

**Report to OHCHR on “human rights in the administration of justice”,  
pursuant to Resolution 42/11**

11 January 2021



**Harm Reduction International (HRI)** is a leading NGO dedicated to reducing the negative health, social and legal impacts of drug use and drug policy. We promote the rights of people who use drugs and their communities through research and advocacy to help achieve a world where drug policies and laws contribute to healthier, safer societies.



The **International Drug Policy Consortium (IDPC Consortium)** is a global network of non-government organisations that aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

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## Introduction

Harm Reduction International (HRI) and the International Drug Policy Consortium (IDPC) welcome the opportunity to submit information to the Office of the UN High Commissioner for Human Rights for the preparation of its report under Human Rights Council Resolution 42/11 on human rights in the administration of justice. This submission addresses some of the current and emerging challenges specifically faced by people detained for drug offences and people in detention who use drugs.

## Background

Of the 11 million people currently behind bars worldwide, close to half a million people are incarcerated for mere drug possession, with an additional 1.7 million incarcerated for other non-violent drug offences.<sup>1</sup> That means that about 21% - or over one in every five prisoners worldwide - are being held on a drug charge. Punitive drug laws have fuelled mass incarceration and have impacted marginalised communities disproportionately, often on the basis of race, ethnicity, and/or poverty.<sup>2</sup>

The criminalisation of drug use and possession and the adoption of disproportionate criminal penalties for all drug offences have resulted in the over-representation of people who use drugs in detention settings. According to global figures, people who use drugs make up about one-third to one half of the world's prison population,<sup>3</sup> and an estimated 56-90% of people who inject drugs will be incarcerated at some stage.<sup>4</sup> People in detention report higher lifetime rates of drug use, including injecting drug use, than the broader community, along with more harmful patterns of use, such as sharing injecting equipment. One in three people in detention is estimated to have used drugs at least once while in prison.<sup>5</sup>

For these and other reasons, including overcrowding, poor sanitation and inadequate health care, prisons represent high risk environments for the transmission of HIV and hepatitis C. Prevalence of these infections in prison populations is substantially higher than in the non-prison population. An estimated 3.8% of prisoners are living with HIV and 15.1% with hepatitis C.<sup>6</sup>

This makes prisons important settings for the provision of evidence-based harm reduction services, including needle and syringe programmes (NSPs) and opioid agonist therapy (OAT)<sup>7</sup>, which have been proven to prevent the spread of HIV and hepatitis C. Sadly, only ten countries currently provide NSPs

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<sup>1</sup> UN system coordination Task Team on the Implementation of the UN System Common Position on drug-related matters (March 2019). *What we have learned over the last ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters*. Available at [https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN\\_Entities/What\\_we\\_have\\_learned\\_over\\_the\\_last\\_ten\\_years\\_-\\_14\\_March\\_2019\\_-\\_w\\_signature.pdf](https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN_Entities/What_we_have_learned_over_the_last_ten_years_-_14_March_2019_-_w_signature.pdf)

<sup>2</sup> See, amongst others: Drug Policy Alliance (2015). *The Drug War, Mass Incarceration, and Race*, [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf); StopWatch, Release & London School of Economics. *The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales*, <https://www.release.org.uk/publications/ColourOfInjustice>

<sup>3</sup> Dolan K. et al. (2015). 'People who inject drugs in prison: HIV prevalence, transmission and prevention'. *International Journal of Drug Policy*. Vol 26:S12-S15.

<sup>4</sup> UNAIDS (2014). "The GAP report". Available at [https://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS\\_Gap\\_report\\_en.pdf](https://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf)

<sup>5</sup> UNODC (2019). *World Drug Report 2019: Executive Summary*, p. 21. Available at: [https://wdr.unodc.org/wdr2019/prelaunch/WDR19\\_Booklet\\_1\\_EXECUTIVE\\_SUMMARY.pdf](https://wdr.unodc.org/wdr2019/prelaunch/WDR19_Booklet_1_EXECUTIVE_SUMMARY.pdf)

<sup>6</sup> Dolan, K. et al. (2016). "Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees", *The Lancet Series: HIV and related infections in prisoners*.

<sup>7</sup> OAT (also referred to as OST, OTP or MMT) is the prescription of an opioid agonist substance with similar pharmacological action to the drug of dependence. It presents a lower degree of risk than opioids purchased on the street because it is a medical grade substance which comes with details of its active compounds. Examples of OAT include methadone and buprenorphine, which are on the WHO's list of essential medicines, and are two of the most widely used, evidence-based treatment for opioid dependence around the world.

in at least one prison, while 59 countries provide OAT in at least one prison. Coverage of and access to these essential services remain inadequate where they are available.<sup>8</sup>

### **The right to health of people in detention who use drugs**

People deprived of their liberty retain their human rights, including their right to the highest attainable standard of health. Fulfilling the right to health includes ensuring access to preventive health services and harm reduction services, such as OAT and NSPs, for all who require it, including in prison settings. Notably, the right to health of people in detention engages other human rights, including the rights to life and to be free from torture and ill treatment. The denial of harm reduction services has been found to contribute to or even constitute conditions that amount to ill treatment.<sup>9</sup>

According to widely accepted international standards on the treatment of people deprived of liberty, states have an obligation to provide a standard of care that is at least equivalent to that available in the broader community, commonly known as the “principle of equivalence”. It is now widely accepted that providing harm reduction services and evidence-based treatment for drug dependence, HIV and hepatitis C to the general public but not to people deprived of their liberty is a flagrant violation of international human rights law.<sup>10</sup> Some experts, however, have rightly questioned whether the aim should not be equivalence of care, but rather equivalence of objectives and results, which would require a higher standard of care for prisoners.<sup>11</sup> This idea is particularly relevant in the current climate, which has served to accentuate the unique risks that people in prisons and other detention settings face.

