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HUMAN RIGHTS, DRUG CONTROL AND THE UN SPECIAL PROCEDURES:

Preventing arbitrary detention through the promotion of human rights in drug control[1]

THE INTERNATIONAL CENTRE ON HUMAN RIGHTS AND DRUG POLICY

Established in 2009, the International Centre on Human Rights and Drug Policy (HRDP) is dedicated to developing and promoting innovative legal and human rights research and teaching on issues related to drug laws, policy and enforcement.

The HRDP's work supports policy development that reconciles the international narcotics control conventions with international human rights law

The HRDP is an academic partner of the Human Rights Centre, School of Law at the University of Essex

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1. Introduction

Human rights violations occurring as a consequence of drug control or enforcement efforts have been well-documented by both civil society organisations and United Nations human rights monitors. These violations highlight the degree to which the framework established under the three United Nations drug conventions contributes to an environment of increased human rights risk, and in some cases directly fuels abuses. The relationship between international human rights law and international drug control law is therefore a significant issue for human rights activists and scholars, yet to date it has largely gone unaddressed. The UN drug control bodies rarely mention human rights, while the UN human rights mechanisms rarely mention drug control. In effect, the two speak different languages and hold different priorities.[2] As the "eyes and ears" of the UN human rights system, the special procedures serve a critical role in bridging the normative gap and bringing thematic attention to this emerging human rights issue.

Such attention is critical to shifting the existing punitive drug control paradigm to one grounded in human rights and public health. Research underway at the International Centre on Human Rights and Drug Policy reveals that the historical treatment of drug control issues within the special procedures system is insufficient to have an impact on current drug control policy and practice. Reporting by mandate holders on drug control has been scattered and rarely collaborative, despite the numerous intersections drug control issues present across the mandates. As the special procedures develop their programme of work for the coming year, they have an important opportunity to consider ways in which coordination across the mandates can enhance the promotion and protection of human rights while countering the world drug problem—both to have an impact on policy-making and to close the normative gaps between the two legal regimes.

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[2] Paul Hunt, UN Special Rapporteur on the right to the highest attainable standard of health, 'Human Rights, Health and Harm Reduction: States' Amnesia and Parallel Universes', address to Harm Reduction 2008: IHRA's 19th International Conference (International Harm Reduction Association, 11 May 2008) http://www.hr-dp.org/contents/952 (last accessed 01 December 2014)

Ways in which the special procedures can organise their work to such ends should include the following:

Contribute to the development of a joint special procedures statement for submission to the UN General Assembly Special Session on Drugs in 2016. A UN General Assembly Special Session on Drugs scheduled for mid-2016 is an important opportunity for the special procedures to have an impact on the drug policy debate, and ensure that human rights is rooted firmly at the centre of reforms moving forward.

Advance the normative development of human rights and drug control through collaborative and individual thematic reporting on the promotion and protection of human rights while countering the world drug problem. The normative gaps highlighted in this research present numerous opportunities for mandate holders to develop lines of inquiry within their individual work and through collaborative reporting. This can include: an analysis of normative gaps; suggestions for standard setting measures that target stakeholders responding to the world drug problem, and; promoting the issue as a thematic human rights concern within the broader UN human rights mechanisms.

2. Research methodology

This research project is based on information collected from the review of publicly available reports of the special procedures. The International Centre on Human Rights and Drug Policy selected five special procedures for review due to their particular relevance to drug policy:

1. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
2. Special Rapporteur on the right to the highest attainable standard of health
3. Special Rapporteur on summary, arbitrary or extra-judicial executions
4. Special Rapporteur on the rights of indigenous peoples
5. Working Group on arbitrary detention

A search of publicly available reports from each special procedure was undertaken to identify:

- Each instance throughout the mandate's lifetime where drug control practices were highlighted.
- The key drug control practices that overlap with the mandate holder.

- The relative strength of recommendations given by the special procedure for follow-up action based on SMART indicators.[3]
- The potential intersections such practices have with other mandate holders within the special procedure mechanism.

3. Preliminary data

Table 3.1

Mandate	Total reports reviewed	Total reports highlighting drug control practices	Total recommendations on drug control measures
Indigenous Peoples	85	25	3
Health	64	31	13
Arbitrary Detention	64	35	2
Executions	56	37	15
Torture	85	44	20
Total:	**354**	**172**	**53**

4. Historical treatment of drug control within the Working Group on arbitrary detention

The protection of individuals from arbitrary detention in the context of drug control policy figures prominently into the mandate of the Working Group.[4] Since the earliest days of this special procedure, the Working Group has clarified that the scope of its mandate extends beyond pre-trial criminal settings to all instances of detention that may raise question of arbitrariness within the meaning of established international standards.[5] As measures taken within the drug control regime occur across administrative and criminal detention settings, the Working Group has grounds to pursue questions relevant to the arbitrary nature of such practices.

Indeed, the discriminatory and arbitrary application of detention in the name of drug control were considered frequently in reports and a thematic examination of the detention of people who use drugs has been proposed.[6] Several of the Working Group's thematic deliberations are of importance to addressing the arbitrary nature of numerous detention regimes in place to control drug use and trafficking.[7] Much of the reporting noted concern that important procedural safeguards were absent in drug

[3] Specific, Measureable, Attainable, Realistic, and Time-bound, *see* Human Rights Council, Manual on the Special Procedures of the Human Rights Council (June 2008) para 98 http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf <last accessed December 2014>

[4] United Nations Human Rights Council Resolution 24/7 (8 October 2013) A/HRC/24/L.15

[5] Report of the UN Working Group on Arbitrary Detention (*hereinafter WGAD*) (12 January 1993) E/CN.4/1993/24, Deliberation 03, page 14; Report of the WGAD (17 December 1996) E/CN.4/1997/4, para 96

[6] Report of the WGAD (18 January 2010) A/HRC/13/30 para 48

[7] Report of the WGAD (12 January 1993) E/CN.4/1993/24, *see* Deliberation 03-p 14, Deliberation 04-p 16; Report of the WGAD (01 December 2004) E/CN.4/2005/6, *see* Deliberation 07-p 16; Report of the WGAD (24 December 2012) A/HRC/22/44, *see* Deliberation 09-p 16

control detention measures and overall concern that people who use drugs are particularly at risk to arbitrary detention.[8] However, reporting lacked substantive analysis of the intersections between States' human rights and drug control obligations, and how failures to integrate human rights standards into drug policymaking and practice can lead to arbitrary practices of detention. Likewise, recommendations explicitly calling on States to uphold their obligations to ensure detention practices adhere to human rights standards while implementing drug control measures were less frequent.[9] As State responses to drug control include administrative and criminal detention practices, representing a significant percentage of the world's incarcerated population—including individuals detained arbitrarily—the mandate holders have an important role to play in shifting such practices to those grounded in human rights.[10]

Under the framework of this research, sixty-four reports of the special procedure were examined, including twenty-two annual and forty-two country reports. **This review revealed that thirty-five of the sixty-four reports explicitly mention drug-related issues. However, only two reports include recommendations on drug policy concerns.**[11]

5. The intersection of drug control policy and arbitrary detention

The question of deprivation of liberty in the context of drug laws and policies takes many forms, including both penal and administrative measures. In each of these circumstances, detention for drug offences or drug use may meet the threshold of arbitrariness where legally proscribed safeguards are not in place.

