

## Drugs, crime and punishment

### *Proportionality of sentencing for drug offences*

By Gloria Lai<sup>1</sup>

Proportionality is one of the key principles of the rule of law aiming to protect people from cruel or inhumane treatment. The principle has been established in international and regional human rights agreements and many countries have adopted reflections of it in their constitution or penal code. Its application to drug-related offences is firstly the responsibility of the legislators, in defining the level of penalisation of certain behaviours. The level of penalisation should be determined according to the severity of damage that a certain behaviour causes to others or to society. In the second instance, the courts and judges have to apply the principle of proportionality in defining the appropriate punishment for a particular case; and finally, proportionality also plays a role in the execution of this punishment. This briefing paper looks at specific criteria of proportionality developed in the context of drug control and describes a number of recent attempts to recalibrate the often grossly disproportionate nature of current drug laws and their enforcement around the world.

The core requirement of proportionality is that an individual's rights and freedoms may only be limited to the extent that it is appropriate and necessary for achieving a legitimate aim. Such standards further require that of the range of available options for restricting an individual's rights and freedoms in order to achieve a legitimate aim, the option that is least intrusive to fundamental rights should be adopted.<sup>2</sup> In the context of drug offences, a legitimate aim of punishment should correspond with the basic objective of the UN drug control conventions: to improve the health and welfare of mankind.<sup>3</sup> As a

#### RECOMMENDATIONS

- Governments should review their laws, sentencing guidelines and practices for drug offences to evaluate their compliance with existing standards of proportionality.
- A proportionality check should consider as an option that activities relating to certain acts or substances may be dealt with outside the realm of criminal law. For example, the possession, purchase or cultivation of drugs for personal use should not constitute offences.
- Proportionate sentencing frameworks should distinguish between the type of drugs and the scale of the illicit activity, as well as the role and motivation of the offender: serious or organised traffickers; micro-traffickers (low-level dealers or smugglers); people dependent on drugs; and people who use drugs occasionally (or 'recreationally').
- For drug-related offences committed due to drug dependency or to meet basic economic needs, services such as treatment, education, aftercare, rehabilitation or social integration should be offered as more humane, effective and proportionate alternatives to conviction.
- For micro-trafficking offences, reduced or provisional sentences, as well as alternatives to imprisonment, should be promoted. The socio-economic circumstances in which an offence was committed and the financial gains of the offender should be considered as important mitigating factors.
- Ensuring the consistent application of proportionate sentencing laws and guidelines should include addressing institutional biases against drug offenders, for example amongst judges.
- The death penalty for drug offences should be entirely abolished.

result, a proportionate sentence for a drug offence should be determined in accordance with the potential harm that a controlled substance may cause to the health and welfare of a community.

The principle of proportionality is understood in international law as an essential means for safeguarding fundamental human rights. Unfortunately, its application has often been limited to scaling the severity of punishment without questioning in principle the need to inflict a punishment at all – a problematic limitation, especially in the context of the contemporary drug policy debate where punishment is no longer assumed to be a necessary response for all drug-related activities. Applying the principle of proportionality to drug control should transcend any predisposition towards punishment *per se*. The trend towards decriminalisation of possession for personal use is a clear example that abstaining from punishment may well be the most appropriate outcome of a proportionality check of drug laws and sentencing practices for certain drug-related activities.<sup>4</sup>

## **PROPORTIONALITY IN DRUG CONTROL**

The International Narcotics Control Board (INCB) has emphasised to governments the need to meet standards of proportionality in their sentencing for drug offences in its 2007 Annual Report.<sup>5</sup> In 2010, the United Nations Office on Drugs and Crime (UNODC) also issued a statement calling on countries to ensure the adoption of proportionate penalties for drug offences. The UNODC further urged countries to abolish the death penalty for drug offences, as the International Covenant on Civil and Political Rights only permits imposition of the death sentence for the ‘most serious crimes.’<sup>6</sup> Also the UNODC’s human rights guidance note of 2012 refers repeatedly to the principle of proportionality, for example saying that:

Responses to drug law offences must be proportionate... For offences involving the possession, purchase or cultivation of illicit drugs for personal use, community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to

conviction and punishment, including detention.<sup>7</sup>

At the same time, proportionality is a critical consideration in many governmental reviews of drug laws and policies. In recent years, there has been greater discussion on the principle of proportionality in sentencing policies for drug offences. The governments of Argentina, Ecuador, Brazil, the United Kingdom (UK), South Africa and New Zealand all have initiated reviews of drug laws that consider proportionality as an important standard that sentencing frameworks should meet.<sup>8</sup> The European Union has also used proportionality arguments in its harmonisation efforts of sentencing levels for drug trafficking offences.