### **Women in detention who use drugs**

Women are disproportionately sentenced for drug-related offences and are particularly vulnerable to negative health and social outcomes once incarcerated.<sup>12</sup> Because women only make up an estimated 6% of the global prison population,<sup>13</sup> their needs are commonly marginalised and deprioritized. According to studies in high-income countries, women deprived of their liberty are also more likely than their male counterparts to have experienced problem drug use in the year before incarceration.<sup>14</sup>

Both inside and outside of prisons, harm reduction services for women are frequently inadequate. Evidence from around the world demonstrates that women who use drugs are subjected to far greater stigma and discrimination than their male peers because of gender stereotypes.<sup>15</sup> This impacts their willingness and ability to access harm reduction and other health care services. The intersection of being a woman, a person who uses drugs and being incarcerated makes the stigmatisation even more acute. The criminalisation of people who use drugs also has a particularly severe impact on women. Women who use drugs consistently report facing harassment, physical and sexual violence, and

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<sup>8</sup> Harm Reduction International. (2020). *The Global State of Harm Reduction 2020*. London: Harm Reduction International.

<sup>9</sup> See Sander, G. (February 2016). *HIV, HCV, and TB in Prisons: Human Rights, Minimum Standards and Monitoring at the European and International Levels*: London: Harm Reduction International.

<sup>10</sup> See, for example, Report of the Special Rapporteur on the right to the highest attainable standard of physical and mental health, Anand Grover, General Assembly (6 August 2010) UN Doc. A/65/255, para. 60.

<sup>11</sup> Lines, R. (December 2006). *From equivalence of standards to equivalence of objectives: The entitlements of prisoners to health care standards higher than those outside prisons*, in *International Journal of Prisoner Health*; 2(4): 269-280.

<sup>12</sup> Harm Reduction International (November 2020). *Global State of Harm Reduction 2020*. London: Harm Reduction International. Available at: <https://www.hri.global/global-state-of-harm-reduction-2020>

<sup>13</sup> Walmsley, R. (2018). *World Female Imprisonment List*. London: World Prison Brief.

<sup>14</sup> UNODC (2019). *World Drug Report 2019: Executive Summary*, p. 21. Available at: [https://wdr.unodc.org/wdr2019/prelaunch/WDR19\\_Booklet\\_1\\_EXECUTIVE\\_SUMMARY.pdf](https://wdr.unodc.org/wdr2019/prelaunch/WDR19_Booklet_1_EXECUTIVE_SUMMARY.pdf)

<sup>15</sup> Harm Reduction International, South African Network of People Who Use Drugs and Environments of Shelter for Women Who Use Drugs Surviving Violences (Metzineres). (2020). *Harm Reduction for Women in Prison*. Available at: [https://www.hri.global/files/2020/06/10/Harm\\_Reduction\\_for\\_Women\\_in\\_Prison\\_2.pdf](https://www.hri.global/files/2020/06/10/Harm_Reduction_for_Women_in_Prison_2.pdf)

invasive searches from law enforcement officers. The highly controlled environment inside prisons can exacerbate this.<sup>16</sup>

In both South Africa and Spain, for example, women have reported being humiliated, dehumanized and subjected to excessive punishments in prison because of their drug use.<sup>17</sup> Invasive searches are one means by which women are subjected to dehumanizing and humiliating treatment. This has the effect of pushing them away from formal health and harm reduction services, where they are available, which increase the harms of drug use and exacerbate the distrust between people who use drugs and prison authorities.

In South Africa, women who use drugs who are incarcerated and access OAT have also reported serious problems around punishment and expulsion from these programmes. In one case, incorrect dosages had been given out, which resulted in prisoners trading the medication amongst each other. One woman described being thrown off the OAT programme for three weeks after being caught taking someone else's dose in addition to her own. She explained that her withdrawal symptoms made her want to die.<sup>18</sup> Punitively withholding OAT is inhumane and degrading punishment, and the European Court of Human Rights has ruled that withholding this essential medicine in places of detention can constitute torture.<sup>19</sup>

In terms of best practices, interviews with incarcerated women who use drugs in both South Africa and Spain have revealed that women would be much more likely to access a service in prison if it was delivered with compassion, humanity, and personal connection.<sup>20</sup> They commonly referred to their experiences of *Metzineres* (community-based harm reduction services) outside of prison that are holistic and do not medicalise or pathologise their experiences.<sup>21</sup>

### **Measures taken to address the right to health: the provision of harm reduction services in place of detention**

*[OHCHR question: What measures have member States taken during the COVID-19 pandemic to ensure the right to health of persons deprived of their liberty? Please identify challenges faced in providing basic health and hygiene needs for persons deprived of their liberty. Please also indicate any impacts that the pandemic has had on the mental health of persons deprived of their liberty.]*