The current drug control regime, underpinned by three international treaties, obliges States to take measures to control the illicit trade and consumption of certain drugs including both the use of criminal law[12] and the provision of treatment to persons who

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[8] Report of the WGAD, Visit to the People's Republic of China (22 December 1997) E/CN.4/1998/44/Add.2, para 81, 97-99; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 111-119

[9] Only two Country reports present drug policy reform guidance in their final recommendations: Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 102; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 148

[10] Report of the WGAD, The question of the Human Rights of all persons subjected to any form of detention or imprisonment (17 December 1993) E/CN.4/1994/27, *see* request from the Human Rights Commission to bring attention to negative consequences brought about by drug trafficking, para 40; Report of the WGAD, Visit to Mexico (17 December 2002) E/CN.4/2003/8/Add.3, para 20; Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 101; Report of the WGAD, Mission to Malaysia (8 February 2011) A/HRC/16/47/Add.2, para 97

[11] Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 102; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 148

[12] Single Convention on Narcotic Drugs (*hereafter* 1961 Convention)(adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151, Article 36; Convention on Psychotropic Substances (*hereafter* 1971 Convention) (adopted 11 January 1971, entered into force 16 August 1976) 1019 UNTS 175, Article 22; Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*hereafter* 1988 Convention)(adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95, Article 3

use drugs,[13] all subject to national interpretation and domestic and international law.[14] State implementation of laws and policies to give effect to these obligations can come into conflict with their international human rights obligations, in particular the substantive and procedural safeguards to prevent the arbitrary detention of individuals. This conflict is not one limited to domestic implementation, as international organisations and other States directly support and encourage these drug control practices through financial and technical support.[15]

Many of these policies and subsequent practices examined by the Working Group and listed below are essential for the mandate holders to continue to address during country and thematic work.

5.1. Human rights protections against the arbitrary application of administrative detention

The prohibition of arbitrary detention, including in administrative settings, is a fundamental right enshrined within the international legal system and confirmed by the Working Group as a peremptory norm of international law.[16] The legal standards regulating administrative detention are codified in a range of international and regional human rights instruments.[17] These customary and treaty norms establish substantive and procedural safeguards to prevent an arbitrary deprivation of liberty in an administrative setting and include:

- The detention must be established by law[18]
- The reasons for and duration[19] of the detention must be promptly and clearly established[20], necessary, proportionate, and appropriate for the intended aim of the measure[21]

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[13] 1961 Convention, Article 38; 1971 Convention, Article 20; 1988 Convention, Article 3

[14] 1961 Convention, Article 36(1)(a) and Article 36(2); 1971 Convention, Article 22(1) and Article 22(2); 1988 Convention Article 3 paragraph (a) and (b)

[15] Patrick Gallahue, Roxanne Saucier and Damon Barrett, *Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights*, International Harm Reduction Association, 2012, p.26

[16] *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 3., para 90-91; Report of the WGAD (24 December 2012) A/HRC/22/44, para 75

[17] International Covenant on Civil and Political Rights (*hereafter* ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, articles 9 and 14; Universal Declaration of Human Rights GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) article 3; Convention against Torture and Cruel, Inhuman and Degrading Treatment of Punishment, GA Res. 39/46, UN Doc. A/RES/39/46 (1984) articles 6,7, 11 and 15; Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, adopted by GA/RES/43/173 (9 December 1988);[17] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, articles 5 and 6; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, articles 7 and 8; American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992), articles 25 and 26; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, articles 6 and 7

[18] ICCPR, Article 9 (1); General Comment No.8 Article 9 (Right to liberty and security of persons) (*hereafter* General Comment 8), HRI/GEN/1/Rev.9 (Vol. I), 1982, para.1

- There must be means by which to promptly challenge the detention and such means must be available for the duration of the deprivation[22]
- The deprivation must be appropriately recorded[23]
- Conditions, including methods of rehabilitation or treatment, must not be inhuman or degrading[24]

While international human rights law does not absolutely prohibit involuntary deprivations of liberty in administrative settings, including for medical reasons, enhanced safeguards are necessary to prevent such measures from becoming arbitrary. In addition to the above, these include:

- The decision to detain on medical grounds must be made by a qualified professional[25]
- The reason for deprivation must not only be necessary, but meet the relevant international threshold established to be medically necessary[26]
- Treatment must be medically and/or scientifically appropriate[27]

When considering drug control interventions such as compulsory treatment or the involuntary commitment of people for drug use, the application of such safeguards equally applies.[28]

5.2 Administrative detention and drug control

The administrative detention of people who use drugs is a long-standing practice by States as a means to respond to the medical needs of individual users and, in other cases, to more broadly advance agendas that seek to eliminate the social 'evil' of drug use.[29] In all circumstances, human rights safeguards must be in place to protect individuals from arbitrary detention. In policy and practice, administrative detention in

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[19] ICCPR, Article 9 (2); General Comment 8, para 2
[20] ICCPR, Article 9 (3); General Comment 8, para 3 and 4
[21] ICCPR, Article 9 (3); General Comment 8, para 3 and 4
[22] ICCPR, Article 9 (4)
[23] *Nechiporuk and Yonkalo v. Ukraine* (21 April 2011) App. No. 42310/04, para 176; see also, *Kurt v. Turkey* (25 May 1998) App. No. 5/1997/799/1002, para 125; Rick Lines, 'Treatment in Liberty' (2014) Journal of International Law and Drug Policy (forthcoming 2015 publication) 8
[24] ICCPR, Article 7; Report of the WGAD (12 January 1993) E/CN.4/1993/24, Deliberation 04, p 16
[25] This would equally apply in a judicial detention if treatment is part of the criminal sentence.
[26] *Nevmerzhitsky v. Ukraine* (5 April 2005) App. No. 54825/00, para 98-99; *Witold Litwa v. Poland* (4 April 2000) App. No.26629/95, para 61-64
[27] *Herczegfalvy v. Austria* (24 September 1992) App. No. 10533/83, para 82 and 94: "a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading."
[28] Rick Lines, 'Treatment in Liberty' (2014) Journal of International Law and Drug Policy (forthcoming 2015 publication) 9, 15; General Comment 8, para 1; Report of the WGAD (15 December 2003) E/CN.2/2004/3, para 74; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (10 August 2009) A/64/272, para 39
[29] 1961 Convention, preamble: 'addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind'

the name of drug control—particularly when framed as a health intervention—frequently fails to include human rights protections, leading to widespread instances of arbitrary detention.

5.2.1. Administrative detention under the law of international drug control

The practice of administrative detention in the context of drug control includes a range of measures that engage the question of arbitrary detention. The question is most pertinently raised when an individual is involuntarily or compulsorily confined to undergo drug treatment, although preventive detention measures of persons suspected of drug use for security reasons is also relevant.[30] While some States adopt such practices, they are not supported by the international drug control legal regime.[31] The most relevant provisions under the international drug control conventions,[32] which create obligations for States to provide treatment and rehabilitation, do not establish grounds for such measures.[33]

The Working Group, in carrying out its mandate, has examined questions of arbitrary detention raised by these practices in several reports, highlighted below.

5.2.2. Applying human rights standards to administrative drug detention

The involuntary commitment of individuals to psychiatric or rehabilitation centres, based on the premise that drug use endangers the lives of the individual or others, has been integrated into the legislation of States throughout the world.[34] Since the ratification of 1961 Single Convention on Narcotic Drugs more than fifty years ago, human rights law has set clear normative standards to protect individuals from arbitrary detention for health reasons. This is best illustrated through jurisprudence and normative guidance related to the detention of persons deemed to be mentally ill and standards established to protect individuals from detention regimes dedicated to re-education through forced labour.[35] Since its earliest days, the Working Group identified

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[30] Report of the WGAD, Mission to Malaysia (8 February 2011) A/HRC/16/47/Add.2 , para 38-40; Report of the WGAD (18 January 2010) A/HRC/13/30/Add.2, p 23

[31] For a comprehensive analysis of the issue *see*: Rick Lines, 'Treatment in Liberty' (2014) Journal of International Law and Drug Policy (forthcoming 2015 publication) 20-27

[32] 1961 Convention, art. 38.