This paper seeks to outline an application of proportionality to sentencing for drug offences that is consistent with the international legal framework. It begins with a discussion on the international standards of proportionality, and the disproportionality in many countries’ sentencing practices on drug offences. For example, minor drug offences (such as low-level dealing or smuggling) are often punished with harsher penalties than for other offences that cause far more harm, such as murder and rape. The paper then considers the review of sentencing practices for drug offences carried out in the UK, Argentina, Brazil and the EU, before turning to the specific issue of sentencing for drug ‘mules’. It concludes with recommendations for the reform of policies and laws, to ensure that sentencing frameworks for drug offences meet the standards of proportionality demanded by international law.

It is important to note that many governments impose disproportionate penalties, including the death penalty,<sup>9</sup> in the belief that harsh punishment will deter individuals from engaging in drug-related activities. In the light of mounting evidence that harsh penalties do not effectively deter the use of drugs, and lack of evidence on the ability of harsh penalties to deter other drug-related offences, it has become more necessary for governments to revise disproportionate penalties.<sup>10</sup> This paper recommends that governments adopt a broad set of criteria, including the

offender's role, gains and motivation, in order to achieve adequate standards of proportionality in their sentencing frameworks for drug offences.

### **THE PRINCIPLE OF PROPORTIONALITY IN A HUMAN RIGHTS PERSPECTIVE**

The requirement for proportionality in sentencing is firmly grounded in international law and norms. Article 29(2) of the Universal Declaration of Human Rights (UDHR) provided a rationale for requiring proportionality in sentencing, when it stated that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The International Covenant on Civil and Political Rights (ICCPR) protects many rights relevant to sentencing for drug offences, notably the rights to life, liberty, security of the person, privacy, and freedom from torture. In interpreting the ICCPR, the Human Rights Committee has stated that where a State implements measures to restrict a right protected under the ICCPR, it 'must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.'<sup>11</sup> In addition, the Committee has explained that '[r]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.'<sup>12</sup> The Committee on Economic, Social and Cultural Rights adopts a similar interpretation for the right to health – a right that is highly relevant to the sentencing of drug dependent offenders – by stating that limitations to it 'must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitation are available.'<sup>13</sup>

The Charter of Fundamental Rights of the European Union provides in Article 49(3) that 'the severity of penalties must not be disproportionate to the criminal offence' thus rendering the principle of proportionality binding in domestic jurisdictions across Europe. The European Court of Human Rights (ECHR) requires that there must be a 'reasonable relationship of proportionality'<sup>14</sup> between the means employed to restrict fundamental rights and the aim sought to be achieved.<sup>15</sup> In particular, the ECHR has increasingly referred to the need for measures to be 'necessary in a democratic society', which includes the expectation that any encroachment upon fundamental rights must be justified by a 'pressing social need'.<sup>16</sup>

The Inter American Court of Human Rights (IACHR) also recognises proportionality as an entrenched principle. The Court has ruled, in the context of sentencing, that 'no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality'.<sup>17</sup>

In summary, proportionality is a valued principle under international law, and is understood to require that an individual's rights and freedoms are limited only to the extent that is strictly necessary and appropriate for achieving a legitimate aim. A legitimate aim is one which seeks to achieve the 'just requirements of morality, public order and the general welfare in a democratic society' and meets a 'pressing social need'. In addition, the principle of proportionality requires governments to ensure that measures adopted which restrict fundamental rights must be the least intrusive option available for achieving a legitimate aim.