Like in the broader community, the redeployment of resources and staff to support COVID-related health services has disrupted other critical health services, including harm reduction services, in place of detention. As highlighted by numerous public health and human rights bodies and experts, states have an obligation to continue to provide essential health services to people deprived of their liberty, including harm reduction measures, during the pandemic.<sup>22</sup> Yet civil society reports reveal that some

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<sup>16</sup> Harm Reduction International, South African Network of People Who Use Drugs and Environments of Shelter for Women Who Use Drugs Surviving Violences (Metzineres). (2020). *Harm Reduction for Women in Prison*. Available at: [https://www.hri.global/files/2020/06/10/Harm\\_Reduction\\_for\\_Women\\_in\\_Prison\\_2.pdf](https://www.hri.global/files/2020/06/10/Harm_Reduction_for_Women_in_Prison_2.pdf)

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> European Court of Human Rights (2016). *Domestic Authorities Failed to Thoroughly Examine Which Therapy was Appropriate for Long-term Drug Addict in Detention*. Strasbourg: European Court of Human Rights.

<sup>20</sup> Harm Reduction International, South African Network of People Who Use Drugs and Environments of Shelter for Women Who Use Drugs Surviving Violences (Metzineres). (2020) *Harm Reduction for Women in Prison*. Available at: [https://www.hri.global/files/2020/06/10/Harm\\_Reduction\\_for\\_Women\\_in\\_Prison\\_2.pdf](https://www.hri.global/files/2020/06/10/Harm_Reduction_for_Women_in_Prison_2.pdf)

<sup>21</sup> Ibid.

<sup>22</sup> Puras, D. (16 April 2020). *Statement by the UN expert on the right to health on the protection of people who use drugs during the COVID-19 pandemic*. Available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25797&LangID=E>

prisons currently do not even have doctors, while lack of funding threatens the continued availability of medicines in others.<sup>23</sup>

The little information currently available on the provision of harm reduction in prisons during COVID-19 reveals no real trends; the situation simply varies from country to country. In some countries, services appear to have continued despite other COVID-19 related restrictions being imposed. In Georgia and Estonia, for example, civil society reports that OAT has continued to be provided to prisoners on a regular basis without any problems documented.<sup>24</sup> Similarly, in Bosnia and Herzegovina, OAT reportedly continues to be available, but the use of masks and disinfectants have become a requirement to use this service.<sup>25</sup> In Kenya, the first OAT programme within a prison setting was opened in Mombasa during the pandemic, in June 2020.<sup>26</sup>

In other countries, services have either been abused by authorities, interrupted or suspended. In Moldova, a country heralded as one of the best in the world in terms of harm reduction provision in prisons, the provision of OAT has reportedly been suspended in two prisons because authorities have distributed the medication among themselves, and interruptions in the availability of antiretrovirals have also been reported.<sup>27</sup> In Lithuania, guards are reportedly threatening to revoke prisoners' access to methadone as a means to assert control and suppress conflicts arising during the lockdown.<sup>28</sup> Civil society also report that the provision of OAT was suspended in prisons in Kyrgyzstan.<sup>29</sup> In Canada, restrictions were imposed on almost all programming in prisons in March 2020. Yet according to the Correctional Service of Canada, the "Prison Needle Exchange Program" (PNEP) continued in the prisons where it was already being provided, while its promised rollout has remained suspended since March.<sup>30</sup> Even before the lockdown, many - if not most - people in prison who inject drugs were not accessing the programme because of its inherently flawed nature, which includes approvals by health and security staff, as well as the institutional warden, before individuals can participate.<sup>31</sup> While it has been difficult to gather reliable data on PNEP uptake since March due to strict limitations on prison visits, civil society maintains it is safe to assume that numbers remain very low due to significant restrictions on programming that occurred at the onset of the pandemic, on top of the confidentiality concerns and other barriers to access which have yet to be addressed.<sup>32</sup>

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<sup>23</sup> Eurasian Harm Reduction Association (May 2020). *Harm reduction programmes during the COVID-19 crisis in Central and Eastern Europe and Central Asia*. Available at: [https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL\\_ENG\\_1.pdf](https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL_ENG_1.pdf)

<sup>24</sup> Drug Reporter (2020). *Harm Reduction Responses to COVID-10 in Europe: Regularly Updated Infopage*. Available at: <https://drogriporter.hu/en/how-harm-reducers-cope-with-the-corona-pandemic-in-europe/>

<sup>25</sup> Eurasian Harm Reduction Association (May 2020). *Harm reduction programmes during the COVID-19 crisis in Central and Eastern Europe and Central Asia*. Available at: [https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL\\_ENG\\_1.pdf](https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL_ENG_1.pdf)

<sup>26</sup> Suhartono, S. (June 2020). 'Drug use and COVID19 in prisons: First Clinic Dedicated to the Treatment of People Living in Prisons with Opioid Use Disorders in Kenya', *ISSUP*. Available at: <https://www.issup.net/knowledge-share/news/2020-06/drug-use-and-covid-19-prisons-first-clinic-dedicated-treatment-people>

<sup>27</sup> Ibid.