[33] Rick Lines, 'Treatment in Liberty' (2014) Journal of International Law and Drug Policy (forthcoming 2015 publication) 25

[34] Report of the WGAD, Mission to Turkey (7 February 2007) A/HRC/4/40/Add.5, para 92: ; Report of the WGAD, Visit to the People's Republic of China (22 December 1997) E/CN.4/1998/44/Add.2, para 81; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 111

[35] Convention on the Rights of Persons with Disabilities (*hereafter* CPRD) (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, Articles 14, 15, 17, 25; Committee on Economic Social and Cultural Rights 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) E/C.12/2000/4, para 8; *Nevmerzhitsky v. Ukraine* (5 April 2005) App. No. 54825/00; The protection of persons with mental illness and the improvement of mental health care, UNGA Res 46/119 (17 Dec

the detention of mentally ill persons and coercive re-education regimes as particularly relevant to the question of arbitrary detention.[36] Despite this rich catalogue of legal protections established through human rights law, administrative detention measures in the name of drug control are carried out with little regard for human rights.[37] It is a matter of law that such standards apply equally to individuals using, or thought to be using drugs, despite widespread practice to the contrary.

5.2.1.1. Grounds for detention

In order for involuntary committal for drug use to be compliant with international human rights standards, the substantive grounds establishing why the commitment is necessary must be clearly articulated.[38] Such criteria must meet the test of medical necessity and can only be justified when the individual poses an *immediate* threat of harm to herself/himself or others.[39] Dubious medical grounds establishing a nexus between substance use and harm are not sufficient for involuntary detention.[40] People who use drugs can and do make decisions about their own lives on a regular basis. Drug use or dependence cannot itself establish sufficient grounds for compulsory detention.[41] However, many States implement measures based on overly broad criteria such as, the use of a certain substance is a threat to society,[42] or that people who use drugs are, by definition, 'harmful to their family and surroundings'.[43] In some States, security forces round up "addicts"[44], and in others, family members can have a drug-using relative committed.[45] In its review of States, the Working Group has previously

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1991); Report of the WGAD (12 January 1993) E/CN.4/1993/24, Deliberation 4, p 16; Report of the WGAD (01 December 2004) E/CN.4/2005/6, Deliberation No. 7, p 16

[36] Report of the WGAD (12 January 1993) E/CN.4/1993/24, Deliberation 4, p 16; Report of the WGAD (01 December 2004) E/CN.4/2005/6, Deliberation No. 7, p 16

[37] *See*: D Wolfe & R Saucier. 'In rehabilitation's name? Ending institutionalized cruelty and degrading treatment of people who use drugs', International Journal of Drug Policy, 21(May 2010)3, 145–148; Human Rights Watch, 'The Rehab Archipelago Forced Labour and Other Abuses in Drug Detention Centers in Southern Vietnam'; Human Rights Watch, 'Skin on the Cable: The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia'

[38] Report of the WGAD (01 December 2004) E/CN.4/2005/6, Deliberation No. 7, para 54 (a): "Laws shall be couched in clear terms."

[39] *Witold Litwa v. Poland* (4 April 2000) Application no. 26629/95, para 62, 65, 73, 78 and 79; Report of the Special Rapporteur on torture and other forms of inhuman or degrading treatment or punishment (01 February 2013) A/HRC/22/53, para 69

[40] *Witold Litwa v. Poland* (4 April 2000) Application no. 26629/95, para 73; Report of the Special Rapporteur on torture and other forms of inhuman or degrading treatment or punishment (01 February 2013) A/HRC/22/53, para 34-35, 87

[41] United Nations Office on Drugs and Crime (UNODC) and WHO, "Principles of drug dependence treatment", discussion paper, 2008, p 15

[42] Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 111-119

[43] Report of the WGAD, Mission to Turkey (7 February 2007) A/HRC/4/40/Add.5, para.91

[44] Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3; Report of the Special Rapporteur on torture and other forms of inhuman or degrading treatment or punishment (01 February 2013) A/HRC/22/53, para 40

[45] Study of Religion, University of Toronto (9 April 2013), Guatemala's compulsory rehabilitation centers (Submission to the United Nations Committee Against Torture), http://www2.ohchr.org/English/bodies/cat/docs/ngos/UniversityToronto1_Guatemala_CAT50.pdf; Daniel Wolfe (14 February 2012), Death, drug treatment, and Christ's love (Open Society Foundations Voices Blog), http://www.opensocietyfoundations.org/voices/death-drug-treatment-and-christ-s-love; IDPC Advocacy Note, Compulsory

found such substantive grounds to be lacking,[46] while in others, the absence of clear grounds was not highlighted as a concern.[47] In its most recent report from Brazil, the Working Group commendably highlighted the threat involuntary commitment for drug use poses to the prohibition on arbitrary detention, but themselves characterised such measures as permissible when an individual is a "threat to society".[48] As discussed above, such overly broad criteria do not meet international legal standards.

5.2.1.2. Procedural safeguards necessary

In all cases of involuntary committal, procedural safeguards must be in place to protect an individual from arbitrary detention.[49] Such safeguards apply equally to commitment or compulsory detention orders of those thought to be using drugs, assuming sufficient grounds have been established as identified above. Whenever a detention is ordered for health grounds, the decision must be made by an independent medical professional, following a medical examination and based on ethically and scientifically sound reasons.[50] A person should be voluntarily offered such treatment options and refuse such care before compulsory confinement to a closed facility can be considered.[51] In all cases, the individual must be provided with means to challenge such a measure, including on-going, judicial review.[52] Judicial control of detentions is a significant protection against arbitrary detention that the Working Group emphasises in thematic and country reviews.[53] In any case, the deprivation may not go on indefinitely, and should only continue as long as strictly necessary.[54] The Working Group has highlighted these procedural safeguards as critical in the case of detention practices for drug dependence on several occasions, most clearly in its recent report on Brazil.[55] The

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rehabilitation in Latin America: An unethical, inhumane and ineffective practice February 2014, http://www.idhdp.com/media/1236/idpc-advocacy-note_compulsory-rehabilitation-latin-america_english.pdf

[46] Report of the WGAD, Mission to Turkey (7 February 2007) A/HRC/4/40/Add.5, para 95-96

[47] Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3

[48] Report of the Working Group on Arbitrary Detention Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 148

[49] *See* Section 5.1

[50] *Nevmerzhitsky v Ukraine* (5 April 2005) App. No. 54825/00, para 94; *Herczegfalvy v Austria* (24 September 1992) App No 10533/83, para 82; Report of the WGAD (01 December 2004) E/CN.4/2005/6, Deliberation No. 7, para 58; ICESCR General Comment 35, para 19

[51] Committee on Economic Social and Cultural Rights 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc. No. E/C.12/2000/4, para 8; Report of the Special Rapporteur on torture and other forms of inhuman or degrading treatment or punishment (01 February 2013) A/HRC/22/53, para 28

[52] Report of the WGAD (01 December 2004) E/CN.4/2005/6, Deliberation No. 7 on Issues Related to Psychiatric Detention; ICCPR, article 9(4)

[53] Report of the WGAD (15 December 2003) E/CN.4/2004/3, para 74, 87; Report of the WGAD, Mission to Nicaragua A/HRC/4/40/Add.3, para 101-102; Report of the WGAD, Deliberation No. 9 (24 December 2012) A/HRC/22/44, para 48; Report of the WGAD (30 June 2014) A/HRC/27/48, para 87; Report of the WGAD, Deliberation No. 7 (01 December 2004) E/CN.4/2005/6, para 47

