



Submission | 15 June 2020

Input to the UN Working Group on Arbitrary Detention's study on arbitrary detention relating to drug policies

Penal Reform International (PRI) welcomes the opportunity to submit the following information to the Working Group. This submission is based on PRI's stance that: drug policies should be evidence-based and include the decriminalisation of minor offences, proportionality of sentencing, and non-custodial alternatives to imprisonment. Measurements of the outcomes of drug policies should include their impact on human rights, health, peace, and security and development. PRI is a non-governmental organization that works internationally to ensure fair and effective criminal justice systems.

This submission provides a global overview of trends in relation to drug policies and the use of prison, and sentencing issues. It also covers the various issues for women who are disproportionately impacted by drug policies, and drug treatment in detention. The issues covered in this submission are not exhaustive and the country examples are illustrative.

Key resources drawn upon:

- Penal Reform International/ Thailand Institute of Justice: *Global Prison Trends* series: <https://www.penalreform.org/resource/global-prison-trends/>.
- Penal Reform International with Linklaters LLP and the International Drug Policy Consortium, *Sentencing of women convicted of drug-related offences*, 2020: The report published the findings of five key questions relating to the relevant legislation and sentences imposed for drug-related offences across criminal justice systems in 18 jurisdictions, with a focus on women. <https://www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/>.

Introduction

Drug policies have traditionally sought to achieve a ‘drug-free world’ including through prosecution and imprisonment or the imposition of a criminal sanction for all actors involved in the illicit drug market (including drug users), alongside crop eradication campaigns and drug seizures. This has resulted in law enforcement targeting those at the lowest levels of the drug chain, such as drug couriers, low-level dealers, subsistence farmers engaged in illicit crop cultivation, and people who use drugs. This approach has led to an increase in drug-related violence, corruption, mass use of imprisonment and prison overcrowding, while patterns of drug production, trafficking and consumption have tended to evolve in order to evade law enforcement actions. Human rights impacts of drug policies have been well documented by various UN bodies, including the UN Office of the High Commissioner for Human Rights, and regional/national bodies.

An assessment of the decade-long UN Political Declaration and Plan of Action on drug control which ended in 2019 shows that governments have not only failed to achieve the targets and commitments made in 2009 – in pursuance of a ‘drug-free world’ – but in many cases have introduced counterproductive policies that have directly or indirectly resulted in human rights violations.¹ Harsh sentences for drug-related offences have seen imprisonment rates increase, particularly for specific segments including women (explored below) and minorities.

Imprisonment and drug policies

In many countries, prison remains the predominant sanction for drug-related offences. There is an ever-increasing body of research demonstrating that, rather than imprisoning high-level figures in drug trafficking rings, such policies tend to imprison drug users or the low-level dealers (micro-traffickers, i.e. people who move or deal drugs at a community level rather than internationally).

Prison terms – including mandatory minimum terms, and even life imprisonment – for drug-related offences such as possession for personal use have pushed prison populations to new records. There are now at least 11 million people in prison (also referred to as jails, remand centres and detention facilities) under criminal justice orders globally – the highest ever seen. Prohibition-based drug policies have had a significant impact in driving prison populations up. Approximately **one in five** people in prison worldwide (**over 2 million people**) are there for drug-related offences, with approximately **20 per cent** of them (**0.5 million people**) serving a sentence for drug possession for personal use. In some countries and regions people charged or convicted of drug-related offences represent the highest proportion of people held, particularly in Asia and the Americas.

Many jurisdictions are imprisoning people for low-level drug offences due to strict legislation which often does not meet the principle of proportionality. A number of jurisdictions do not distinguish between trafficking and other supply-side activities, for instance in Japan trafficking is regarded as a high-level offence, regardless of the amount or price of drug traded. Levels of overcrowding and poor detention conditions are common meaning the purpose of imprisonment – to protect society through reducing recidivism – is difficult to achieve.

¹ International Drug Policy Consortium, Taking stock: A decade of drug policy – A civil society shadow report, 2018, p7

➔ For more information on what constitutes offences such as: possession, supply, trafficking across 18 jurisdictions see: <https://www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/>, published in 2020.