<sup>28</sup> Drug Reporter (2020). *Harm Reduction Responses to COVID-10 in Europe: Regularly Updated Infopage*. Available at: <https://drogriporter.hu/en/how-harm-reducers-cope-with-the-corona-pandemic-in-europe/>

<sup>29</sup> Eurasian Harm Reduction Association (May 2020). *Harm reduction programmes during the COVID-19 crisis in Central and Eastern Europe and Central Asia*. Available at: [https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL\\_ENG\\_1.pdf](https://harmreductioneurasia.org/wp-content/uploads/2020/06/regional-review-FINAL_ENG_1.pdf)

<sup>30</sup> Graveland Bill (22 March 2020). *Guard union says prison needle exchange suspension on hold because of COVID-19*, in *Global News*. Available at: <https://globalnews.ca/news/6716549/coronavirus-prison-needle-exchange-expansion/>

<sup>31</sup> Statement by 70 organisations Canada-wide. (August 2019), *Correctional Service of Canada Must Fix Fundamental Flaws with Prison Needle Exchange Program*. Available at: <http://www.aidslaw.ca/site/wp-content/uploads/2019/08/PNSP-2019-Organizations-Statement-2.pdf>

<sup>32</sup> Ka Hon Chu, S. (22-23 September 2020). *Personal communication, on file with staff at HRI*.

In some other regions, harm reduction services appear to have been adapted to safeguard the health of people who use drugs in prison. In Scotland, for example, where approximately 25% of the people in prisons receive a daily dose of OAT (methadone), a decision was taken early on to switch to the use of depot buprenorphine (Buvidal) for all people currently on methadone in prison serving sentences of six months or longer.<sup>33</sup> Available as a 7-day or 28-day injection, depot buprenorphine helps to ensure continuity of OAT while the COVID-19 restrictions are in place and minimises contact with frontline healthcare staff. Ministers and the Scottish Government's Health Finance Planning and Assurance Group agreed on emergency funding of up to £1.9 million for Health Boards to cover the cost of transferring methadone administration to Buvidal in prisons for an initial four month period (May-August 2020), and a step-by-step approach was put in place to ensure a careful transition for those who require it.<sup>34</sup> Similarly, in the Australian state of New South Wales, a suspension of prison visits resulted in a reduction of illicit drugs available in the prison, which led to an increase in demand for OAT among prisoners. While some people were already receiving depot buprenorphine (CAM2038) before the lockdown following a successful trial in late 2019, everyone else receiving a different form of OAT during lockdown was transferred onto depot buprenorphine to reduce the resources needed for OAT delivery and increase the availability of staff for other clinical activities.<sup>35</sup> Although these approaches are commendable in many ways, the exclusion of people serving shorter sentences or not currently on OAT but who might now wish to be appears arbitrary and is more than likely a violation of their human rights.

### **Measures taken to address conditions of detention: prison decongestion schemes**

*[Question: What measures have member States taken during the COVID-19 pandemic to address conditions in detention facilities? Please provide information on challenges faced in liberating individuals recommended for release by OHCHR.]*

People deprived of their liberty have faced significant changes to their conditions of detention, as well as to the limited services that are generally available to them, during the pandemic. For many, prison lockdowns have meant even more extreme restrictions on their lives, leading to conditions in several countries falling far below a humane standard. These measures have had a devastating impact on the mental and physical health of people in prison. They have also led to rising tensions<sup>36</sup> and an increase in prison riots; in Italy, prison riots emanating from COVID-19 restrictions resulted in the death of 13 prisoners, most from overdosing on drugs allegedly taken from prison clinics during the riots;<sup>37</sup> in Colombia, prison protests triggered by the onset of the pandemic resulted in the death of 23 people deprived of liberty at the hands of law enforcement officials.<sup>38</sup> They have also intensified the risk of human rights abuses. As aptly pointed out by the Joint Committee on Human Rights in relation to the human rights implications of the UK government's response to COVID-19, legitimate questions remain

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<sup>33</sup> Smith, Dr G. (1 May 2020). *Coronavirus (COVID-19): opiate substitution treatment in prisons - Chief Medical Officer letter*. Scottish Government. Available at: <https://www.gov.scot/publications/coronavirus-covid-19-opiate-substitution-treatment-in-prisons---chief-medical-officer-letter/>

<sup>34</sup> Scottish Government (1 May 2020). *Coronavirus (COVID-19): clinical guidance on the use of Buvidal in prisons*. Available at: <https://www.gov.scot/publications/coronavirus-covid-19-clinical-guidance-on-the-use-of-buvidal-in-prisons/>

<sup>35</sup> Roberts, J., White, B., Attalia, D., Ward, S., and Dunlop, A. (2020). *Letter to the Editor: Rapid upscale of depot buprenorphine (CAM2038) in custodial settings during the early COVID-19 pandemic in New South Wales, Australia*, in *Addiction*.

<sup>36</sup> Office of the Correctional Investigator (Canada) (19 June 2020). *COVID-19 Update for Federal Corrections - June 19, 2020*. Available at: <https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20200619-eng.pdf>

<sup>37</sup> National Guarantor for the Rights of Persons Detained or Deprived of Liberty. National Preventive Mechanism under the OPCAT. 12 March 2020. Available at: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/83c265b8b8fadd34332d545d7c915e8c.pdf>

<sup>38</sup> Murga, I. (8 June 2020), 'Demoledor informe sobre la sangrienta represión del motín en la prisión Modelo de Bogotá', *Euronews*. Available at: <https://es.euronews.com/2020/06/08/demoledor-informe-sobre-la-sangrienta-represion-del-motin-en-la-prision-modelo-de-bogota>

as to whether the severe restrictions imposed in prisons were proportionate and whether lives could have been protected by other, less restrictive means, including through more extensive and responsibly managed early release schemes.<sup>39</sup>

### *Prison decongestion schemes*

When COVID-19 was identified as a global pandemic in March 2020, OHCHR and other international actors called on states to enact emergency measures to address and contain the spread of COVID-19 in prisons.<sup>40</sup> Governments were urged to limit arrests, promote alternatives to punishment and incarceration, and urgently release prisoners with underlying health conditions, older persons, and those charged or convicted for minor or non-violent offences, including drug offences.<sup>41</sup> Governments the world over heeded these calls and began committing to and implementing these schemes.