[54] Human Rights Committee, General comment No. 29 (2001) CCPR/C/21/Rev.1/Add.11, para 3; Human Rights Committee, *Fardon v* Australia (10 May 2010) CCPR/C/98/D/1629/2007; Human Rights Committee, *A. v. Australia,* (3 April 1997) CCPR/C/59/D/560/1993, para 9.4; Concluding Observations of the Human Rights Committee, Russian Federation (29 October 2009) CCPR/C/RUS/CO/6, para 19; Report of the WGAD, Deliberation No. 4 (12 January 1993) E/CN.4/1993/24, p 20

[55] Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 148

duration of involuntary detention for suspected drug use can be no longer than a few days, as there is no scientific evidence to suggest that compulsory treatment for any length of time is appropriate.[56] Any non-arbitrary compulsory detention for drug use is limited to the period of time until that individual has regained personal autonomy over their ability to make decisions and no longer poses imminent harm to herself/himself or others.[57] Despite these clear limitations to compulsory detention practices, States continue to carry out commitment orders for suspected drug users, and involuntarily detain individuals in drug detention centres for extended periods of time.[58] There have been cases where these practices go unrecorded and involve the removal of "street children" to psychiatric centres.[59] The use of compulsory drug detention centres throughout East Asia demonstrates how such procedural inadequacy leads to arbitrary detention on a widespread and systematic level.[60]

5.2.1.3. Purpose of compulsory drug detention

While the Working Group has limited its consideration of drug detention regimes to procedural and substantive reviews when assessing arbitrariness, there is scope within the mandate to expand its consideration. This is significant, as there are situations where even with strict adherence to procedural safeguards, an administrative detention order for drug use can be arbitrary. Oftentimes, the purpose of the detention of those thought to be using drugs is rehabilitation through coercive regimes of re-education and forced labour.[61] As the Working Group itself has pointed out in one of its first

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[56] United Nations Office on Drugs and Crime, 'UNODC and the Promotion and Protection of Human Rights' (Vienna, 2012) http://www.hr-dp.org/files/2013/10/24/UNODC_Human_rights_position_paper_2012.pdf (last accessed 28 November 2014) p 16; United Nations Office on Drugs and Crime, "From Coercion to Cohesion: Treating Drug Dependence Through Healthcare, Not Punishment. Discussion Paper," (2 March 2 2010) http://www.unodc.org/docs/treatment/Coercion_Ebook.pdf (accessed 27 November 2014) p 7-8; Stevens, Alex, 'The Ethics and Effectiveness of Coerced Treatment of People who use Drugs, Human Rights and Drugs' (2011) 2 Human Rights and Drugs, 7

[57] *Ibid*; see also Convention on the Rights of Persons with Disabilities, article 3(a) for useful guidance on autonomy

[58] With, at times, the support of the international community; *see* Report of the Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment (1 February 2013) A/HRC/22/53, para 42-43

[59] Report of the Working Group on Arbitrary Detention Mission to Brazil A/HRC/27/48/Add.3 (30 June 2014), para.115

[60] "Torture in the Name of Treatment. Human Rights Abuses in Vietnam, China, Cambodia, and Lao PDR", Human Rights Watch, 24 July 2012; Pearshouse, R. and Amon, J. "The ethics of research in compulsory drug detention centres in Asia", Journal of the International AIDS Society, 5 December 2012; Report of the Working Group on Arbitrary Detention Visit to the People's Republic of China, E/CN.4/1998/44/Add.2, 22 December 1997, para.85; Report of the Working Group on Arbitrary Detention Report of the Working Group on Arbitrary Detention Mission to China, E/CN.4/2005/6/Add.4, 29 December 2004, para.48; Joint United Nations Programme on HIV/AIDS, 'Joint Statement: Compulsory drug detention and rehabilitation centres' March 2012

[61] Human Rights Watch, 'The Rehab Archipelago Forced Labour and Other Abuses in Drug Detention Centres in Southern Vietnam', New York, 2011; Human Rights Watch, '"Skin on the Cable" The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia', New York, 2010; Nick Thompson, 'Detention as Treatment: Detention of Methamphetamine Users in Cambodia, Laos, and Thailand', International Harm Reduction Development Program, New York, 2010; Richard Elliott, Rick Lines, Rebecca Schleifer, Alison Symington, 'Treatment as Torture: Applying International Human Rights Standards to Drug Detention Centres', Open Society Foundations, New York, 2011; Richard Pearshouse, 'Compulsory Drug Treatment in Thailand', Canadian HIV/AIDS Legal Network, Toronto, 2009; World Health Organization Western Pacific Region, 'Assessment of Compulsory Treatment of People Who Use Drugs in Cambodia, China, Malaysia and Viet Nam: An Application of Selected Human Rights Principles' Manila, 2009

deliberations, the purposive element of such detention regimes must be considered when assessing arbitrariness.[62] Detention as a form of drug dependence treatment has not been recognised as a scientifically proven medical treatment.[63] Additionally, practices that fail to establish clear times lines for release and base such release on progress made in rehabilitation are considered inherently arbitrary.[64] In the situation of compulsory drug treatment, there is no circumstance where compulsory rehabilitation for any length of time is considered appropriate—it is arbitrary by its very nature.

As States continue to carve out exceptional circumstances to broadly detain persons who use drugs, there is a need for human rights monitors, including the Working Group, to explicitly call on States to fully integrate human rights protections through reform of drug control legislation and policy. As the Working Group has commendably highlighted on several occasions, such exceptional measures put individuals at increased risk for arbitrary detention. The Working Group can strengthen its assessment of drug-related administrative detention practices by more robustly incorporating existing guidelines to such reviews. The Working Group is encouraged to provide more detailed guidance and recommendations on how States can ensure their administrative detention responses to drug control are fully compliant with protections against arbitrary detention.

5.3 Human rights protections against arbitrary detention in criminal settings

As established in Section 5.1, the prohibition of arbitrary detention is a fundamental right enshrined within the international legal system and confirmed by the Working Group as a peremptory norm of international law.[65] The legal standards regulating detention based on criminal grounds are codified in a range of international and regional human rights instruments.[66] These customary and treaty norms establish substantive and procedural safeguards to prevent an arbitrary deprivation of liberty in a criminal detention setting and extend to pre-trial detention. These include:

- The detention must be established by law[67]
- The reasons for and duration[68] of the detention must be promptly and clearly established[69], necessary, proportionate, and appropriate for the intended aim of the measure[70]

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[62] Report of the WGAD, Deliberation 04 on rehabilitation through labour (12 January 1993) E/CN.4/1993/24, p 17 & 19
[63] WHO/UNODC, "Principles of Drug Dependence Treatment" (March 2008) p 14 www.who.int/substance_abuse/publications/principles_drug_dependence_treatment.pdf (accessed 01 November 2014)
[64] Report of the WGAD, Deliberation No. 4 (12 January 1993) E/CN.4/1993/24, p 20
[65] *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 3., para 90-91; Report of the WGAD (24 December 2012) A/HRC/22/44 para 75
[66] *Supra footnote* 17
[67] ICCPR, Article 9; General Comment No.8, para 1

- There must be judicial means by which to promptly challenge the detention and such means must be available for the duration of the deprivation[71]
- The deprivation must be appropriately recorded[72]
- Conditions must not be inhuman or degrading[73]
- Minimum fair trial standards must be followed throughout the judicial process[74]

When considering penal responses to drug control, the application of these minimum safeguards equally applies and derogation is not permitted.[75]

5.4 Criminal detention and drug control

The detention of people following a criminal charge for drug use, possession, cultivation, or trafficking is a long-standing practice by States as a means of drug suppression. The application of penal measures in response to drug control includes a range of practices that engage the question of arbitrary detention. These laws and policies are often designed or applied without necessary human rights protections to ensure fair trial standards are upheld, and are often implemented within criminal justice systems incapable of guaranteeing procedural safeguards, leading to arbitrary conditions of over-incarceration, including the overrepresentation of vulnerable groups within the prison system. While some States adopt such practices, they are not supported by international law, including both the human rights and international drug control systems.[76]

