treatment programmes in prison should not discriminate against women; they should have equal access as male prisoners, and the programmes should be adapted to meet the needs of women prisoners, according to the Bangkok Rules.

6. Torture

Operational recommendations 4 c and o

In some countries drug users are detained in compulsory 'drug rehabilitation centres' without oversight, and there are reports of serious human rights violations including the prohibition of torture.⁹⁰ Compulsory drug treatment in centres that constitute detention raise various human rights concerns. There have been documented cases of forced labour, torture and other human

⁸⁶ Organization of American States/OAS Secretariat for Multidimensional Security/ SMS Inter-American Drug Abuse Control Commission - CICAD, *Technical Report on Alternatives to incarceration for Drug-Related Offenses*, 2015, p. 32, Box no. 5.

⁸⁷ Washington Office on Latin America, *Eliminating barriers to re-entry: Criminal record reform in Costa Rica*, 2017.

⁸⁸ <http://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf> para 203

⁸⁹ Human Rights Watch, 'Pregnant Women Will No Longer Await Trial in Brazilian Jails: Supreme Court Ruling a Victory for Law Reform in Brazil', 23 February 2018, www.hrw.org/news/2018/02/23/pregnant-women-will-no-longer-await-trial-brazilian-jails.

⁹⁰ See, Parry J., Vietnam is urged to close drug detention centres after widespread abuse is discovered, BMJ, 2011; 343; and Amon J., Why Vietnamese don't want to go to rehab, Human Rights Watch, May 2010.

rights abuses in these centres.⁹¹ For example, UN monitors found a treatment facility in Brazil to be more like a prison than a hospital, 'as evidenced by the architecture of this facility and by the fact that patients had to keep their heads down and their hands behind their backs when walking through the facility and when talking to staff'.⁹²

For instance, in Vietnam there are up to 11,317 people held in such centres in the capital Ho Chi Minh City alone, including children. Detainees are forced to perform menial work and violations of rules or failure to meet work quotas are punished by beatings and deprivation of food and water.⁹³ In Belarus, drug offenders were sent to special prisons with harsher conditions where they were forced to wear green badges identifying them as drug offenders.⁹⁴

The United Nations human rights bodies and the European Court of Human Rights are increasingly finding that issues relating to infectious diseases in detention – including the denial of harm reduction services or essential medicines to people who use drugs,⁹⁵ – can contribute to, or even constitute, conditions that meet the threshold of ill-treatment.

RECOMMENDATIONS TO IMPLEMENT UNGASS OUTCOME DOCUMENT COMMITMENTS:

- Close compulsory drug detention and rehabilitation centres and implement voluntary, evidence-informed and rights-based health and social services in the community.
- Harm reduction services or essential medicines for people who use drugs in detention should be provided to prevent ill-treatment.
- Prison staff should be sensitized and trained on the needs of drug users in prison to prevent ill-treatment and torture.
- Independent detention monitoring bodies, external from the prison administration, should monitor the treatment of drug users in prison, including their access to harm reduction services.

/End

⁹¹ Jurgens R and Csete J. In the name of treatment: ending abuses in compulsory drug detention centers, *Addiction*, 2012, 689-691.

⁹² Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil, CAT/OP/BRA/1, 2012.

⁹³ Human Rights Watch, *World Report 2018*, January 2018, p630.

⁹⁴ 'Belarus Drug Offenders Singled Out in "Intolerable" Prison Conditions', *Talking Drugs*, 14 September 2016, www.talkingdrugs.org/belarus-drugs-policy-lukashenko-prison.

⁹⁵ See, for example, Human Rights Committee, Concluding Observations: Republic of Moldova, UN Doc. CCPR/CO/75/MDA, 5 August 2002; European Court of Human Rights, *McGlinchey and Others v. the United Kingdom* (2003); Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak*, UN Doc. A/HRC/10/44, 14 January 2009; United Nations General Assembly, *Report of the Special Rapporteur on the right to the highest attainable standard of physical and mental health, Anand Grover*, UN Doc. A/65/255, 6 August 2010; Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan E. Méndez*, UN Doc. A/HRC/22/53, 11 February 2013; Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of the Russian Federation*, UN Doc. CCPR/C//RUS/7, March 2015 (Advanced Unedited Version).