



Promoting fair and effective criminal justice

NGO-Consultation UNGASS: Criminal justice and penal policies

As member of the Civil Society Task Force PRI would like to submit the input of criminal justice organisations to the Steering Committee of the Civil Society Task Force for inclusion in the final civil society submission to Member States ahead of the United Nations General Assembly Special Session (UNGASS) on drugs, to be held on the 19th to 21st April 2016 in New York.

Introduction

Non-governmental organisations whose mission includes criminal justice met for a face-to-face consultation in Geneva on 28 September 2015, on the occasion of the Human Rights Council “Panel discussion on the impact of the world drug problem on the enjoyment of human rights”.

The consultation, using the “Civil Society Task Force Recommendations for the “Zero Draft” of the Outcome Document for UNGASS 2016” as a starting point, was convened by Penal Reform International and the International Drug Policy Consortium (both members of the Civil Society Task Force, CSTF), kindly hosted by the Quaker’s UN Office in Geneva, and focused on the area of criminal justice and penal policies.

The views and recommendations of this group were shared electronically with other criminal justice organisations to collect additional views and recommendations. Feed-back was incorporated into this paper.

The views and recommendations are structured based on the five thematic areas for the 2016 UNGASS and include: drugs and health; drugs and crime; human rights, women, children, and communities; new challenges.

I. Crime and health

Recommendations:

There was consensus amongst participants of the consultation that the current CSTF Recommendations for the “Zero Draft” should include, explicitly, access to drug dependency treatment and opiod substitution therapy (OST) in detention, including prisons.

They also wish to stress that an emphasis should be added on the principle of informed consent of any treatment and on the prohibition of non-consensual drug dependency treatment under international law.

All participants shared the view that drug use and possession should be decriminalised, however decided upon consultation that the chapter of “Drugs and Crime” conceptually would be the more logical place to do so (rather than under “Crime and health”).

There was consensus that criminalisation has the effect of scaring people away from accessing health-care as well as measures that would prevent the infection with HIV/AIDS and other blood-borne infections.

The participants voiced their concern that even where drug use is decriminalised, it may still prompt administrative sanctions that are equally punitive, while lacking access to safeguards of due process.

Discussion:

The participants held, after discussion, that conceptually decriminalisation constitutes a criminal justice rather than a health issue, as the right to health includes a positive obligation of states to ensure the effective enjoyment of this fundamental right. Furthermore, the participants seek to avoid the risk that drug use of any kind is medicalised (despite the fact that not every drug prompts health risks). The participants therefore decided to include their respective views and recommendations in the chapter on “Drugs and crime” while a mention under the health chapter would be welcome.

The participants stressed the right to autonomy and informed consent, which forms part of the right to health enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights. CESCR General Comment No. 14 clarifies that the right to health “contains both freedoms and entitlements” including “the right to be free from interference, such as (...) non-consensual medical treatment (...)” (para. 8, see also Special Rapporteur on the right to health (A/65/255, paras. 31-33). It has to be noted that the principle of a patient’s autonomy and informed consent equally applies in detention, as emphasised in Rule 32 (b) of the revised Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), see ECOSOC 19 September 2015, UN-Doc. E/RES/2015/20).¹

Following discussion on whether to raise the issue of cost-effectiveness of drug dependency prevention and treatment as compared to imprisonment the participants agreed that while useful in advocacy, from a human rights perspective cost implications do not represent a valid argument. Rather, the participating organisations wished to stress the prerogative of human rights arguments, the lack of effectiveness of current punitive policies and the fact that the latter have proven not to make societies safer.

II. Drugs and crime

Given the mission of participating organisations in the area of criminal justice this chapter was of foremost interest and importance in the consultation, and there was agreement on the following concerns and recommendations to be incorporated in the “Civil Society Task Force Recommendations for the “Zero Draft” of the Outcome Document for UNGASS 2016”.

Recommendations:

¹ Rule 32 (1) The relationship between the physician or other health-care professionals and the prisoners shall be governed by the same ethical and professional standards as those applicable to patients in the community, in particular: (...) (b) Adherence to prisoners’ autonomy with regard to their own health and informed consent in the doctor-patient relationship (...).