### **APPLICATIONS OF THE PROPORTIONALITY PRINCIPLE**

While most countries of the world have signed up to international (and for some, regional) agreements recognising the principle of proportionality, they often do not incorporate the requirements of proportion-

ality in their sentencing framework of drug offences. For example, the European Court of Human Rights (ECHR) has condoned with scarce analysis the imposition of lengthy imprisonment sentences for minor drug offences such as personal possession.<sup>18</sup>

In addition, international ‘war on drugs’ type discourse has encouraged the adoption of severe penalties. The United Nations drug control conventions<sup>19</sup> are a key example, which contain language emphasising the gravity of the world drug problem, thereby leading to the justification of imposing disproportionately severe sanctions for drug-related offences. For example, the preamble to the 1961 Convention asserts that ‘addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind’.<sup>20</sup> The conventions also implicitly endorse severe measures, such as article 24 of the 1988 Convention: ‘A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic’.<sup>21</sup>

However the stated objectives of the UN drug conventions are to ensure the health and welfare of mankind, by restricting the non-medical use of controlled substances whilst ensuring their availability for medical purposes.<sup>22</sup> They do not contain any requirement whatsoever to criminalise drug use and contain explicit and considerable latitude to avoid punishment for offences relating to personal use, including possession, purchase and cultivation.<sup>23</sup> They also recognise the need to establish penalties that differ in accordance with assessments of the potential harm and therapeutic value of particular substances, and whether a trafficking offence is ‘serious’ or ‘minor’:

In appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.<sup>24</sup>

In practice, however, the politically driven development of the international drug con-

trol system over the past few decades has favoured excessively severe measures in response to the ‘serious evil’ of drugs, and largely neglected the treaty provisions that seek to promote proportionate and appropriate penalties.

In 2007, the INCB in its role of monitoring compliance with the UN drug conventions, sought to promote the concept of proportionality by explaining that ‘the conventions constitute the world’s agreed proportionate response to the global problems of illicit drug abuse and trafficking... The conventions set minimum standards only’.<sup>25</sup> However, by emphasising that the conventions only set minimum standards, the INCB risked implying to governments that they are free to impose penalties that are more severe than necessary. It missed an opportunity to warn governments against imposing disproportionately severe penalties, which violate international law. The INCB President Hamid Ghodse maintains that the Board’s mandate requires them to stay neutral with regard to the death penalty because the severity of sanctions is the ‘exclusive prerogative’ of States. When challenged whether this also applied to extrajudicial killings or torture, he confirmed that in fact there was ‘no atrocity large enough’ for the INCB to speak out against it.<sup>26</sup>

Other UN entities have sought to promote discussion on decriminalisation as an alternative response to drug-related activities. In 2010, the UN Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health published a report exploring the option of decriminalisation<sup>27</sup> and other UN bodies such as UNAIDS made explicit statements on the harmful impacts of criminalisation upon the realisation of fundamental human rights.<sup>28</sup>

Countries that have signed and ratified the UN drug conventions and international human rights instruments are legally bound to apply proportionality in sentencing drug offenders. Countries that are also members of regional bodies such as the EU are separately and doubly obliged to comply with proportionality standards under regional

agreements. Some countries have also enshrined proportionality as a constitutional principle, including Greece,<sup>29</sup> India,<sup>30</sup> the United Kingdom,<sup>31</sup> and Canada,<sup>32</sup> while in Finland, Germany and Sweden, proportionality is prescribed as a specific requirement for sentencing in their Penal Codes.

While many jurisdictions recognise the principle of proportionality in their sentencing laws and practices, it is questionable whether those always meet the standards of proportionality required by international law. For example, the gross disproportionality test adopted by US courts does not require a penalty to be intended to achieve a legitimate aim, and therefore seems to permit a wide range of penalties that do not necessarily seek to protect the health and welfare of communities.<sup>33</sup> As a result, it is imperative that governments review their sentencing frameworks in accordance with the universal standard of proportionality, and subsequently work to remove disproportionate penalties for drug offences.

## THE UK SENTENCING COUNCIL

In 2011, the United Kingdom conducted a review of its sentencing framework for drug offences. The review was initiated by the UK Sentencing Council, a body tasked with developing a sentencing framework for all criminal offences in England and Wales.<sup>34</sup> The review resulted in a new set of guidelines for sentencing drug offences, the *Sentencing Council: Drug Offences Definitive Guideline*<sup>35</sup> (the Guidelines) which came into force on 24 February 2012. The Guidelines require all courts to follow the prescribed sentencing practices in relation to several offences including importation and exportation of controlled drugs, and supply and possession offences. The Sentencing Council's aim was to provide a more consistent, transparent and proportionate approach to sentencing.

The principle for sentencing of all criminal offences in England and Wales is defined by section 143 of the Criminal Justice Act 2003 which states:

In considering the seriousness of any offence, the court must consider the offen-

der's **culpability** in committing the offence and any **harm** which the offence caused, was intended to cause or might foreseeably have caused.