In some places, people accused of drug offences can be held in pre-trial detention for months, sometimes years. Pre-trial detention is mandatory for drug offences, whether or not the offence is serious or of a minor nature, in a number of countries. For instance, in Mexico, Article 19 of the Constitution establishes that pre-trial detention is mandatory and automatic for crimes that the law defines as grave crimes against health, which includes drug offenses. Several other Latin American states also have pre-trial detention as obligatory, or the norm in practice, including Costa Rica and Guatemala. Elsewhere in Europe pre-trial detention has been found to be preferred for cases involving prosecution of drug users, leading to an excessive use of pre-trial detention. In Romania all the judges and prosecutors interviewed in a study admitted that they considered pre-trial detention an appropriate measure in drugs cases.²

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, as prescribed in the UN Tokyo Rules. It should only be employed 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. Various alternatives, including electronic monitoring, should be explored before detention.

Penal Reform International promotes alternatives to imprisonment, especially for minor, non-violent offences, whether drug-related or committed by individuals in the context of drug dependency (both at sentencing and pre-trial stages). This is part of a broader approach which considers drug use as a health issue, and not one that can be effectively tackled through incarceration. For all minor, non-violent drug offences, prison should only be used as a last resort.

There are some good examples where alternatives to imprisonment have been implemented for drug-related offences. At the regional level, the European Council adopted its conclusions on the alternatives to coercive sanctions in March 2018, which recommend that EU member states make non-custodial measures more widely available for drug offenders and that they implement them effectively and monitor and evaluate their effectiveness.³ A study of alternative sanctions for drug-related crimes published in 2016 found that 15 of 28 European countries regularly suspend sentences for drug-related offences.⁴

➔ For more information see *Special Focus, Global Prison Trends 2020: Alternatives to imprisonment*: www.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf

² <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>, paragraph 69.

³ 'European Council Adopts Conclusions on Alternatives to Coercive Sanctions', Drug Reporter, 10 March 2018, drogriporter.hu/en/european-council-adopts-conclusionson-alternatives-to-coercive-sanctions

⁴ Kei Ito, Lucy Strang, Emma Disley, et al., Study on alternatives to coercive sanctions as response to drug law offences and drug-related crimes, European Commission, 2016

COVID-19 and people in prison for drug-related offences

The human rights impact of holding people in often overcrowded prisons has come under the spotlight during the COVID-19 pandemic. The right to life and right to health, among others, have been put at risk and in many cases violated amidst the lockdowns and other measures introduced. Lockdowns have meant services have been scaled back or cut (including for drug programmes) and visits curtailed or outright banned affecting mental well-being and the ability to access basics, including money and medicine.

To date, there have been almost 75,000 recorded cases of COVID-19 in prisons across 80 countries, and 1,151 deaths in 35 countries' prisons due to COVID-19.⁵ However, this data is incomplete and therefore not reflecting the true scale of the impact of COVID-19 on people detained.

As countries respond to the COVID-19 pandemic many have sought to reduce their prison population through early release or exceptional measures to release people from prison, and/or reduce the admission numbers. However, people in prison for drug-related offences have often been excluded from such measures. For instance, in the Philippines, the Board of Pardons and Parole have recommended vulnerable populations in detention (such as the elderly) be granted executive clemency, but this excludes those charged with drug offenses as they are classified as 'high-risk'. Indonesia has implemented one of the highest number of releases, but to be eligible you must be sentenced to less than five years and have completed two-thirds of your sentence – due to the high penalties for possession of drugs, most people in prison for drug offences are excluded as they are serving sentences longer than five years.⁶

These exclusions fail to take account of the fact that most people in prison for drug offences have committed relatively low-level non-violent crimes. They have furthermore indirectly excluded women in some cases. For instance, people in prison for drug-related offences are disqualified from release mechanisms in Colombia, which disproportionately impacts women as 45 per cent of women in prison are there for drug-related offences (compared to 12 per cent of men).

➔ For more information see, *Coronavirus: Healthcare and human rights for people in prison*, www.penalreform.org/resource/coronavirus-healthcare-and-human-rights-of-people-in/; and *Coronavirus and women in detention – a gender-specific approach missing* <https://www.penalreform.org/blog/coronavirus-and-women-in-detention-a-gender-specific/>

Women and drug policies

The number of women and girls in prison, estimated to be more than 714,000, is increasing: from 2000 to 2017, this figure globally increased by more than 50%, while the overall prison population increased by around 20%. It is clear from country-based research that the number of women in prison has not grown dramatically because of an increase in criminal activity, but because of political choices, including harsh drug policies. A larger proportion of women (35 per cent) than men (19 per cent) are in prison for drug-related offences globally.⁷ A number of countries are