According to research conducted by Harm Reduction International, 109 countries and territories adopted a variety of decongestion schemes between March and June 2020 in an effort to curb the potential spread of COVID-19 within prisons.<sup>42</sup> The main measures introduced included early releases, often through sentence commutation, pardons, diversion to home arrest and release on bail/parole.<sup>43</sup> Eligibility for release from prison was largely determined by length of sentence remaining, age, and pre-existing health conditions. By 24 June 2020, these schemes had resulted in the release of approximately 639,000 people, a mere 5.8% of the global prison population.<sup>44</sup> While this was a welcome initial response, efforts have fallen far short of the significant political commitments made in the name of public health at the peak of the pandemic. Moreover, it is now clear that the effectiveness of these schemes was obstructed by serious design and implementation flaws, bureaucratic hurdles and a lack of political commitment, ultimately revealing an overarching preoccupation with punishment over public health.<sup>45</sup>

In terms of release criteria, type of offences was worryingly found to be a significant and recurring criterion for *exclusion* from release in many countries. People convicted of violent crimes, drug offences, terrorism, and political prisoners were largely excluded from early release.<sup>46</sup> The blanket exclusion of people convicted for certain offences without considering their individual circumstances

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<sup>39</sup> Joint Committee on Human Rights (14 September 2020). *The Government's response to COVID-19: human rights implications*. Available at: <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26502.htm>

<sup>40</sup> UN High Commissioner for Human Rights (25 March 2020). *Urgent action needed to prevent COVID-19 "rampaging through places of detention*, OHCHR. Available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>; UNODC, WHO UNAIDS and OHCHR (13 May 2020), *Joint Statement on COVID-19 in prisons and other closed settings*. Available at:

<https://www.who.int/news-room/detail/13-05-2020-unodc-who-un aids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>

<sup>41</sup> Ibid.; Puras, D. (16 April 2020). *Statement by the UN expert on the right to health on the protection of people who use drugs during the COVID-19 pandemic*. Available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25797&LangID=E> (accessed 8 September 2020)

<sup>42</sup> Harm Reduction International (June 2020). *COVID-19, Prisons and Drug Policy: Global Scan March-June 2020*. London: Harm Reduction International. Available at: [https://www.hri.global/files/2020/07/10/HRI\\_-\\_Prison\\_and\\_Covid\\_briefing\\_final.pdf](https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf)

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Girelli, G. (21 July 2020). *Incarceration Should Not Be a Death Sentence*, in *Open Society Foundations, Voices*. Available at: <https://www.opensocietyfoundations.org/voices/incarceration-should-not-be-a-death-sentence> (accessed 18 September 2020)

<sup>46</sup> Harm Reduction International (June 2020). *COVID-19, Prisons and Drug Policy: Global Scan March-June 2020*. London: Harm Reduction International. Available at: [https://www.hri.global/files/2020/07/10/HRI\\_-\\_Prison\\_and\\_Covid\\_briefing\\_final.pdf](https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf)

and their vulnerability to the virus can constitute arbitrary detention if it is found to be inappropriate, unnecessary or disproportionate,<sup>47</sup> or if it relies on discriminatory grounds.<sup>48</sup>

Not only does this reveal the arbitrary nature of these decisions, but it also demonstrates that - even in the face of a global pandemic - many countries continue to prioritise punitive approaches to drugs and other social and health issues over individual and public health. At least 28 countries - over 25% - explicitly excluded people detained for certain drug offences, regardless of whether they met other eligibility criteria.<sup>49</sup> Sri Lanka was particularly restrictive, in that it excluded from eligibility not only individuals convicted of drug possession and trafficking, but also prisoners “addicted to drugs”.<sup>50</sup> In 19 countries, people in pre-trial detention were explicitly excluded; while in some countries, such as Albania and Turkey, decongestion measures only considered prisoners with a final sentence, thus excluding incarcerated individuals who should be presumed innocent.<sup>51</sup> At least ten countries excluded prisoners who did not have a fixed home address. Although justified in some cases as a means of preventing homelessness, this stipulation further disadvantages and marginalises some of the most vulnerable prisoners. It also ignores longstanding and serious problems with the re-entry process, including lack of housing and employment opportunities.<sup>52</sup>

The wholesale exclusion of people convicted for certain drug offences from decongestion measures has a heightened impact on women, and on other populations that are disproportionately incarcerated for drug offences. In the case of women, the arbitrariness and inappropriateness of this exclusion is especially apparent, as most women convicted for drug offences are in prison for non-violent and low-level drug activities, such as transporting drugs.<sup>53</sup> Many women become involved in the illegal drug trade as a result of coercion, of the influence of their male partners and family members, or to obtain an income for themselves, their children and other dependents.<sup>54</sup> Their exclusion from releases cannot be justified by any conceivable risk they might pose to public health, or to other persons.