1) The participating organisations shared the concern about how the “war on drugs” has resulted in a **militarisation of law enforcement**, and an escalation of the use of force. The present NGOs considered that this constituted a disproportionate response.

“The ‘war on drugs’ has resulted in a militarisation of law enforcement, with armed forces used for purposes they were never trained for.”

“The use of torture with impunity, abuses by criminal groups and enforced disappearances are fuelled by the prohibition regime.”

Civil society organisations also voiced concern about the practice of denying access to opiate substitution therapy as a means to coerce confessions, which has been identified as a violation of the right to be free from torture and ill-treatment by the Special Rapporteur on torture (A/HRC/22/53).

2) The NGOs also agreed that “*the punitive approach to drugs has contributed to an **erosion of due process**, with drug offences being dealt with under different procedural rules that undermine the rule of law*”. In many countries, individuals detained on drug-related offences face mandatory pre-trial detention, are held on remand based on the mere assumption of a risk of re-offending or flight, and/ or can be held longer before being charged compared to other offences.

NGOs flagged that this practice is also counter-productive as pre-trial detention prevents access to (effective) drug dependency treatment.

Concerns raised included the creation in some countries of a specific offence for refusal of mandatory drug-testing, the - de jure or de facto - reversal of the burden of proof for drug-related offences as well as restrictions on access to case material and evidence in criminal procedures involving drug-related offences.

“Restrictions on a defendant’s access to case materials should be limited to exceptional circumstances and accompanied by appropriate safeguards.”

NGOs also pointed out due process concerns with regard to plea bargaining in cases involving drug-related offences, and called for adequate safeguards to prevent undue pressure on suspects and defendants to prevent them from pleading guilty under pressure of a severe sentence.

3) The participants shared the view that “*criminalisation had the result of scaring drug dependent people away from seeking **community-based health services**, and that it disproportionately targets marginalised communities which play a minor role in the drug trade*” (eg farmers, micro-traffickers). Participants expressed the view that this may be linked to the targets/ indicators (number of arrests and seizures) as well as the lack of investment in capacity for the complex investigations required, and the reluctance to recognise the impact of corruption.

“Law enforcement focused on the number of arrests and seizures, targeting the small but visible actors rather than the big players of organised crime.”

4) There was consensus that the “war on drugs” is a major contributing factor to prison overcrowding, as also captured in the study of the Office of the High Commissioner on “the impact of the world drug problem on the enjoyment of human rights” (para. 45).

Moreover, the high number of cases prosecuted in the name of the “war on drugs” was observed to cause congestion of criminal justice systems overall, resulting in a number of violations of human rights, including the right to liberty and due process.

5) There was an overarching concern about the **disproportionality of sentences** for drug-related offences. The participating organisations strongly held that the Civil Society recommendations to the UNGASS should make explicit the call for proportionate sentences, which include the following elements:

Drug use and possession for personal use should be **decriminalised** in line with recommendations of various UN bodies.

For other drug-related offences, sentences need to be **proportionate**.

“In order for a criminal justice system to be fair and proportionate sentencing needs to be individualised, taking into account the type of drug, the amount as well as the role played in the drug trade as well as other mitigating or aggravating factors.”

Increased use should be made of **non-custodial measures and sanctions**, in particular for minor, non-violent offences, in line with the United Nations Standard Minimum Rules for Non-custodial Measures (The **Tokyo Rules**), and be gender-sensitive, in line with the UN Bangkok Rules. Some participants also raised concern about the use of drug dependency treatment as a precondition for access to non-custodial alternatives.

The safeguards of the **right to liberty and due process** need to be upheld for all offences, including drug-related offences. Mandatory pre-trial detention, the overuse of pre-trial detention for drug-related offences and mandatory minimum sentences contradict these principles.

The **death penalty** constitutes the ultimate inhuman and degrading treatment and punishment, as well as a grossly disproportionate sentence. Drug-related offences, as many UN bodies have emphasised, do not meet the threshold of “most serious offences” as enshrined in the International Covenant on Civil and Political Rights.

Defendants need to be given access to legal representation, and **legal aid** in line with Principle 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

6) The participating organisations share the concern about the disproportionate effect on **ethnic and other minorities**.

“Legislation is discriminatory in nature. The designation of drug users attaches a stigma that is against anti-discrimination laws.”