5.4.1. Criminal detention under the law of international drug control

The international drug control regime has evolved into a predominantly punitive, enforcement led system, in which the broad application of criminal laws and penal measures raise questions of proportionality, necessity and appropriateness of their

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[68] ICCPR, Article 9 (2); General Comment No.8, para 2; Report of the WGAD (24 December 2012) A/HRC/22/44, para 67

[69] ICCPR, Article 9 (3); General Comment No.8, para 3 & 4; Report of the WGAD (24 December 2012) A/HRC/22/44, para 67

[70] ICCPR, Article 9 (3); General Comment No.8, para 3 & 4; *Toregozhina v Kazakhstan* (European Court of Human Rights, 20 November 2014) CCPR/C/112/D/2137/2012, para 7.2; Report of the WGAD (24 December 2012) A/HRC/22/44 para 83

[71] ICCPR, Article 9 (4); Report of the WGAD (24 December 2012) A/HRC/22/44, para 80

[72] International Convention for the Protection of All Persons from Enforced Disappearance, UNGA Res 71/177 (20 December 2006), entered into force 23 December 2010, Article 17; *Nechiporuk and Yonkalo v. Ukraine* (European Court of Human Rights, 21 April 2011) App. No. 42310/04, para 176; *Kurt v. Turkey* (European Court of Human Rights, 25 May 1998) App. No. 5/1997/799/1002, para 125; Human Rights Committee, General Comment 20 Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), para 11; Human Rights Committee, General Comment 35 (advanced version), para 23

[73] ICCPR, Article 7; Report of the WGAD, Deliberation No. 4 (12 January 1993) E/CN.4/1993/24, p.20

[74] ICCPR, Article 14; Report of the WGAD (21 January 1992) E/CN.4/1992/20, para 23(f), also *see* p 10, Annex I describing a Category III violation in the consideration of individual cases

[75]ICCPR, Article 4 and 9; Human Rights Committee, General Comment No.8, para.1; Report of the WGAD (15 December 2003) E/CN.2/2004/3, para 74; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (10 August 2009) A/64/272, para 39; Rick Lines, 'Treatment in Liberty' (2014) Journal of International Law and Drug Policy (forthcoming 2015 publication) 9 and 15

[76] Rick Lines, 'Treatment in Liberty' Compulsory Detention for Drug Use and Human Rights, p.20-27

use.[77] Legal authority for penal responses at the international level can be found in the three international drug control treaties, which establish grounds for penalisation measures, including detention, for more than forty-nine offences.[78] Language used throughout the drug control treaties calls attention to the "serious"[79] or "grave"[80] nature of drug-related offences and—for certain offences—establish a minimum requirement of "adequate" penal responses.[81] Similarly present throughout the treaties are limitation clauses subjecting such responses to national interpretation and domestic and international law.[82] As earlier outlined, international human rights law has established a robust system of protections most relevant to the consideration of drug-related criminal detentions.

5.4.2. Applying human rights standards to criminal drug detention

The Working Group has given broad consideration to how criminal drug laws and policies are linked to arbitrary instances of detention, and has progressively determined that pre-trial detention practices, sentencing standards, and over incarceration can fall under the scope of its mandate for consideration.[83] Such expansive interpretation of the mandate establishes grounds for a more robust examination of how drug control penal measures adversely affect guarantees of the prohibition of arbitrary detention. The following sections explore several entry points where such penal measures engage the question of arbitrary detention and provide an overview of the Working Group's consideration of drug control to date, highlighting where more advanced human rights analysis and attention is needed.

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[77] General Comment No.8, para 1 and 4; Report of the WGAD (24 December 2012) UN Doc. A/HRC/22/44, para 61; Press Release: Office of the High Commissioner of Human Rights, Side event: World Drug Problem on Human Rights (16 June 2014), Navi Pillay: "[T]he 1961 Single Convention on Narcotic Drugs emphasizes that drug control policy seeks to protect the health and welfare of humankind. Clearly, implementation of this laudable goal should not violate human rights, which would contravene the objective."

[78] 1961 Convention, Article 36 establishes 17 categories where imprisonment is a possible measure of "adequate" punishment, the 1988 Convention, Article 3 establishes 32 categories of offences.

[79] 1961 Convention, Article 36; 1971 Convention, Article 22.

[80] 1988 Convention, Article 3(4)(a)

[81] 1961 Convention, Article 36; 1971 Convention, Article 22; 1988 Convention, Article 3

[82] For example, *see*: 1961 Convention, Article 36(1)(a) and Article 36(2); 1971 Convention, Article 22(1) and Article 22(2); 1988 Convention, Article 3 paragraph (a) and (b)

[83] Report of the WGAD, Implementation of General Assembly Resolution 60/251 of 15 March 2006 (9 January 2007) A/HRC/4/40, para 59, 68-72 and 77-78; Report of the WGAD, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development (16 February 2009) A/HRC/10/21, para 49; Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 62-63; Report of the WGAD, Mission to Mauritania (21 November 2008) A/HRC/10/21/Add.2, para 64; Report of the WGAD, Mission to Malaysia (8 February 2011)A/HRC/16/47/Add.2, para 57

5.4.2.1. Pre-trial detention[84]

Punitive responses to drug control have led to the extensive practice of pre-trial detention for a range of drug offences from personal possession to trafficking.[85] In the criminal procedure of many States, remand to detention pending trial for drug offences is either mandatory or linked with posting costly bail money[86] and has contributed to rapidly growing prison populations in many countries.[87] The Working Group considers pre-trial detention a measure that must be limited to particularly exceptional circumstances, given the challenges it poses to fair trial guarantees and the principal of presumption of innocence.[88] For example, when the Working Group examined the effects of Nicaragua's harsh narcotics law on people suspected of low-level drug offences, they noted mandatory pre-trial detention as a feature of the legislation, but did not raise concern or build any recommendations explicitly calling for an end to such practice.[89] While in other reports the Working Group noted pre-trial detention regimes, including systems linked to bail, led to diminished guarantees of a suspect's access to resources to adequately challenge her or his detention and ability to defend the case, directly impeding guarantees of equal protection before the law.[90] The increased number of individuals detained on a pre-trial basis has led to overwhelmed justice systems that are unable to uphold minimum due process standards,[91] and procedural guarantees of promptness for both judicial review and court hearings to determine criminal responsibility,[92] resulting in periods of detention pending trial that extend beyond several years.[93]

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[84] An examination of pre-trial detention measures arising from drug offenses and the particular experience of women in Latin America is currently underway as a joint clinical research project with the International Centre on Human Rights and Drug Policy, the University of Essex Human Rights Clinic, and the Open Society Justice Initiative for the 2014/2015 academic year: http://www.essex.ac.uk/hrc/careers/clinic/current-projects.aspx

[85] 'Presumption of Guilt: The Global Overuse of Pre-trial Detention' (Open Society Justice Initiative, 2014) pp 33, 57, 95; Report of the UN Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, Visit to Indonesia (10 March 2008) A/HRC/7/3/Add.7, p 28

[86] Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 65—bail not permitted under Nicaragua's criminal code for a range of drug offenses; Report of the WGAD, Mission to Malaysia (8 February 2011) A/HRC/16/47/Add.2, para 39—In Malaysia, the WGAD recommended the abrogation of the Dangerous Drugs Acts. Suspected drug traffickers may be detained for up to 60 days before the Minister for Home Affairs issues a detention order and up to 2 years; "Informe sobre el uso de la prisión preventive preventiva en las Américas", Comisión Interamericana de Derechos Humanos (30 December 2013) OEA/Ser.L/V/II. Doc. 46/13, para 124-130