⁵ <https://www.jpp.org.pk/covid19-prisoners/>

⁶ <https://nobox.ph/post/leave-no-one-behind-bars-covid-19>

⁷ UNODC, World Drug Report 2019. Booklet 2: Global Overview of Drug Demand and Supply, United Nations, 2019, p. 32

driving these numbers up, with women convicted of drug-related offences accounting for high proportions of the female imprisoned population, including 52.9 per cent in Ecuador in 2018,⁸ 82-84 per cent in Thailand, 53 per cent in the Philippines, and over 60 per cent in Peru and Costa Rica.⁹ In Brazil, 63 per cent of women in prison in 2014 were there because of minor drug-related offences – compared to a quarter of men.¹⁰

For women, the increase in their imprisonment for drug-related offences has been attributed, in part, to the greater ease with which low-level crimes can be prosecuted, with women's primary role in drug trafficking usually being that of a drug courier. This makes them typically easy targets for drug enforcement authorities, even though it does little to disrupt drug-trafficking networks. Furthermore, as the UN Special Rapporteur on violence against women has noted, 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.¹¹

Sentencing practices should take into account the background of female offenders, in particular their typically low-level role and exploitation in the drug trade, possible coercion by male partners, as well as caretaking responsibilities and gender inequalities in access to education and employment. For instance, studies have found that a large number of women in prison for drug-related offences in Southeast Asia are foreign nationals and usually convicted for drug trafficking or selling drugs for, or with, their male partners. Evidence shows that the backgrounds and reasons for their involvement in such crimes are complex and thread with violence, coercion and vulnerability.¹²

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, also known as the Bangkok Rules, which were adopted by the UN General Assembly in December 2010 and provide standards for the specific characteristics and needs of women offenders and prisoners, call for the reduction in the unnecessary imprisonment of women. These supplement the UN Tokyo Rules on non-custodial measures (1990) which promote alternatives to imprisonment. The Bangkok Rules ask for sentencing authorities to take into account the nature of the crime, among other factors. They remain largely unimplemented to date, particularly when it comes to drug crimes.

In this context, in 2020, Penal Reform International published a new report, together with Linklater LLP and the International Drug Policy Consortium in early 2020,¹³ which examined legal

⁸ Sentencing of women convicted of drug-related crimes, Penal Reform International/Linklaters LLP/IDPC, 2020, p. 66, see www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/

⁹ International Drug Policy Consortium, Women deprived of liberty – Submission to the Working Group on the issue of discrimination against women in law and practice, 26 September 2018, p3

¹⁰ 'Women behind bars', The World, 13 April 2018, www.theworldweekly.com/reader/view/16072/our-world-this-week

¹¹ UN Special Rapporteur on violence against women, 'Pathways to, conditions and consequences of incarceration for women', A/68/340 (2013), para. 26

¹² Chuenurah C., & Park, M.Y., Women prisoners in Southeast Asia: Their Profiles and Pathways to Prison, Korean Journal of Correctional Discourse, 2016, 10(3), 75-79; and Dr Samantha Jeffries, Chontit Chuenurah, Vulnerabilities, Victimisation, Romance and Indulgence: Thai Women's Pathways to Prison in Cambodia for International Cross Border Drug Trafficking, International Journal of Law, Crime and Justice, Volume 56, March 2019, Pages 39-52.

¹³ [https://www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/](http://www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/)

frameworks and judicial practices across 18 jurisdictions¹⁴ to assess how women convicted of drug-related offences are sentenced. Key findings include:

- The complex reasons and pathways of women’s confrontation with criminal justice systems for drug-related offences are not adequately reflected in legislation or (where existing) sentencing guidelines, nor sentencing practices across the 18 jurisdictions.
 - While there is a variety of considerations mentioned in a number of jurisdictions’ legal instruments that can mitigate culpability or lessen a sentence for a woman prosecuted or convicted for drug-related offences, the impact on their sentence received is less certain.
 - Factors typically include consideration of pregnancy, single-parent status, or other circumstances such as experience of violence or coercion, role in the crime, or status of vulnerability. Where such factors are explicitly mentioned, they are given weight of differing degrees or discretion is limited by the applicable law or sentencing guidelines (including mandatory minimum sentences), thus limiting their impact. In cases where they have been taken into account, it is difficult to quantify the effect on the sentence given.
 - Some countries generally impose non-custodial sentences for low-level drug-related offences for women (such as England and Wales, Germany and New Zealand), but in Russia, non-custodial sentences are only issued in about four per cent of drug-related offences cases. Data suggests that in some jurisdictions, like France, prison terms handed down to females convicted for drug-related offences appeared less severe than for male offenders, with reasons suggested including that first-time female offenders tend to be prosecuted for less complex offences and they have a lower reoffending rate. At the other end of the spectrum, in Hong Kong, a sample of cases involving drug trafficking by women in situations of vulnerability (including one pregnant woman) shows harsh prison sentences of 14 – 20 years as being common. Similarly, in the Philippines drug offences attract prison terms ranging from 12 years and one day to 20 years or life imprisonment.
- ➔ For more information see the full report: *Sentencing of women convicted of drug-related offences*, www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/