7) The participants also agreed that there is a need to “**balance the use of resources** spent on law enforcement as compared to other interventions”. It was pointed out that success in drug policies should not be measured based on the number of arrests or seizures, but requires different criteria for evaluation.

Discussion:

The participants reported the observation from their work that the punitive drug policies contributed significantly to the problem of overcrowding, ripe in many countries across the globe. They agreed that mandatory sentencing and disproportionately long sentences for drug-related offences are a major contributing factor for this phenomenon. It was also raised that in many countries, even without the imposition of mandatory pre-trial detention, remand prison is imposed on a systematic basis for drug-related offences, based on the automatic assumption of a risk of re-offending and/ or a flight risk rather than a case-to-case assessment as required under international law.

The participants noted that these concerns are captured in the study of the Office of the High Commissioner on “the impact of the world drug problem on the enjoyment of human rights” (4 September 2015, UN-Doc. A/HRC/30/65), which highlights that “mandatory sentencing and disproportionately long sentences for drug possession or use have often resulted in sentences longer than those for serious crimes such as murder, rape, kidnapping or bank robbery, and have contributed to overincarceration and prison overcrowding”. The report quotes, for example, the Working Group on Arbitrary Detention noting that “overincarceration for drug-related offences contributes significantly to prison overcrowding and that overcrowding can call into question compliance with article 10 of the International Covenant on Civil and Political Rights, which guarantees that everyone in detention shall be treated with humanity and respect for their dignity”.

The denial of treatment, including opiate substitution therapy, as a means to coerce confessions was highlighted in the light of the prohibition of torture and other ill-treatment. It was noted that the Special Rapporteur on Torture, Juan Mendez, has recognised such denial, resulting in painful withdrawal symptoms, as a violation of international law (report A/HRC/22/53). He noted that any statements taken in this context therefore need to be treated as evidence obtained under torture and excluded from use in criminal proceedings.

With regard to non-custodial measures and sanctions it was pointed out that in some countries, the lack of drug dependency treatment means that persons with drug dependencies do not have access to probation and to early conditional release.

With regard to the right to fair trial it was noted that reflective of the punitive trend the burden of proof has been reversed in some countries, de jure or de facto.

Access to legal aid was discussed briefly in the consultation as a requirement for due process, in line with the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Principle 3 of this international standard, specifically addressing “Legal aid for persons suspected of or charged with a criminal offence” calls on States to “ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process”. It also states that “Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty” and that it is “the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid”.

It was pointed out that opiod substation therapies should be evaluated independently in order to identify problems and assess their effectiveness.

III. Human rights

1) There was unequivocal consensus that the **death penalty** for drug-related offences must be abolished, as captured in the current CSTF paper. The participating organisations wish to emphasise this call as a basic human rights requirement in light of the ICCPR as well as the absolute prohibition of torture and other cruel, inhuman or degrading treatment and punishment.

In line with this requirement the participating organisations wish to add to the recommendations the call for commutation of death sentences already handed down.

“Death sentences for drug-related offences must be abolished, but also death sentences already handed down must be commuted.”

Furthermore, the participating NGOs recall that in line with the UN Principles and Guidelines on legal aid in criminal proceedings, legal aid must be provided in death-penalty applicable cases.

2) The participating NGOs wish to stress that the **proportionality of sentences** is a human rights issue.

3) Due attention should be paid to the complexity of the issue of "**children and drugs**", differentiating between measures to prevent children from using drugs, measures to care for children who do use drugs, and measures in the best interest of children whose parents use drugs.

“Is imprisonment of parents really in the best interest of the child, eg just because they use marihuana from time to time?”

Feed-back highlighted that adolescents are often the main targets of police raids linked to possession of drugs, and pointed to the high levels of police violence children and young people are exposed to in many countries due to the punitive approach of law enforcement (stop-and-search, excessive use of force).

Civil society organisations observed that these punitive trends have become an obstacle to the effective implementation of the UN Convention on the Rights of the Child, and have encouraged a hardening of the juvenile justice systems overall, while the promotion of non-custodial measures should prevail in particular for children. Mandatory pre-trial detention and mandatory minimum sentences prevent the consideration of the best interest of the child as required by the Convention, both if they themselves or a parent is investigated or prosecuted on a drug-related offence.