In some countries (including Belgium, Columbia, Costa Rica and Iran) release measures were or continue to be temporary, meaning that prisoners have to or are expected to return to prisons when the emergency is over.<sup>55</sup> In Iran, for example, the country held up as a shining example of successful prison decongestion, thousands of prisoners were called back to prison in late spring, many without

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<sup>47</sup> UN Human Rights Committee (2014). *General Comment 35, Article 9 (Liberty and security of persons)*, UN Doc. CCPR/C/GC/35, para. 12. Available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC35-Article9LibertyandSecurityofperson.aspx>

<sup>48</sup> UN Working Group on Arbitrary Detention (2012). *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, UN Doc. A/HRC/22/44, para. 63. Available at: <https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>

<sup>49</sup> Ibid.

<sup>50</sup> Perera, Y. (9 April 2020). *AG formulates guidelines to reduce prison overcrowding*, in *Daily Mirror Online*. Available at: [http://www.dailymirror.lk/breaking\\_news/AG-formulates-guidelines-to-reduce-prison-overcrowding-due-to-COVID-19/108-186430](http://www.dailymirror.lk/breaking_news/AG-formulates-guidelines-to-reduce-prison-overcrowding-due-to-COVID-19/108-186430) (accessed 16 September 2020)

<sup>51</sup> Harm Reduction International (June 2020), *COVID-19, Prisons and Drug Policy: Global Scan March-June 2020*. London: Harm Reduction International. Available at: [https://www.hri.global/files/2020/07/10/HRI\\_-\\_Prison\\_and\\_Covid\\_briefing\\_final.pdf](https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf)

<sup>52</sup> Ibid.

<sup>53</sup> Washington Office on Latin America et al. (2016). *Women, Drug Policies and Incarceration: A Guide for Policy Reform in Latin America and in the Caribbean*, p. 10. Available at: <http://fileservr.idpc.net/library/WOLA-WOMEN-FINAL-ver-25-02-1016.pdf>

<sup>54</sup> Ibid, p.3.

<sup>55</sup> Harm Reduction International (June 2020), *COVID-19, Prisons and Drug Policy: Global Scan March-June 2020*. London: Harm Reduction International. Available at: [https://www.hri.global/files/2020/07/10/HRI\\_-\\_Prison\\_and\\_Covid\\_briefing\\_final.pdf](https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf)

following proper quarantine procedures.<sup>56</sup> Not only is this shortsighted, especially considering the second wave of COVID-19 currently sweeping across the world, but it misses an important and unique opportunity to swiftly address prison overcrowding.

Implementation of decongestion schemes has been poor in many countries. In the UK, for example, although the government committed to release 4000 prisoners in April, only 242 were released as of 17 July 2020, of whom 50 were compassionate releases of vulnerable prisoners, pregnant women and mothers with babies.<sup>57</sup> In Mexico, none of the people released from prison were freed pursuant to the amnesty law adopted in response to the spread of COVID-19, but rather through pre-existing mechanisms because the oversight mechanism envisaged in the amnesty law was never put in place. In Cambodia, the Interior Minister announced plans in May 2020 to release around 10,000 individuals from the country's heavily overcrowded prisons - however, at the time of writing it still remains unclear whether anyone has been freed.<sup>58</sup>

Despite a few isolated examples of efforts to reduce arrest and detention, most countries continued to arrest people during the emergency, including for non-violent crimes and other offences that posed no threat to the public, such as non-violent drug crimes.<sup>59</sup> In Iran, for example, drug use accounted for 7,702 arrests between June and August 2020 in the Tehran province alone.<sup>60</sup> On top of the fact that there is no evidence that incarceration reduces drug use and trafficking, such arrests inevitably interfere with decongestion efforts and invalidate the thousands of early releases and pardons specifically issued for that purpose.<sup>61</sup>

Finally, there appear to have been very few measures put in place to protect the health and well-being of those urgently released back into the general community. Recently released prisoners are particularly vulnerable and require wraparound services, including access to essential health services and housing security. Sudden release, combined with a limited functioning of community-based services during COVID-19 times has made, at least initially, referrals and liaison difficult. This type of disjunction can result in the disruption of treatments like OAT and of comorbidities such as HIV and hepatitis C, with severe effects on individual and public health.<sup>62</sup> Early into the pandemic, the UN Special Rapporteur on the right to health and other UN experts called for effective measures to be put in place, and adequately funded, to ensure that those released from prisons and other detention settings have continuity of care, access to adequate housing and health care in the general community.<sup>63</sup>

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<sup>56</sup> Abdorrahman Boroumand Center (September 2020). *COVID-19 Fear in Iran's Prisons: Iran Must Do More to Protect Prisoner, Summer 2020 Update*. Available at: <https://www.iranrights.org/library/document/3764>

<sup>57</sup> UK Ministry of Justice (July 2020), *HM Prison and Probation Services COVID-19 Official Statistics - Data to 17 July 2020*, Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903420/HMPPS\\_COVID19\\_WE\\_17072020\\_Pub\\_Doc.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903420/HMPPS_COVID19_WE_17072020_Pub_Doc.pdf)

<sup>58</sup> Amnesty International and the Cambodian League for the Promotion and Defence of Human Rights (23 July 2020), *Cambodian Authorities must follow through with release of prisoners amid COVID-19*. <https://www.amnesty.org/download/Documents/ASA2327682020ENGLISH.pdf>

<sup>59</sup> Harm Reduction International (June 2020), *COVID-19, Prisons and Drug Policy: Global Scan March-June 2020*. London: Harm Reduction International. Available at: [https://www.hri.global/files/2020/07/10/HRI\\_-\\_Prison\\_and\\_Covid\\_briefing\\_final.pdf](https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf)

<sup>60</sup> Abdorrahman Boroumand Center (September 2020). *COVID-19 Fear in Iran's Prisons: Iran Must Do More to Protect Prisoner, Summer 2020 Update*. Available at: <https://www.iranrights.org/library/document/3764>

<sup>61</sup> Ibid.