The Guidelines advise the courts to evaluate culpability assessing an offender as having played one of three roles in an offence: leading, significant, or lesser role. Those categorised as having a leading role are involved in 'directing or organising buying and selling on a commercial scale' or have 'an expectation of financial gain', among other factors. Those in a lesser role include those who supply for social purposes or who have 'little or no influence on those above in the supply chain'.

In relation to evaluating the degree of harm, quantity thresholds are advised to distinguish between four types of production and trafficking offences. Category 1 is the most serious or 'harmful' offence, involving large amounts of drugs, for example, 5kg and more of cocaine or heroin; 200kg of cannabis or 10,000 ecstasy tablets. Category 4 is the lowest level trafficking offence, with thresholds of 100g of cannabis or 5g of heroin or cocaine. For production offences, the scale and purpose of the operation is also a factor in determining the category of the offence.<sup>36</sup> The final sentence will be decided following the consideration of additional issues including mitigating and aggravating factors, potential for plea reduction, and assistance given to the prosecutor.

The Sentencing Council's review was also especially concerned with the sentencing of 'drug mules'. At the time of the review, sentencing for the trafficking of drugs was based on the quantity and purity of the drugs involved, which resulted in many vulnerable couriers receiving sentences at the same level as more serious, organised traffickers.<sup>37</sup> To address this disproportionality, the Guidelines advised on a reduction in sentence from the previous starting point of ten years imprisonment to a starting point of six years for most drug mule cases.

In issuing the Guidelines, the Sentencing Council aimed to achieve more proportionate and consistent sentencing practices for drug offences in the UK. Nevertheless, disproport-

tionality in the UK framework still exists when comparing sentences for drug offences with sentences for other types of offences. The starting point of sentences for violent offences is generally much lower than sentences for non-violent drug offences such as importing 10,000 ecstasy tablets for commercial gain (where the Guidelines advise a starting point of 14 years). For example, a rape conviction is given a 5 year sentence as a starting point, and an offence causing grievous bodily harm is given a 3 year sentence as a starting point. Therefore by looking at the UK sentencing framework for all criminal offences, it is apparent that proportionality for the sentencing of drug offences remains inadequate.

## ARGENTINA

In 2009 the Supreme Court of Argentina, partly in response to concerns about the extreme overcrowding and poor conditions in the country's prisons, reviewed the national regime of drug sanctions and ruled that the repression of possession for personal use was unconstitutional.<sup>38</sup> This ruling was informed by the principles of privacy and autonomy, and the rights to health and human dignity. The Supreme Court's ruling applies only to possession for personal use, and not trafficking offences. Argentinian drug-trafficking laws<sup>39</sup> do not distinguish between trafficking activity in small amounts of drugs (micro-trafficking) as opposed to large scale trafficking or involvement in organised crime. There is a four to fifteen year custodial penalty for all trafficking offences that can be raised to 20 years in cases of 'aggravated trafficking'. A sentencing regime that does not distinguish between micro-trafficking and more serious types of trafficking offences can enable judges to disproportionately punish offending behaviour.

Distinguishing between micro-trafficking and more serious trafficking offences in sentencing helps to address the socio-economic circumstances of an offender. For example, a trafficking offence may be committed by individuals playing a wide range of roles: a member of a family business that supplies its neighbourhood out of financial necessity, a

user-dealer, a drug 'mule' from a socially and economically depressed area, or a member of a sophisticated, organised crime group engaged in large-scale trafficking. In practice, high-level traffickers are seldom brought to justice – due partly to systemic corruption amongst police and officials. The majority of offences brought before the courts are 'possession for sale' offences, which are given an average sentence of 4 years and 7 months of imprisonment. It is concerning that vulnerable groups including minorities, women, and those from poorer socio-economic backgrounds are disproportionately imprisoned for drug offences. For example, 33.5% of all female inmates are imprisoned for drug offences. The disproportionate imprisonment of members of vulnerable groups exacerbates their depressed socio-economic circumstance and reduces the likelihood of their recovery out of those negative circumstances. In addition, Argentina continues to be criticised by the Inter-American Commission on Human Rights for its poor prison conditions that adversely affect the dignity and physical integrity of inmates.<sup>40</sup>