[87] World Pre-Trial/Remand Imprisonment List (second edition) 18 Jun 2014: "Close to three million people are held in pre-trial detention and other forms of remand imprisonment throughout the world"

[88] Report of the WGAD (01 December 2004) E/CN.4/2005/6, para 68-70 and 77

[89] Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 65

[90] Report of the WGAD, Civil and Political Rights, including the question of Torture and Detention (12 December 2005) E/CN.4/2006/7, para 66; Report of the WGAD (19 December 2001) E/CN.4/2002/77 para 60(b); Fact Sheet No. 26, The Working Group on Arbitrary Detention, p.21 establishes scope for the WGAD to consider Category II cases of arbitrary detention to include deprivations resulting from a failure to ensure ICCPR Article 26 guarantees

[91] Report of the WGAD, Mission to Ecuador (26 October 2006) A/HRC/4/40/Add.2, paras 90 and 98

[92] ICCPR, Articles 9 (3)/(4)

[93] Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, paras 90-100, 118; Inter-American Commission on Human Rights, Report on the use of Pre-trial Detention in the Americas (30 Dec 2013) OEA/Ser.L/V/II. Doc. 46/13, para 47; *Luis*

In the broadest sense, failure to integrate guarantees that ensure detention be reserved for necessary and proportionate reasons into criminal procedure results in laws mandating pre-trial detention for low-level drug crimes, undermining the system's ability to meet procedural guarantees of promptness. This has a disproportionate effect on marginalised groups suspected of low-level crimes and with few resources to secure bail when pre-trial detention is not mandatory.

5.4.2.2. Sentencing practices

Much like the application of pre-trial detention, criminal sanctions for drug offenses lead to harsh sentences for low-level drug crimes and, in many cases, for prolonged periods of time.[94] While the international drug control treaties establish a minimum requirement of "adequate" responses to certain broadly enumerated offences, "adequate" is subject to national interpretation and international law.[95] Under a human rights framework, any "adequate" measures of deprivation must always satisfy the customary legal requirements prohibiting arbitrary detention, including the strict test of proportionality.[96] While States enjoy broad discretionary powers when determining sentencing policies, the Working Group has taken the view that arbitrariness can still arise when sentences fail to demonstrate necessity and proportionality in achieving a legitimate aim.[97] The Working Group has examined the principle of proportionality in the context of migrants, counter-terrorism detention regimes, security detention during states of emergency, and in the general phenomenon of over-incarceration and has consistently called on States to ensure that such deprivations be in pursuit of a legitimate aim.[98] These same standards apply to sentencing policies pursued in response to drug control.

The Working Group has examined sentencing practices for drug crimes in several country visits, highlighting how disproportionate sentences affect the protection of

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Bronstein v. Argentina (Report) IACHR (11 March 1997) Report No. 2/97 para 51, 59; 'Presumption of Guilt: The Global Overuse of Pre-trial Detention' (Open Society Justice Initiative, 2014)

[94] Rodrigo Uprimny Yepes, Diana Esther Guzmán, Jorge Parra Norato, *Addicted to Punishment: The disproportionality of drug laws in Latin America* (Dejusticia Working Paper 1, January 2013) pp 25-48

[95] 1961 Convention, Article 36; 1971 Convention, Article 22; 1988 Convention, Article 3; for examples of limitation clauses, *see*: 1961 Convention, Article 36(1)(a) and Article 36(2); 1971 Convention, Article 22(1) and Article 22(2); 1988 Convention, Article 3 paragraph (a) and (b)

[96] *See* Section 5.3

[97] Report of the WGAD (30 June 2014) A/HRC/27/48, para 72; Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 62-63; Report of the WGAD (15 December 1995) E/CN.4/1996/40, *see* General Criticisms from para 83-92; Report of the WGAD (26 December 2011) A/HRC/19/57, para 64 (v): judicial remedy must be in place to ensure protections from: 'Lack of proportion between the act with which the detainee is accused and the extreme measure of deprivation of liberty'

[98] for proportionality and detention of migrants, *see:* Report of the WGAD (18 January 2010) A/HRC/13/30, para 91, states of emergency and counterterrorism, *see*: Report of the WGAD (10 January 2008) A/HRC/7/4, para 82(a); Report of the WGAD (15 December 1994) E/CN.4/1995/31, para 57(b); Report of the WGAD (15 December 2003) E/CN.4/2004/3, para 59; over-incarceration, *see:* Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 62-63

individuals from arbitrary detention.[99] In Mexico, for example, the Working Group called for immediate reform to ensure sentences are proportionate and aligned with international human rights standards.[100] In some countries, due to their proximity to trafficking routes, and illicit criminal enterprises often present along these routes, States have adopted criminal laws to enable the arrest and prosecution of people who have friends, relatives, or neighbours involved in criminal enterprises, including drug trafficking networks. Sentencing practices of such individuals are often disproportionate to the actual nature of the crime.[101]

States often apply exceptional sentencing policies to drug offences that undermine procedural guarantees to protect an individual from arbitrary detention. In some cases these policies make individuals ineligible for parole or amnesty, and unable to challenge the legality of their on-going detention.[102] The Working Group has noted that even when States implement sentencing policies aimed at diverting individuals from criminal detention settings, such as into drug rehabilitation or treatment programmes, fair trial standards must still be upheld.[103] In the case of drug treatment courts, the Working Group noted that diversion to rehabilitation or treatment must not delay a determination of criminal responsibility.[104] While visiting the same provincial drug court in Canada, the Working Group also raised concern at the coercive power the criminal justice system has on an individual's decision to pursue medical treatment, though it still proceeded to commend the initiative.[105] There is growing evidence to suggest drug court models promoted by some countries—particularly, the United States[106]—are of questionable value in reducing incarceration rates and raise significant human rights issues, including questions relevant to arbitrary detention.[107] The use of

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[99] Report of the WGAD, Mission to Ecuador (26 October 2006) A/HRC/4/40/Add.2, para 87, 97 and 101(b); Report of the WGAD, Visit to Mexico (17 December 2002) E/CN.4/2003/8/Add.3, para 44 and para 72(a)

[100] Report of the WGAD, Visit to Mexico (17 December 2002) E/CN.4/2003/8/Add.3, para 44 and para 72(a)

[101] Report of the WGAD, Visit to Honduras (1 December 2006) A/HRC/4/40/Add.4, para 47 and 87; Report of the WGAD, Mission to El Salvador (11 January 2013) A/HRC/22/44/Add.2, para 125

[102] Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 102; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 118; Report of the WGAD (26 December 2011) A/HRC/19/57, para 64 (v): judicial remedy must be in place to ensure protections from: 'Lack of proportion between the act with which the detainee is accused and the extreme measure of deprivation of liberty'

[103] Report of the WGAD, Visit to Canada (05 December 2005) E/CN.4/2006/7/Add.2, para 57

[104] Report of the WGAD, Visit to Canada (05 December 2005) E/CN.4/2006/7/Add.2, para 53-57

[105] Report of the WGAD, Visit to Canada (05 December 2005) E/CN.4/2006/7/Add.2, para 57

[106] Latin American countries are also implementing programmes based on a similar model, for more information *see* 'Memorandum of Understanding for coordinating joint efforts to promote drug treatment courts and other alternatives to incarceration for drug dependent offenders in the America' (April 2009) <http://www.nadcp.org/sites/default/files/nadcp/CICAD%20MoU.pdf > last accessed 29 January 2015