<sup>62</sup> Ghosh, A. (December 2020), *Prisoners with drug use disorders during covid-19 pandemic: Caught between a rock and a hard place*, in *Asian Journal of Psychiatry*, 54.

<sup>63</sup> Puras, D. (16 April 2020), *Statement by the UN expert on the right to health on the protection of people who use drugs during the COVID-19 pandemic*. Available at:

Nevertheless, reports are now emerging from civil society around the world revealing the scale and impact of these calls being ignored. In Iran, for example, many individuals from disadvantaged socioeconomic backgrounds were not linked to adequate financial, harm reduction, and housing support post-release from prison.<sup>64</sup> Furthermore, among many people without stable housing, the closure of parks following lockdown limited their access to water and sanitation facilities.<sup>65</sup> In India, scores of people released from prison were forced to walk, hitchhike or cycle hundreds of kilometres to get home and faced stigma and discrimination from their families, communities and current or potential employers.<sup>66</sup> On top of these vulnerabilities, people who use drugs being released from prison also face an increased risk of opioid overdose arising from decreased tolerance to opioids and/or erratic access to OAT, which would be particularly acute during lockdown. While no information could be found on rates of overdose among people who use drugs recently released from prison through decongestion schemes, the general lack of planning to ensure their safety and well-being, as well as the shocking scarcity of naloxone<sup>67</sup> for prisoners' on release under normal circumstances,<sup>68</sup> suggest that an increase in opioid overdose deaths during this period is likely. Indeed, generally speaking, opioid overdose deaths have surged in both Canada and the United States during the pandemic, with the United States recording a national jump of 18% in March, 28% in April and 42% in May (A. Coletta, 2020; W. Wan & H. Long, 2020).<sup>69</sup>

## Virtual hearings

*[Question: Have member States introduced video-conferencing or other substitutes for the personal attendance of a detainee or accused person during reviews of deprivation of liberty or in relation to criminal trials? Is the consent of the affected individual required for such practices? What have been the advantages and disadvantages of such virtual hearings? Please identify how these virtual hearings allow detection and prevention torture and other ill-treatment, and how they ensure the confidentiality of lawyer-client communications.]*

Since the outset of the pandemic, several countries have introduced audio and visual technologies to conduct criminal proceedings remotely, especially in urgent matters.<sup>70</sup> However, the real implications of virtual proceedings on defendants' rights are little understood.<sup>71</sup> The limited existing research on virtual hearings indicates that remote proceedings can result in worse sentencing outcomes for

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<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25797&LangID=E>; UN High Commissioner for Human Rights (25 March 2020). *Urgent action needed to prevent COVID-19 "rampaging through places of detention*, OHCHR. Available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>; UNODC, WHO UNAIDS and OHCHR (13 May 2020), *Joint Statement on COVID-19 in prisons and other closed settings*. Available at: <https://www.who.int/news-room/detail/13-05-2020-unodc-who-un aids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>

<sup>64</sup> Alavi, M., Moghanibashi-Mansourieh, A., Radfar, S.R., Alizadeh, S., Bahramabadia, F., Esmizade, S., Dore G., Sedeh, F. B., and Deilamizade, A. (17 August 2020), "Coordination, cooperation, and creativity within harm reduction networks in Iran: COVID-19 prevention and control among people who use drugs", in *International Journal of Drug Policy*.

<sup>65</sup> Ibid.

<sup>66</sup> Pundir, P. (31 August 2020), *Inmates Released from Overcrowded Prisons Due to COVID-19 Are Struggling*, in *Vice*. Available at: [https://www.vice.com/en\\_ca/article/z3e5ga/inmates-released-from-overcrowded-prisons-due-to-covid-19-are-struggling](https://www.vice.com/en_ca/article/z3e5ga/inmates-released-from-overcrowded-prisons-due-to-covid-19-are-struggling)

<sup>67</sup> Naloxone is a medication used to counter the effects of an opioid overdose.

<sup>68</sup> Harm Reduction International (November 2020), *Global State of Harm Reduction 2020*. London: Harm Reduction International.