The Argentinian Government established an advisory committee of legal experts to review all aspects of its drug laws, including proposals to introduce a greater degree of proportionality into its sentencing practices for drug offences by distinguishing between levels of trafficking. In June 2012, draft legislation was introduced in Parliament, based on findings of the committee, that proposes to decriminalise possession for personal use in accordance with the Supreme Court ruling, and lowering the minimum penalty range for drug smuggling. The justification provided for the legislative proposal is that:

persons employed by criminal organizations to carry small quantities of drugs across borders are usually women from extremely vulnerable social backgrounds who find themselves forced to do this activity, often putting their health at serious risk, in exchange for ridiculously low payments. ... By setting a minimum of 4 years, which prevents the imposition of a suspended sentence, the system loses the flexibility to scale the penalty in relation to the

degree of culpability of each person and this framework suggests the appropriateness of bringing it down to 3 years to avoid overburdening and overcrowding and the imposition of sanctions that may be grossly unfair for certain cases.<sup>41</sup>

## **BRAZIL**

In 2006, Brazil passed a new drugs law<sup>42</sup> which decriminalised personal use and possession but imposed severe sentences for trafficking offences. The new law was an improved response to cases of shared personal consumption and social (or 'low-level') dealing which, under the previous law, were equated with trafficking and met with the same degree of punishment. Nevertheless the new law retains a disproportionate approach to sentencing for trafficking offences. For example, the law increased the minimum prison sentence for trafficking offences from 3 to 5 years, leading to a marked increase in the prison population since 2006.

While the new law provides for up to a two third reduction in sentence for first-time offenders who are not involved in on-going criminal activity or an organised crime group, such reductions are rarely applied in practice. A mixture of corruption, social bias, and prejudice amongst the judiciary has ensured the continuation of disproportionate sentencing practices for many offences. Such sentencing practices have resulted in a prison population where 90% (of whom approximately 20% – and increasingly more – are detained for drug offences) come from lower socio-economic backgrounds.

The challenge for Brazil is to address the judiciary's systematic neglect of the mitigating factors that should be considered in sentencing decisions. Although the legal framework on sentencing allows judges a degree of discretion, this discretion is exercised in favour of severity rather than proportionality. A reason for the bias towards greater severity can be attributed to the UN drug conventions – outlining several aggravating factors but no mitigating factors – which greatly influenced the drafting of the Brazilian sentencing framework.

A proportionate approach to sentencing should include the consideration of mitigating factors to address social inequalities and the vulnerability of marginalised socio-economic groups. For example, in addition to the mitigating factors of first-time offences and non-involvement in organised crime, being primarily motivated by reasons of subsistence and a comparatively low financial compensation for the role played should also be mitigating factors.

In September 2010, the Supreme Court of Brazil ruled that a law denying small time traffickers alternative penalties to prison was unconstitutional.<sup>43</sup> In its judgment the Supreme Court said that sentencing decisions should include case-by-case consideration of whether drug treatment or other interventions are more appropriate than prison. The judgment augurs a more proportionate approach to sentencing and reduced strain on the penal system, but it remains to be seen whether state level courts will follow the approach of the Supreme Court.

## **EU FRAMEWORK DECISION**

In 2004, the European Council issued a framework decision on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking ('the Framework Decision'). One of its key objectives was to forge a common approach to sentencing across the European Union by establishing minimum rules on penalties for trafficking offences. The Framework Decision states that:

Each member shall take the measures necessary to ensure that the offences defined in Articles 2 and 3 [*drug trafficking offences*] are punishable by effective, proportionate and dissuasive criminal penalties.... of a maximum of at least between one and three years of imprisonment.<sup>44</sup>

The Framework Decision distinguishes only between crimes linked to trafficking, including production, manufacture, sale and cultivation,<sup>45</sup> and not between the roles played by a defendant in an offence. However distinctions are made on other grounds. A maximum of 1 to 3 years' imprisonment is required for all trafficking offences<sup>46</sup> but penal-

ties may be reduced where a person has either ‘renounced criminal activity relating to trafficking in drugs’ or provided assistance to the authorities, such as giving information to aid investigations or prevent further offences.<sup>47</sup> On the other hand, a maximum of 5 to 10 years’ imprisonment is required where an offence involves ‘large quantities of drugs’ or ‘those drugs which cause the most harm to health, or has resulted in significant damage to the health of a number of persons’.<sup>48</sup> Such factors in determining more severe sentences are indicative of harm rather than culpability. Many jurisdictions in the EU adopt similar indicators to gauge the seriousness of an offence, for example causing injury or death,<sup>49</sup> and the quantity<sup>50</sup> or street value of drugs seized (Ireland).