[107] Important questions to examine may include: To what extent does a country's drug sentencing laws prevent individuals from accessing such an alternative measure? *see* Eric L. Sevigny, Harold A. Pollack, and Peter Reuter, 'Can Drug Courts Help to Reduce Prison and Jail Populations?' (May 2013) 647 Annals of the American Academy May 190, 196; How does requiring the accused to register a guilty plea to access alternative measures affect fair trial standards? Celinda Franco, 'Drug courts: Background, effectiveness and policy issues for Congress' (October 2010) Congressional Research Service,

drug treatment courts as an alternative measure to incarceration requires further scrutiny in future examinations by the Working Group. Any such alternative measures must be undertaken within a human rights framework, utilizing evidence based on sound methodological principles. If rehabilitation is ordered as an alternative to incarceration, under no circumstances may it extend beyond the period of an applicable criminal sentence and any alternative measures to detention must be provided with equal access and not connected with exorbitant costs to the individual offender.[108]

5.4.2.3. Over-incarceration

The current punitive approach to drug control has contributed to mass incarceration in prison systems across the globe.[109] Many of the criminal justice policies put in place by States, and discussed in the previous sections, lead to prolonged pre-trial detention[110] and harsh criminal sentencing[111] that directly affect the numbers of people under custodial care.

Overwhelmed prison systems and overcrowded prisons engage a range of rights that are considered within the scope of the Working Group's current mandate.[112] Prison conditions created by overcrowding were of frequent concern to the Working Group, particularly as they directly affect an individual's procedural rights to access justice and mount a criminal defence.[113] The Working Group has progressively expanded its consideration of prison conditions in response to the absence of another mandate to take up the issue, and has taken the view that overcrowded prison conditions engage the right to be treated with humanity when detained by authorities,[114] and broadly undermines the prohibition on arbitrary detention.[115] Frequently, the Working Group

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<http://fas.org/sgp/crs/misc/R41448.pdf> last accessed 29 Jan 2015, p 10; What are the implications of providing a medical alternative to detention for people who are not clinically drug dependent? E Halper, "Drug courts, meant to aid addicts, now a battlefield of pot politics," *Los Angeles Times*, 26 July 2014

[108] Report of the WGAD (26 October 2006) Visit to Ecuador A/HRC/4/40/Add.2, para 74

[109] For example, incarceration for drug offenses rose by as much as 100% for 8 countries in Latin America between 1997 and 2007, *see* 'Systems Overload: Drugs Laws and Prisons in Latin America' (Transnational Institute/Washington Office on Latin America, 2011) http://www.druglawreform.info/images/stories/documents/Systems_Overload/TNI-Systems_Overload-def.pdf (last accessed 01 December 2014); In the United States, nearly 50% of the federal prison population are incarcerated for drug offenses, *see* United States Federal Bureau of Prisons, Inmate Statistics (*last updated:* October 2014) http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last accessed 01 December 2014)

[110] Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 66; Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 64

[111] Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 91

[112] Report of the WGAD, Mission to Ecuador (26 October 2006) A/HRC/4/40/Add.2, para 66-67; Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 36-39; Report of the WGAD, Visit to Angola (29 February 2008) A/HRC/7/4/Add.4, para 98; Report of the WGAD (09 January 2007) A/HRC/4/40, para 66; Report of the WGAD (01 December 2004) E/CN.4/2005/6 para 68

[113] Report of the WGAD (30 June 2014) A/HRC/27/48, para 72; Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 60-67; Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 62; *see* Section 5.3 above for human rights framework

[114] Report of the WGAD (09 January 2007) A/HRC/4/40, paras 59-80

[115] Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 67

submitted strong recommendations to States to directly address prison overcrowding through investment in additional resources and the application of alternative measures of detention.[116] While the Working Group examined some of the reasons that lead to over-incarceration in 2014, reporting infrequently examined the links between punitive drug control responses and overcrowding.[117]

5.5 Drug control, arbitrary detention and discrimination

While this briefing paper has introduced a range of drug control practices that raise the question of arbitrary detention across administrative and criminal detention settings, it is important to note the acute impact such practices have on marginalised communities across the globe. Minority groups - such as indigenous communities, Roma communities and communities of people of colour - are disproportionately represented in prisons across many countries as a result of the discriminatory enforcement of narcotics laws.[118] Likewise, the detention of women and children—particularly those from minority groups—for drug offences has dramatically increased over the past several decades.[119]

International human rights law provides a valuable framework for both examining underlying, structural sources of discrimination as well as by establishing positive obligations to address systemic discrimination through reform of law and practice.[120]

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[116] Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 68; Report of the WGAD, Mission to Ecuador (26 October 2006) A/HRC/4/40/Add.2, para.101(f); Report of the WGAD (09 January 2007) A/HRC/4/40, para 77; Report of the WGAD, Visit to Canada (05 December 2005) E/CN.4/2006/7/Add.2, para 67; Report of the WGAD, Mission to Malaysia (8 February 2011) A/HRC/16/47/Add.2, para 103

[117] The thematic examination of over-incarceration assessed preventive and migrant detention regimes, *see* Report of the WGAD (30 June 2014) A/HRC/27/48, para 72-77; Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 77 called for an examination of over-incarceration; Two reports linked drug control policy with overcrowding, *see*: Report of the WGAD, Visit to Mexico (17 December 2002) E/CN.4/2003/8/Add.3, para.44; Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 64

[118] 'Systems Overload: Drugs Laws and Prisons in Latin America' (Transnational Institute/Washington Office on Latin America, 2011) pp 44, 67, 71; 'In Search of Happy Gypsies: Persecution of Pariah Minorities in Russia' (European Roma Rights Centre, May 2005) Country Reports Series No.14, pp 10, 56, 60, 73; 'Targeting Blacks: Drug law enforcement in the United States' (Human Rights Watch, 2008)

[119] In the UK in 2010, 24% of women in prison were there for drug offenses, see 'Statistics' at http://www.womeninprison.org.uk/statistics.php; In Europe and Asia combined, more than 28% of women in prison are there for drug offenses, see Eka Iakobishvili, Cause for Alarm: The Incarceration of Women for Drug Offences in Europe and Central Asia, and the Need for Legislative and Sentencing Reform (International Harm Reduction Association 2012) <accessed 23 September 2014> http://www.hr-dp.org/contents/954; Across countries in Latin America women in prison for drug offenses represents from 20 to 90% of the female prison populations, see Corina Giacomello, 'Women, drug offenses and penitentiary systems in Latin America' (International Drug Policy Consortium 2013) p 10; 'A Gender Perspective on the Impact of Drug Use, the Drug Trade, and Drug Control Regimes' (UN Women, July 2014) Policy Brief, p 3 http://www.hr-dp.org/files/2014/12/02/Gender_and_Drugs_-_UN_Women_Policy_Brief.pdf

[120] ICCPR, Articles 2(1), 26; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD), Articles 1(1), 2(1)(a), 5(a); Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Articles 1, 2, 15; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, enforced 03 January 1996) 993 UNTS 3 (ICESCR), Article 2

To date, the Working Group has highlighted with concern how drug control penal measures disproportionately impact women, children, and other minority groups within criminal justice systems.[121] However, recommendations in country reporting failed to bring attention to the specific issue, focusing instead on more general issues of law reform.

