

Mandate of the Working Group on Arbitrary Detention

REFERENCE: WGAD-Study drug policies

4 February 2020

Dear Sir/Madam,

I am writing to you in my capacity as the Chair-Rapporteur of the United Nations Working Group on Arbitrary Detention, pursuant to Human Rights Council resolution 42/22.

Paragraph 14 of the resolution requested “the Working Group to prepare, as suggested by the Working Group in its report submitted to the Human Rights Council at its thirtieth session, in close consultation with Member States, civil society, relevant international and regional organizations, United Nations agencies, funds and programmes, particularly the United Nations Office on Drugs and Crime, in full respect of the mandates of the United Nations Office on Drugs and Crime and of the Working Group, and with the support of the Office of the United Nations High Commissioner for Human Rights, **a study on arbitrary detention relating to drug policies** to ensure that upholding the prohibition thereon is included as part of an effective criminal justice response to drug-related crimes, in accordance with international law, and that such a response also encompasses legal guarantees and due process safeguards, in accordance with the recommendation on this issue contained in the outcome document adopted by the General Assembly on 19 April 2016 at its special session, and to submit a report thereon to the Council at its forty-seventh session, and to bring the report to the attention of the Commission on Narcotic Drugs as the policymaking body of the United Nations with prime responsibility for drug-control matters.

In the above context, the Working Group would like to refer to the attached questionnaire prepared in connection with the study. The Working Group invites all stakeholders to transmit relevant information, including that pursuant to the questionnaire, by **1 April 2020**. All submissions (word format) should be sent electronically in English, French or Spanish to wgad@ohchr.org using the email title: “Submission for WGAD study arbitrary detention relating to drug policies”.

Yours sincerely,



José Antonio Guevara Bermúdez
Chair-Rapporteur
Working Group on Arbitrary Detention

Civil society organizations

Issues that Stakeholders may wish to include in their replies

(In reference to HRC resolution 42/22 requesting a study on arbitrary detention relating to drug policies)

1. Please provide information concerning the number of people held in pre-trial detention as well as the number of those who are imprisoned pursuant to a conviction for drug-related offences. Please indicate what percentage of the total pre-trial detention population are being held for drug-related offences. Please identify the percentage of the total prison population who have been convicted and imprisoned for drug-related offences. For those convicted of drug-related offences, what percentage of this group have been imprisoned for acquisition, use or possession of drugs for personal use? How many people convicted of drug use belong to disadvantaged groups (e.g. women, pregnant women, children and youth, indigenous people, sex workers, lesbian, gay, bisexual, transgender (LGBT) persons, homeless people, people with HIV/AIDS, persons with disabilities, ethnic minorities, migrant communities)?
2. Does your State consider the acquisition, use or possession of drugs for personal use a minor offence within the meaning of this term as set out in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (article 3, para. 4 (c)? If so, what percentage of people arrested for the acquisition, use or possession for personal use of drugs are diverted out of the criminal justice system, and what alternative measures, if any, are such people subjected to?
3. Has your State decriminalized the acquisition, use or possession of illegal drugs for personal use? If so, to what drugs does this apply and what are the amounts considered to be for personal use? What is the legislative or judicial basis for such decriminalization? If decriminalization has not taken place, what penalties apply to the acquisition, use or possession of illegal drugs for personal use?
4. What types of circumstances have led to unlawful and arbitrary arrest of people in your State for drug-related offences? What structures/institutions are in place so that people who are arrested for a drug-related offence can make a complaint about unlawful and arbitrary arrest and detention, or the threat thereof?¹
5. Does your State differentiate in its criminal procedures for persons alleged to have committed drug-related offences compared to those who have been arrested for other types of criminal offences? For example, are persons arrested for drug-related offences held in custody longer than persons arrested for other offences before being charged or before being brought before a judge to determine the legality of their arrest? Are persons charged with drug-related offences automatically held in pre-trial detention until trial? Is legal aid available for persons charged with drug-related offences in similar circumstances to which it would be available for other criminal offences? Does your State allow persons convicted of drug-related offences to be considered for suspended sentence, sentence reduction, parole, release on compassionate grounds, pardon or amnesty that are available to those who are convicted of other crimes? Are legal presumptions used so that persons found with amounts of drugs above specified

¹ Examples of arbitrary arrest and detention could include threatening arrest and detention if the person who uses drugs or is a minor dealer does not give money to law enforcement, or in the case of women give money and/or sex; accessing a person's health records as a means of determining if a person uses drugs; targeting arrests areas at or near drug treatment centres for people who use drugs; disproportionately targeting minorities, women or poor people for possible drug-related offences; excessive use of force during drug enforcement operations.

thresholds, or in possession of keys to a building or vehicle where drugs are found, are presumed to have committed an offence?