It is important to distinguish between both the type of drug involved and the defendant’s role in making sentencing decisions, in addition to the harm caused by the offence. Although it can be difficult to accurately assess an offender’s role, as the roles of different players are often unclear, distinctions have been made along the following lines in the EU:

**Involvement in organised crime** – the Framework Decision stipulates that a maximum of at least 10 years’ imprisonment should be imposed for offences committed as part of a criminal organisation.<sup>51</sup> Some countries make further distinctions, such as between a member, leader or provider of finance.<sup>52</sup>

**User-dealer** – several EU countries adopt the role of user-dealer in their sentencing regimes, either in statute (Belgium, Greece, Hungary, Austria) or judicial practice (Cyprus, Poland, Slovenia, Slovak Republic). User-dealers are sometimes given reduced sentences or alternatives to imprisonment, such as drug dependence treatment, community services, probation or suspended sentences. However in some jurisdictions, there is a lack of awareness, willingness or capacity amongst lawyers and judges to implement proportionate sentences for user-dealers.

**Social supply** – many countries recognise social supply (in contrast to commercial

supply) as a less serious offence and reflecting a subordinate role in trafficking, therefore warranting lighter sentences.

The European Commission concluded in a report on the implementation of the Framework Decision that: ‘offences relating to drug trafficking within the framework of a criminal organisation are subject to much higher sentences than those established in the Framework Decision, and we can conclude that the penalty scales are respected’.<sup>53</sup> An impact assessment and review procedure of the Framework Decision is currently underway.

## DRUG MULES

Since the 1990s, efforts have been made by institutions such as the Airports Group of the Council of Europe’s Pompidou Group, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and the UK Sentencing Council, to develop proportionate sentencing rules for drug mules or couriers. Portugal provides a positive example of how to develop a distinction between mules and traffickers (see text box).

A drug mule is defined in various ways in different jurisdictions. A recent study in Quito, Ecuador, proposed defining a mule as ‘a person who carries drugs paid for by someone else across international borders. The person may or may not be paid... the quantity of drugs to be carried is always decided by the person who pays’.<sup>54</sup> Further subdivisions were made according to whether the ‘mule’ was experienced, and whether drugs were carried internally, strapped to their bodies or clothes, or in their luggage – the latter are likely to have the least knowledge about what they were carrying.<sup>55</sup> ‘Mules’ should be distinguished from ‘professional traffickers’ who ‘carried drugs that they had paid for’ and ‘were willing to risk going to prison, they preferred to carry small amounts that they thought would result in a lower sentence’.<sup>56</sup> In the context of the study’s conclusions, it does not appear useful to cross-reference the role against the quantity in sentencing ‘mule’ offences because the large quantities ‘mules’ are compelled to carry by others, without any control over the type of



drug they carry, still reflects a low level of culpability.<sup>57</sup>

The EMCDDA recently released the findings of a study on the European context, which proposes a definition of ‘drug mule’ reflecting similar considerations to the Ecuador study: ‘A drug courier who is paid, coerced or tricked into transporting drugs across an international border but who has no further commercial interest in the drugs.’<sup>58</sup> The report of the EMCDDA study recognises two types of drug couriers: self-employed or mule. Self-employed couriers will organise the import and sale of drugs by themselves, thereby earning higher profits, whereas the mule merely transports the drugs in exchange for a fee.<sup>59</sup> It therefore appears that the key factor in determining whether a courier is a mule is the extent to which the courier organises and profits from the drugs import.

The circumstances underlying many drug mule offences, such as being a foreigner, lacking knowledge about the consequences of carrying drugs and exploitation by a family member, friend or acquaintance, should be incorporated as mitigating factors during sentencing.<sup>60</sup> For example, in Brazil a statutory mitigating factor is invariably applied by the Federal Courts to foreign drug ‘mules’ because it is presumed that they are not connected to organised crime in a leading role. As a result, foreign national drug couriers usually face a sentence of 1 year 8 months compared to local couriers often dealing in lower quantities who typically receive a minimum 5 years’ imprisonment sentence. Another recommended mitigating factor is whether the offender is a member of a vulnerable group, particularly women who are primary caregivers and need to avoid imprisonment in order to continue caring for their children.