Throughout this document, numerous examples of coercive sanctions and penal measures that lack substantive and procedural human rights guarantees, highlights the significant challenges to the prohibition of arbitrary detention. The discriminatory application and effects of such measures provides the Working Group further grounds to pursue questions of arbitrary detention in drug control at both the individual and structural level.[122]

6. Interplay with other mandate holders

Drugs laws, policy and enforcement activities engage a broad spectrum of human rights issues. Health, arbitrary detention, capital punishment, due process, consent to treatment, prisons and policing, indigenous rights, women's rights and children's rights are just a few of the areas in which drug law and policy have a direct impact, often resulting in violations of international human rights law. Similar contemporary human rights challenges of a systemic nature – those engaging a broad spectrum of rights, challenging peremptory norms of international law or displacing human rights for reasons of security or other State/private interests – have previously received thematic consideration by members of the special procedures. Some of these thematic concerns, such as counter-terrorism, have given rise to specific mandates, while others have been examined thematically through individual and joint reports.[123]

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[121] For reports highlighting impact on women, *see*: Report of the WGAD, Mission to Armenia (17 February 2011) A/HRC/16/47/Add.3, para 78: women interviewed in Abovyan prison were serving maximum sentences between 10 and 13 years imprisonment for trafficking (exceeding the statutory provisions for these crimes); Report of the WGAD, Visit to Nicaragua (9 November 2006) A/HRC/4/40/Add.3, para 86; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 70; for reports highlighting impact on children, *see*: Report of the WGAD, Visit to Argentina (23 December 2003) E/CN.4/2004/3/Add.3, para 54; Report of the WGAD, Visit to Colombia (16 February 2009)A/HRC/10/21/Add.3, para 88; Report of the WGAD, Mission to Brazil (30 June 2014) A/HRC/27/48/Add.3, para 113; reporting highlighting the issue of disproportionate incarceration rates of minorities and persons who use drugs, *see*: Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 65-66; Report of the WGAD (30 June 2014) A/HRC/27/48, para 72

[122] Report of the WGAD (19 January 2011) A/HRC/16/47, para 8: In considering individual cases, the WGAD has established that a Category V arbitrary deprivation occurs when detention is discriminatory in nature; Report of the WGAD (12 December 2005) E/CN.4/2006/7, para 60-67; Report of the WGAD (30 June 2014) A/HRC/27/48, para 65-67; Report of the WGAD (15 December 2003) E/CN.4/2004/3, para 72- 74; Report of the WGAD, Mission to Greece (30 June 2014) A/HRC/27/48/Add.2, para 187

[123] Joint Study On Global Practices In Relation To Secret Detention In The Context Of Countering Terrorism Of The Special Rapporteur On The Promotion And Protection Of Human Rights And Fundamental Freedoms While Countering Terrorism; The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment; the Working Group On Arbitrary Detention; and the Working Group On Enforced Or Involuntary Disappearances (19 February 2010) A/HRC/13/42; Situation of detainees at Guantánamo Bay, Report of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or

Considering the scope of the human rights impacts of drugs laws and policies in the context of past practice, it is proposed that the 'promotion and protection of human rights while countering the world drug problem' be taken up as a thematic concern by the special procedures. In the absence of a specific mandate, there is important work to be done by existing mandate-holders both individually and jointly. Several mandate holders have done work on drug control issues in the past, but there remain numerous opportunities for dynamic collaboration with additional special procedure mandates, to bring a more comprehensive and detailed human rights analysis to the issues involved.

Table 6.1 Individual thematic consideration of drug control policies

Report	Mandate
'Right of everyone to the highest attainable standard of mental and physical health' A/65/255 (06 August 2010)	Special Rapporteur on the right to the highest attainable standard of health
'Applying a human rights-based approach to drug control' A/HRC/10/44 (14 January 2009) paras 49-74	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment
Report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, Juan Mendez, UN Doc. A/HRC/22/53 (1 February 2013) para 40-44, 51-56, 72-74, 86, 87	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment

Table 6.2 Joint collaboration on drug control policies

Communication	Mandate
Urgent appeal to Colombia on aerial fumigation (June 2014)	Special Rapporteur on the right to the highest attainable standard of health Special Rapporteur on the rights of indigenous peoples
Joint Press Release 'Iran: UN experts condemn public execution of juvenile and reiterate call for immediate halt on death penalty' (21 September 2011)	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment Special Rapporteur on summary, arbitrary or extrajudicial executions Special Rapporteur on the situation of human rights in the Islamic Republic of Iran Special Rapporteur on the independence of judges and lawyers
Joint Press Release: 'UN experts call for a moratorium on death penalty in Islamic Republic in Iran' (02 February 2011)	Special Rapporteur on summary, arbitrary or extrajudicial executions Special Rapporteur on the independence of judges and lawyers
Joint Letter from UN Special Rapporteurs on Health and on the Question of Torture to the UN Commission on Narcotic Drugs (10 December 2008)	Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment of punishment Special Rapporteur on the right to the highest attainable standard of health

punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (27 February 2006) E/CN.4/2006/120

Table 6.3. Opportunities for future collaboration/contributions on drug control policies

Mandate	Issue
Special Rapporteurs	
Adequate Housing	Crop eradication; loss of housing benefits and drug offenses; homelessness; discrimination; policing practices
Cultural Rights	Traditional practices of licit drug use; traditional medicines; cultural practices; security and development; discrimination
Education	Drugs education; random school drug testing; strip searches; benefits of school retention; alternative development; reduction in school attendance due to conflict; crop eradication; displacement; policing practices; cultural practices; security and development; discrimination
Extreme Poverty	Access to essential controlled medicines; crop eradication; alternative development; pre-trial detention; policing practices; homelessness; security and development; discrimination
Human Rights Defenders	Harm reduction workers; indigenous rights defenders
Independence of Judges and Lawyers	Mandatory sentencing; pre-trial detention
Internally Displaced Persons	Crop eradication; militarized responses to drug control; access to essential controlled medicines; security and development; discrimination
Migrants	Access to essential controlled medicines; cultural practices; discrimination; policing practices
Racism	Policing practices; discrimination; over-incarceration; access to essential controlled medicines; discrimination; security and development
Right to Food	Crop eradication; alternative development; food shortages from displacement; security and development; displacement
Right to Water	Crop eradication; alternative development; security and development; displacement
Freedom of expression	Laws prohibiting advocacy and outreach on harm reduction; anti-drug propaganda legislation
Myanmar	Crop eradication; militarized responses to drug control; access to essential controlled medicines; discrimination; policing; security and development; benefits of school retention; international assistance; harm reduction
Iran	Executions for drug offenses; sentencing and incarceration practices; international assistance; access to essential controlled medicines; harm reduction
Independent Experts	
Environment	Crop eradication
Minority Issues	Policing practices; discrimination; sentencing and incarceration practices; access to essential controlled medicines
Working Groups	
Discrimination against women in law & practice	Disproportionate incarceration rates of women for drug offenses; discrimination
Human rights & transnational corporations	Access to essential controlled medicines (pharmaceutical companies); harm reduction (private prison corporations); aerial and maritime drug trafficking enforcement (private security firms)
Mercenaries	Crop eradication; illicit drug crop protection

7. Recommendations

1. Contribute to the development of a joint special procedures statement for submission to the UN General Assembly Special Session on Drugs in 2016. This statement can highlight the array of work already undertaken by the special procedures to address the gap between human rights standards and drug control activities and advocate for a human rights framework as the central feature in progressive reform.

2. Consider a thematic examination of drug control policy and the practice of arbitrary detention. The inquiry should extend beyond the focus of the proposed 2009 report and not be limited to practices that lead to the detention of people who use drugs. This report can be part of the mandate holder's independent contribution to the UNGASS in 2016 and/or on-going work to call for thematic attention by the Human Rights Council on the issue.

3. Consider a dynamic and collaborative report with fellow mandate-holders that presents countering the world drug problem as a thematic human rights concern. Raising awareness within the OHCHR so that the High Commissioner may also include drug policy as a thematic stream would be an equally important collaborative objective.

4. Continue to seek opportunities to integrate drug control policies into country work and ensure consistent, strong recommendations to States on how to bring drug control responses in line with human rights standards and obligations.