**Introduction**

In its resolution 42/22[[1]](#footnote-1), the Human Rights Council requested the Working Group on Arbitrary Detention to prepare 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 February 2020, a questionnaire was sent to States and other stakeholders. A briefing on the study was given at the sixty-third session of the Commission on Narcotic Drugs, and consultations were held with the United Nations Office on Drugs and Crime, the International Narcotics Control Board and other stakeholders. Furthermore, from 4 to 5 March 2021, the Working Group held a virtual expert consultation. The report was presented to the Human Rights Council on 18 May 2021.

This submission provides a concise summary of the study on arbitrary detention and drug policies prepared submitted by the Working Group to the Human Rights Council. The complete study can be found at the website of the Working Group[[2]](#footnote-2).

**Summary of the study of the Working Group**

*The Working Group emphasizes that the absolute prohibition of arbitrary deprivation of liberty and the safeguards to prevent such instances apply to everyone, including those who are arrested, detained or charged with drug-related offences and those undergoing rehabilitation for drug dependence, in accordance with international human rights obligations. There is a need for all drug policies to serve a necessary, proportionate and legitimate aim. Imprisonment for drug-related offences should be a last resort and in principle should be used only for serious offences, with diversion or a decision not to prosecute used most often for lesser offences*.

**Human rights violations resulting in arbitrary detention for drug related offences**

*The so-called war on drugs has resulted in a large and disproportionate increase in detention and imprisonment for drug-related offences. Some States have gone well beyond what is required by the international drug control treaties in terms of criminalization and associated penalties, while others have demonstrated excessive zeal in applying the criminalization provisions of those treaties. These disproportionate actions have frequently resulted in widespread human rights violations leading to increased arbitrary detention*.

In particular, the working group has expressed concern over the following practices:

1. Interrogation of suspects when under the influence of drugs
2. Drug testing without consent or judicial warrant, and stop and frisk
3. Failure to register or promptly bring arrested persons before a judge
4. Pretrial detention for drug-related offences, particularly with regards to its over-use.
5. Torture or ill-treatment of persons who have been arrested for drug-related offences
6. Lack of observance of fair trial guarantees, including with regards to drug courts and to military and other special courts
7. Disproportionate sentencing for drug offences
8. Use of death penalty for drug offences
9. Ban on suspended sentence, parole, pardon and amnesty for persons convicted for drug-related offences

*The Working Group has noted that, in some States, human rights defenders, journalists, political opponents and other critics of the Government are subject to drug charges as a means of suppressing or controlling their exercise of freedom of opinion and expression.*

**Discriminatory drug control measures directed at specific groups**

*The war on drugs may be understood to a significant extent as a war on people. Its impact is often greatest on those who are poor, but also frequently overlaps with discrimination in law enforcement directed at vulnerable groups. This has been referred to as the intersectionality of different forms of discrimination, which reinforces disadvantage. The Working Group has observed that criminalization of drug use facilitates the deployment of the criminal justice system against drug users in a discriminatory way, with law enforcement officers often targeting members of vulnerable and marginalized groups.*

In particular, the Working Group expressed concern over the following groups:

1. Ethnic and racial minorities, including people of African descent
2. Indigenous peoples
3. Migrants
4. Women
5. Lesbian, gay, bisexual, transgender, and intersex persons
6. Victims of human trafficking
7. Children who use drugs or commit drug-related offences

**Health care for drug users in detention**

*Worldwide, 20 per cent of persons who are incarcerated use drugs, compared to 5.3 per cent among the general population[[3]](#footnote-3). There are several adverse consequences of high levels of drug use in prisons, including on the health and safety of inmates, the security of prison staff and security and discipline in the prison.*

*The Working Group has addressed the issue of inadequate or non-existent health care for persons in detention. The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health have stated that harm reduction services are essential for persons who are drug dependent.*

*In 2021, only 56 States provided opioid substitution therapy in prisons, and when provided, it may be available only in a limited number of prisons or in male prisons only. For needle and syringe programmes, the situation was worse, with only 11 countries providing such programmes*

**Compulsory treatment of drug users**

*The Working Group considers that the threat of imprisonment should not be used as a coercive tool to incentivize people into drug treatment. While some defendants, when given a choice, have refused drug treatment and accepted a prison sentence as an outcome, the measure of coercion involved in such a choice is too great and is an unacceptable infringement on the right to choose one’s treatment freely, to refuse treatment or to discontinue it at any time. Courts should also not order compulsory or forced drug treatment. Drug treatment should always be voluntary, based on informed consent, and left exclusively to health professionals. There should be no court supervision or monitoring of the process, which should rest exclusively with trained medical professionals.*

In particular, the Working Group has expressed concern about the following situations.