A proportionate approach towards sentencing drug mule offences can be achieved by recognising their low-level role and culpability in the drugs market, and by ensuring that sentencing frameworks are devised systemically. That is, sentencing frameworks can only be effective when combined with targeted law enforcement and awareness-

## **PORTUGAL: REDUCED SENTENCES FOR DRUG MULES**

In the late 1990s, a study was undertaken on traffickers, who comprised approximately 12% of the prison population. Researchers quickly found that the majority could more accurately be defined as a ‘courier’ rather than ‘trafficker’ or ‘consumer’. Their research revealed that the culpability of couriers in trafficking offences is low, because they introduce only ‘tiny’ amounts of drugs into destination markets. In addition, their research showed that imposing heavy sentences on ‘mules’ has little deterrent impact as criminal organisations can easily replace them and bear the economic costs.

Moreover, imposing heavy sentences does not address the desperate poverty and lack of socio-economic opportunities which motivate people to become ‘mules’. The new understanding about drug mules took a few years to take hold within the legal community, and subsequently the recognition that the sentencing framework for drug couriers imposed excessive punishment. Accordingly, Portugal has reduced sentences from an average of 8 years imprisonment in the 1980s to 5 years by the late 1990s, and now suspended sentences for drug mules are a likely outcome. The case of Portugal illustrates the importance of gaining a better understanding about offender profiles in order to achieve improved proportionality in sentencing.

raising programmes and not undermined by the operation of other factors, such as reductions in sentence for a guilty plea or limited access to quality legal representation.

## **CONCLUSIONS**

To ensure adherence with the principle of proportionality, governments should adopt penalties for drug offences that are the least intrusive option available and which are appropriate and necessary for meeting a legitimate aim. Where international standards of proportionality are applied to the sentencing of drug offences, this should lead to abstaining from any form of punishment in certain

cases, and from the imposition of lengthy imprisonment sentences without due regard for the different roles and type of drugs involved in an offence, particularly ‘drug mule’ offences. To gauge the seriousness of a trafficking offence and subsequently decide upon a proportionate sentence, the offender’s role, gains, motivation and the type and quantity of drug involved should be considered.

Disproportionate sentencing frameworks compound negative socio-economic conditions and increase the vulnerability of marginalised groups, hence fail to tackle the motivations that drive many to commit drug trafficking offences. National drug control strategies should not only decriminalise possession for personal use (and provide integral assistance plans for problematic drug users) and recognise different types of trafficking, but also seek to alleviate the socio-economic circumstances of those who commit trafficking offences. Besides being disproportionate and ineffective, the increasing severity of sentencing for drug offences over these past few decades is a major contributing factor to the overcrowding of prisons and the overburdening of criminal justice systems around the world. A range of mitigating factors, including the offender’s motivation and socio-economic circumstances, should be given much more consideration during sentencing.

In spite of its political constraints and disappointing end results, the UK Sentencing Council’s review represents a commendable policy process aiming to introduce greater proportionality into sentencing frameworks for drug offences. These processes should include consideration of sentencing frameworks as part of a broader drug control policy and involve extensive consultation of experts, community groups and civil society in order to produce recommendations that can be successfully operationalised.

## NOTES

1. Gloria Lai is a Senior Policy Officer, International Drug Policy Consortium. This paper is based on the discussions and conclusions made at the TNI-IDPC Expert Seminar on Proportionality of sentencing for drug offences, which took place in London, UK, in May 2011. The report of the seminar is available at:

<http://idpc.net/publications/2011/10/tni-idpc-seminar-proportionality>. The author wishes to thank Ann Fordham (IDPC), Ernestien Jensema (TNI), Marie Nougier (IDPC), Martin Jelsma (TNI), Mike Trace (IDPC), Niamh Eastwood (Release) and Pien Metaal (TNI) for their valuable contribution in drafting this policy brief.

2. United Nations Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); Charter of Fundamental Rights of the European Union (2000). See also United Nations Office on Drugs and Crime (2007), *Handbook of basic principles and promising practices on alternatives to imprisonment* (Vienna: UNODC), [http://www.unodc.org/pdf/criminal\\_justice/07-80478\\_ebook.pdf](http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf)

3. See the Preambles to the 1961 UN Single Convention on Narcotic Drugs, the 1971 UN Convention on Psychotropic Drugs, and the 1988 UN Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances

4. For further information, see <http://druglawreform.info/en/issues/decriminalization>

5. International Narcotics Control Board (2008), *Annual Report 2007*, Chapter 1 (Vienna: INCB), <http://www.incb.org/incb/annual-report-2007.html>

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