6. Have there been cases of torture or other cruel, inhuman or degrading treatment or punishment for persons arrested and detained on drug-related offences, with the objective, for example, to elicit a confession or to learn information about other alleged criminal actors or networks? Have there been cases where opioid substitution therapy has been withheld from drug dependent detainees in order to elicit a confession, or obtain information concerning other alleged criminal or networks? What procedures exist to prevent torture and other forms of ill treatment of people detained for drug-related offences, and to bring to justice those responsible when it does occur? What monitoring measures are in place to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place? What avenues do detainees have for making a formal complaint to an independent authority if such practices occur?
7. Does your State operate compulsory drug treatment centres? If so, what is the legislative basis for such deprivation of liberty? What procedures exist to ensure procedural guarantees are respected prior to confinement in such centres, including whether the detainee has the right to be represented by legal counsel and the right to appeal the decision on compulsory treatment. Is there a medical evaluation of the person's drug dependency prior to confinement? Is treatment in such centres individualized (as opposed to en masse treatment), evidence-based and in conformity with generally accepted medical practices for drug treatment as articulated by World Health Organization (WHO). Is a person detained in such a facility for a specific amount of time, or indefinitely until treatment has been determined to be successful? Can a person, or by way of his or her legal representative, or a family member, file a petition either with an administrative or criminal court for a hearing on his or her release while detained?
8. Do private drug treatment centres exist in your State? What steps does your State take to ensure that treatment in such facilities is voluntary and not a result of coercion? How is the informed consent for treatment obtained? How regularly do independent inspections of private drug treatment facilities take place to ensure that practices that constitute torture or other cruel, inhuman or degrading treatment or punishment do not occur? Do inspections of such facilities include a determination whether treatment is individualized (as opposed to treatment en masse), evidence-based and in conformity with generally accepted medical practices for drug treatment as elaborated by WHO? What guarantees exist that a person who has either voluntarily sought treatment or who has been coercively confined in a private drug treatment centre can freely leave if he or she so wishes? Can such persons make a complaint to inspectors who monitor such facilities or a competent authority if a person who is seeking to leave a private drug treatment centre is prevented from doing so? Are there any criminal or other penalties for failure to complete the treatment?
9. Do drug courts which seek to use treatment as an alternative to imprisonment exist in your State? Please describe their operations, including applicable procedural guarantees for the accused. Does the accused have to plead guilty to the drug-related offence prior to being diverted into treatment? Are only accused persons who are drug dependent on opioids diverted for treatment, or are people who use other drugs that do not cause drug dependence diverted? Can treatment exist for a period that is longer than the period of imprisonment provided for in the offence for which the accused has been charged? Does the accused still have to serve a period of imprisonment if the treatment is not successful? What constitutes successful treatment and does the person in treatment have the right to a hearing before an independent authority and to be represented by legal counsel and present expert medical testimony on the evolution of his or her treatment?

10. Does your State have specialized criminal courts for people accused of drug-related offences that do not have as their focus diversion for drug treatment, but rather operate as specialized criminal courts and normally sentence those charged to prison after conviction? What differences exist between specialized criminal drug courts and regular criminal courts? What is the legislative justification for having specialized criminal courts for drug-related offences? Please describe how such specialized courts conform to the procedural guarantees for detention and fair trial under international norms.

11. Does your State use military courts to try people for drug-related offences? Please describe how such military courts conform to the procedural guarantees for detention and fair trial under international norms. Are military personnel involved in law enforcement operations against individuals or groups suspected of drug-related crimes? If so, are these regular military forces or the military police? Have they received training in human rights standards for law enforcement and the use of force? How is coordination undertaken with civilian law enforcement?

12. Does your State have legislation that provides for administrative detention for people who use drugs who are considered a danger to themselves or others? If so, can you please describe the legislative basis for such detention, applicable procedural safeguards, including the right to be represented by legal counsel and to present expert medical testimony, and a right of appeal? Can other legislation such as that aimed at individuals with psycho-social disabilities be used in relation to those who use drugs and are considered a danger to themselves or others? If so, can you describe the legislative basis for such detention, applicable procedural safeguards, including the right to be represented by legal counsel and to present expert medical testimony, and a right of appeal?

13. Does your State provide for the involuntary detention of pregnant women who use drugs in circumstances where such drug use has been deemed to constitute a danger to the foetus, and where voluntary attempts by health professional to work with the pregnant woman have failed? Please describe the legislative basis and applicable procedural guarantees in case of such an involuntary detention.

14. Does your State provide drug treatment to people in custodial or pre-trial detention, or who have been imprisoned following a conviction? Do these drug treatment services include harm reduction services? Please describe what types of drug treatment and harm reduction services are available to detainees and imprisoned people. Please also indicate if such services are available to those in administrative detention such as undocumented migrants or those subject to a deportation order. If no such services are available, does this result in forced confessions or people not being able to participate in their defence?

15. Are juveniles (those under the age of 18) subject to arrest, detention and imprisonment for drug-related crimes? For crimes relating to the acquisition, use or possession for personal use of drugs? If so, are they detained or imprisoned in facilities for children in conflict with the law who are under 18, or are they detained or imprisoned in facilities for adults? Can such juveniles be subjected to compulsory drug treatment or treatment with the consent of their families/legal guardians?

16. What provision is in place for those drug users and their dependants who are detained in the context of migration in your State?

17. Are there any good practices being developed or implemented in your State in relation to drug-related detention and drug policies? If so, please provide examples.

18. Are there any new or emerging trends in drug-related detention and drug policies that could be addressed by this study?