1. State-run compulsory drug detention centres. Arbitrary detention may occur when people who use or are suspected of using drugs are confined against their will in compulsory drug detention centres. These are sometimes linked to little or no legal due process, lack of evidence-based treatment, and torture or ill-treatment, amongst other rights violations.
2. Private drug treatment centres**.** Reportsshow that in some countries people who use drugs are interned into private drug treatment centres against their will, as they are brought in by law enforcement officials, family members, or centres’ staff. Private treatment centres have been linked to serious human rights violations related to lack of evidence-based treatment, physical violence, humiliation, harsh discipline, and cruel punishments.
3. Compulsory treatment based on administrative or criminal law. *The Working Group has expressed concern at administrative detention “imposed as a means of controlling people who use drugs, especially when such detentions are framed as health interventions”. Detention for drug use or dependence alone could never be “justified, adequate, necessary and proportional” to the aim of protecting the health or life of the drug user or of others in the community[[4]](#footnote-4). Courts should not be involved in mandating or supervising drug treatment, which should be left exclusively to health professionals.*

**Minor drug offences and decriminalization**

Diversion

*The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides that, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measure such as treatment and aftercare when the offender is a drug abuser (art. 3 (4) (c)).*

Our study collates a number of examples of diversion adopted in States. *An important question is what constitutes a minor offence. The classification of the amount of a drug that exceeds what is considered reasonable for personal use frequently creates a legal presumption in national law of a trafficking offence, with severe criminal penalties. In some States, the quantity is set quite low or no definition is provided at all, facilitating arbitrary detention of people who use or possess drugs in small quantities for personal use. The Working Group has recommended that States legislate reasonable threshold amounts to distinguish between drug possession for personal use and the offence of trafficking so that the more serious charge is used only when appropriate[[5]](#footnote-5)*.

Decriminalization

*While the 1988 Drug Convention provides for the criminalization of personal use or possession for personal use of drugs, it allows for an exception to criminalization where it is incompatible with a State’s constitutional principles and the basic concepts of its legal system (art. 3 (1) (c)).*

*122. The Working Group has stated that “criminalization of drug use or consumption should be avoided by all States”[[6]](#footnote-6), and that “States should revise their penal policies and drug legislation with the aim of … decriminalizing the personal use of drugs and minor drug offences”[[7]](#footnote-7). Drug use and dependence should not be treated as a criminal matter, but rather as a health issue, and addressed with rights-based measures. The study underlines that other UN bodies and mechanisms, including the Special Rapporteur on the right to health and the United Nations system common position on drugs, have also called for decriminalization.*

**Conclusions**

The study concludes with a series of recommendations addressed at member States that follow from the findings and observations made above.

1. <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F42%2F22&Language=E&DeviceType=Desktop&LangRequested=False> [↑](#footnote-ref-1)
2. <https://www.ohchr.org/en/documents/thematic-reports/ahrc4740-arbitrary-detention-relating-drug-policies-study-working-group> [↑](#footnote-ref-2)
3. UNODC, World Drug Report 2017, p. 13. [↑](#footnote-ref-3)
4. A/HRC/30/36, para. 59 [↑](#footnote-ref-4)
5. See BLR 6/2019 (available from https://spcommreports.ohchr.org/Tmsearch/TMDocuments); A/HRC/42/39/Add.1, paras. 72–78. [↑](#footnote-ref-5)
6. Working Group on Arbitrary Detention, “States should stop arbitrary detentions for drug offences, say UN rights experts”; A/HRC/39/45/Add.2, para. 88 (a)–(b). [↑](#footnote-ref-6)
7. Working Group on Arbitrary Detention, “States should stop arbitrary detentions for drug offences, say UN rights experts”; statement of the Working Group at the 63rd session of the Commission on Narcotic Drugs, 2–6 March 2020, Item No. 3, general debate [↑](#footnote-ref-7)