“The best interests of the child should be taken into account when prosecuting, remanding or sentencing parents or carers.”

NGOs pointed out that the responsibility for prevention, in many countries, lies with law enforcement agencies and forms part of repressive drug policies rather than being recognised as a specialised area placed under the responsibility of the education and health ministries.

Furthermore, civil society organisations voiced concern about the exclusion of children from harm reduction programmes in a number of countries.

“Children should not be excluded, but have access to harm reduction programmes.”

4) Participants raised concern about the disproportionate effect of the “war on drugs” on **women** as well as the lack of gender-sensitive drug dependency treatment programmes and discrimination in access to such programmes in prison.

“States need to address the gender disparities in the ‘war on drugs’ and ensure that women prisoners have access to drug dependency treatment and harm reduction programmes at an equal level as male prisoners and in a gender-sensitive way.”

5) Participants also raised concern about disproportionate responses such as imprisonment and aerial spraying and forced eradication campaigns, targeting **rural and marginalised communities**.

Discussion:

The participants raised concern about the way the Convention on the Rights of the Child is often referred to as a justification for the criminalisation approach, symbolic of a lack of recognition for the complexities in the protection of children from drugs.

The participants raised doubt about whether the current punitive approach in fact protected children from drug use or involvement in the drug trade, and pointed to the many different ways in which children can be effected (see OSF publication children and drugs).

It was pointed out that parental incarceration is harmful to the well-being of children, and in some circumstances leads to the direct violation of their rights. Sentencing should therefore take into account the rights and needs of children of those sentenced, and should include, for example, unpaid work requirements (community service) or allowing for drug treatment with child care provision. It was mentioned that lack of adequate access to drug dependency treatment for mothers has a negative impact on children, and that residential treatment programmes need to be made available that encompass adequate child care.

Participants voiced concern that children are often excluded from harm reduction programmes, or do not access them because of the criminalisation of such measures, and raised doubt that incarceration of parents who use drugs is in the “best interest of the child”.

NGOs also stressed that often children dependent on drugs are often held in institutions labelled as “social welfare homes” when effectively deprived of their liberty and of their right to informed consent of treatment. Civil society pointed out that the significant number of children and adolescents deprived of their liberty for drug-related offences exacerbates overcrowding of detention facilities.

With regard to women, participants noted the gender disparities in the “war on drugs”, illustrated by the fact that women are the fastest growing prison population. They also stressed that offending often involves a coercive element, and that networks of human trafficking and of drug trade overlap, with women entangled in sexual exploitation and victimisation.

IV. New challenges, threats and realities in addressing the world drug problem

Contributions to this consultation voiced concern that currently drug policies are measures in numerical terms, focusing on the number of arrests, convictions, and seizures, which has been a key factor in driving up the number of people incarcerated for drug-related offences, even where their role in the drug trade is marginal and where they represent the most vulnerable sectors of society.

“Other criteria than the number of arrests must be established for measuring the effectiveness of drug policies.”

Where countries or UN entities provide technical and/ or financial assistance relating to the implementation of the UN Drug Conventions in third countries such assistance should strictly adhere and be guided by human rights standards, and be used as an opportunity to improve procedural safeguards in criminal procedures.

Input to this submission was received from:

- 1) Daniel Joloy, Amnesty International
- 2) Diederik Lohman, Human Rights Watch

- 3) Luciana Pol, CELS (Argentina)
- 4) Paolo de Tarso Lugon Arantes, Humanas (Chile)
- 5) Graham de Barra, Help not Harm Ireland (Ireland)
- 6) Gabriel Elias, PBPD
- 7) Octavian Ichim, Universal Rights Group
- 8) Pien Metaal, The Transnational Institute
- 9) Maud Roure, Interpeace
- 10) Laurel Townhead, UN Quaker's Office
- 11) Ann Fordham, International Drug Policy Consortium
- 12) Andrea Huber, Penal Reform International
- 13) Hasmik Harutyunyan, Protection of Rights without Borders
- 14) Libby McVeigh, Fair Trials International
- 15) Anna Tomasi, Defence for Children International

Observers:

- 16) Mary Murphy, International Committee of the Red Cross
- 17) Daniel Cullen, Quaker's UN Office

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