Death penalty for drug-related offences

In international law, the death penalty is prohibited for all but the ‘most serious crimes’ and international human rights bodies have repeatedly emphasised that this is limited to intentional killing only. The UN Special Rapporteurs on Torture and on Extrajudicial Executions said in 2015 that ‘[e]xecutions for drug crimes amount to a violation of international law and are unlawful killings’¹⁵ and the Human Rights Committee has explicitly stated that drug-related crimes are not the most serious and cannot receive the death penalty.¹⁶

¹⁴ Jurisdictions covered by the study are: Argentina, Australia, Colombia, Costa Rica, Ecuador, England and Wales, France, Germany, Hong Kong, Japan, Mexico, New Zealand, the Philippines, Poland, Portugal, Russia, Spain, and the United States. See: www.penalreform.org/resource/sentencing-of-women-convicted-of-drug-related-offences/

¹⁵ 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

¹⁶ UN Human Rights Committee, 84th Session, Concluding Observations of the Human Rights Committee: Thailand, 27 July 2000, CCPR/CO/84/THA, para. 14

Nevertheless, drug offences remain punishable by death in at least 35 countries and territories worldwide and four of these carried out executions in 2018: Iran, China, Saudi Arabia and Singapore.¹⁷ In January 2020, civil society groups called for international action in the cases of two Bahraini men convicted of drug trafficking and smuggling when their death sentences were upheld by the country's highest court. In Singapore, 84 per cent of the total executions carried out from 2014 – mid-2019 were for drug cases.¹⁸

In a worrying trend, governments in South and Southeast Asia – such as in Bangladesh and Sri Lanka – in particular have emulated the punitive 'zero-tolerance' drug control approach taken by President Duterte in the Philippines, documented recently in the High Commissioner's report,¹⁹ including through re-introduction of the death penalty. On the other hand, Harm Reduction International found a positive downward trend in executions worldwide for drug offences in 2018, reporting a decrease of 90 per cent since 2015. This was driven in part by a significant fall in the use of the death penalty for drug offences in Iran.²⁰

Data indicates that of the approximately 500 women on death row globally, drug-related offences are the second largest category of crimes that women are sentenced to death for (after murder, often of a close family member following a history of gender-based violence), particularly in the Middle East and Asia.²¹

Life imprisonment for drug-related offences

Life imprisonment is on the rise. The number of life-sentenced prisoners around the world has nearly doubled since the year 2000. As of 2014, there were roughly 479,000 persons serving formal life sentences around the world, compared to 261,000 in the year 2000, representing a rise of nearly 84 per cent in 14 years. This trend will persist unless penal policies and practices are changed to limit life imprisonment, and that includes drug policies.

Life sentences, in many cases, is unnecessarily punitive, especially for non-violent drug crimes, and does not satisfy the principle of proportionality. Life imprisonment without parole, in particular, raises issues of cruel, inhuman and degrading punishment, and undermines the right to human dignity by taking away the prospect of rehabilitation.

The global trend towards the abolition of capital punishment does not entirely explain the increasing use of life imprisonment. 'Tough on crime' policies have also led to an increase in life imprisonment, notably for drug-related offences. There are at least 4,820 criminal offences globally which carry some formal type of life imprisonment as a sentence. Not all of these are the 'most serious crimes' for which capital punishment may be imposed and include drug offences.

➔ For more information see, *Life imprisonment: a policy briefing*: <https://www.penalreform.org/resource/life-imprisonment-a-policy-briefing/>

¹⁷ Giada Girelli, Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2018*, February 2019

¹⁸ 'Singapore's execution of drug offenders tripled in five years', Aliran, 7 August 2019, aliran.com/civil-society-voices/singaporesexecution-of-drug-offenders-tripled-in-five-years

¹⁹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25924&LangID=E>

²⁰ Giada Girelli, Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2018*, February 2019

²¹ The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty*, September 2018

Access to drug treatment in detention

Under the principle of equivalency of care, people in prison have the same right to health as those living outside prisons, including access to treatment and harm reduction measures. The UN Nelson Mandela Rules (Rules 24-35) make it clear that the provision of healthcare to prisoners is a state responsibility and should be organised in close relationship with the general public health administration, which in practice is best achieved if managed by the Ministry of Health. People detained 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.

As detailed in the World Drug Report 2019, the UN estimates that about **one in three people** in prison are estimated to have used drugs at least once while in prison, and 19 per cent in the last month. Despite the prevalence of drug use, services and support for people in prison who are using drugs are severely lacking.

Only 56 countries are implementing opioid-substitution therapy (OST), 11 have needle syringe programmes (NSP) in at least one prison and both interventions are in place in only 10 countries. The failure to provide access to such measures, treatment for infectious diseases, coupled with gaps in testing, contribute to disproportionate rates of hepatitis C and HIV among people in prison.²² Human rights bodies have stated that inadequate prevention or treatment of HIV, hepatitis C, TB or drug dependence can constitute ill-treatment and implementation of the 2030 Agenda for Sustainable Development, specifically the pledge to 'leave no one behind' was cited in the UN's call for action to address the shortfall in prevention and treatment of people in prison who use drugs.

Women in prison often have no access to drug treatment, despite an estimated 75 per cent of women arriving in prison having some sort of drug-related problem at the time of arrest.²³ The need for specialised treatment programmes for women with substance dependencies is recognised by the UN Bangkok Rules.²⁴ A major concern is that prison systems often do not guarantee access to such treatment and discriminate against women when it comes to substance dependency treatment, or do not tailor programmes for women.²⁵ In relation to the provision of opioid substitution therapy; one study found that women 'generally have no access to these programmes while incarcerated'.²⁶ The Bangkok Rules are clear that prison health authorities should provide or facilitate specialised treatment programmes for women substance abusers, taking into account prior victimisation, the special needs of pregnant women and women with children, as well as women's diverse cultural backgrounds.²⁷ Where relevant programmes do not

²² UNODC, World Drug Report 2019. Booklet 1: Executive Summary, United Nations, 2019, p. 20

²³ World Health Organisation (WHO), Prisons and Health, 2014, p160

²⁴ The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 15

²⁵ World Health Organisation (WHO), Prisons and Health, 2014, p160; Penal Reform International, Women in criminal justice systems and the added value of the UN Bangkok Rules, 2015, p4

²⁶ International Drug Policy Consortium, Taking Stock: A Decade of Drug Policy: A civil society shadow report, 21 October 2018, p48

²⁷ The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 15

exist in prison, there is an increased duty on authorities to facilitate access to relevant programmes in the community in order to increase women's chance to be successfully rehabilitated.²⁸

Summary of recommendations

- For all minor, non-violent offences, whether drug-related or committed by individuals in the context of drug dependency, **alternatives to imprisonment** should be prioritised both at sentencing and pre-trial stages. Prison should only be used as a last resort.
- **Pre-trial detention** should only be used as a last resort, as prescribed in the UN Tokyo Rules, 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.
- Sentencing practices should take into account the background of **female offenders**, in particular their typically low-level role and exploitation in the drug trade, possible coercion by male partners, as well as caretaking responsibilities and gender inequalities in access to education and employment, in line with the UN Bangkok Rules.
- The **death penalty** and **life sentences** (in particular, life imprisonment without parole) should not be used for drug-related offences as they undermine human rights and violate international law.
- People in prison for drug-related offences should not be automatically **excluded from release schemes** and other measures aimed at reducing the prison population in response to the COVID-19 pandemic, rather their eligibility should be assessed on the same grounds as other offences.
- People in prison who use drugs should be permitted access to evidence-based and, when relevant, gender-sensitive **drug treatment, 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.

Penal Reform International briefing note

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Penal Reform International (PRI) is a non-governmental organisation working globally to promote criminal justice systems that uphold human rights for all and do no harm. We work to make criminal justice systems nondiscriminatory and protect the rights of disadvantaged people. We run practical human rights programmes and support reforms that make criminal justice fair and effective.

Registered in The Netherlands (registration no 40025979), PRI operates globally with offices in multiple locations.

²⁸ In line with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Rule 24 and The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 62