<sup>69</sup> Coletta, A. (16 August 2020), *Canada's other health crisis: As overdoses surge, officials call on government to decriminalise illicit drugs*, in *The Washington Post*. [https://www.washingtonpost.com/world/the\\_americas/canada-drug-overdose-coronavirus/2020/08/15/559dabbe-dcd9-11ea-b4af-72895e22941d\\_story.html](https://www.washingtonpost.com/world/the_americas/canada-drug-overdose-coronavirus/2020/08/15/559dabbe-dcd9-11ea-b4af-72895e22941d_story.html); Wan, W. and Long, H. (1 July 2020), *'Cries for help': Drug overdoses are soaring during the coronavirus pandemic*, in *The Washington Post*. Available at: <https://www.washingtonpost.com/health/2020/07/01/coronavirus-drug-overdose/>

<sup>70</sup> Fair Trials (5 May 2020). *Commentary: Impact assessment of remote justice on fair trial hearings*, <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

<sup>71</sup> Ibid.

defendants, such as increased custodial sentences,<sup>72</sup> or larger bail amounts.<sup>73</sup> Two recent studies in the UK suggested that virtual hearings reduce defendants' understanding of the proceedings;<sup>74</sup> that they create challenges for building trust between defendant and attorney; and that they curtail pre-hearing and side conversations between practitioners.<sup>75</sup> Researchers point out that at the moment the impact of removing the human proximity between judge, attorneys, and defendant is not fully understood.<sup>76</sup>

Because of this, it is especially troubling that virtual remote proceedings have been conducted on death penalty cases. On 15 May 2020, Punithan Genasan, a Malaysian national, was sentenced to death by Singapore's Supreme Court for his complicity in trafficking 28.5 grams of heroin in 2011, a charge he denied. Genasan's lawyer confirmed that his sentencing hearing had been conducted via Zoom.<sup>77</sup> Similarly, in Indonesia, at least 13 drug-related death sentences were reportedly imposed following hearings held via teleconference. Local NGOs highlighted significant flaws in the regulation of remote hearings (such as the failure to ensure access to prosecutorial evidence by the defendant's lawyers), which heighten the risk of fair trial violations in capital cases.<sup>78</sup>

For context, under international law, capital punishment may only be applied to the most serious crimes,<sup>79</sup> which have been consistently interpreted to exclude drug offences.<sup>80</sup> In spite of this, at least 180 people were sentenced to death for a drug offence in 2019 worldwide, 13 of them in Singapore.<sup>81</sup> In Indonesia, 78 capital cases related to drug offences were held between March and October 2020 alone.<sup>82</sup>

Under international law, in countries that retain the capital punishment a death sentence may only be imposed 'after legal process which gives all possible safeguards to ensure a fair trial';<sup>83</sup> in these cases, 'scrupulous respect of the guarantees of fair trial is particularly important'.<sup>84</sup> That hearings on a death penalty case have taken place virtually in a context where the existing research points to a

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<sup>72</sup> UK Ministry of Justice (2010). *Virtual court pilot outcome evaluation*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193633/virtual-courts-pilot-outcome-evaluation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193633/virtual-courts-pilot-outcome-evaluation.pdf)

<sup>73</sup> Seidmand Diamon et al. (2010). 'Efficiency and Cost: The Impact of Videoconference Hearings on Bail Decisions', *Journal of Criminal Law and Criminology* 100(3). Available at:

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jdc>

<sup>74</sup> Gibbs, P. (2017). *Defendants on video – conveyor belt justice or a revolution in access?* (Transform Justice). Available at: <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

<sup>75</sup> Fielding, N., Braun, S., Hieke, G. (2020). *Video Enabled Justice Evaluation* (Sussex Policy and Crime Commissioner & University of Surrey). Available at: <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

<sup>76</sup> Gibbs, P. (2017). *Defendants on video – conveyor belt justice or a revolution in access?* (Transform Justice). Available at: <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

<sup>77</sup> Ratcliffe, R. (20 May 2020). "Singapore sentences man to death via Zoom call". *The Guardian*. Available at: <https://www.theguardian.com/world/2020/may/20/singapore-sentences-man-to-death-via-zoom-call>

<sup>78</sup> Institute of Criminal Justice Reform (2020). *Taking Lives During the Pandemic* (ICJR), page 17. Available at: <https://icjr.or.id/wp-content/uploads/2020/12/Death-Penalty-Report-ICJR-2020.pdf>.

<sup>79</sup> International Covenant on Civil and Political Rights, article 6.2. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>80</sup> UN Human Rights Committee (2019). *General Comment no. 36, Article 6 (Right to Life)*, UN Doc. CCPR/C/CG/35, para 35. Available at: <https://www.refworld.org/docid/5e5e75e04.html>.

<sup>81</sup> Harm Reduction International (Website). *The Death Penalty for Drug Offences 2019*. Available at: <https://www.hri.global/death-penalty-2019>

<sup>82</sup> Institute of Criminal Justice Reform (2020). *Taking Lives During the Pandemic* (ICJR), page 17-18. Available at: <https://icjr.or.id/wp-content/uploads/2020/12/Death-Penalty-Report-ICJR-2020.pdf>.

<sup>83</sup> UN Economic and Social Council (1984). *Safeguards guaranteeing protection of the rights of those facing the death penalty*, ECOSOC Resolution 1985/50 of 25 May 1984. Available at: <https://www.ohchr.org/en/professionalinterest/pages/deathpenalty.aspx>

<sup>84</sup> UN Human Rights Committee (2007). *General Comment no. 32, Right to equality before courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, para. 59. Available at: <https://www.refworld.org/docid/478b2b2f2.html>.

deterioration of the rights of defendants in remote proceedings is concerning and would add to the many violations of fair trial rights that have been recorded in capital cases for drug offences.<sup>85</sup>

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<sup>85</sup> For a review of fair trial concerns in death penalty proceedings for drug charges, see: Sander, G., Girelli, G., Cots Fernandez, A. (2020). *The Death Penalty for Drug Offences Global Overview 2019* (Harm Reduction International), p. 12 and following. Available at: [https://www.hri.global/files/2020/02/28/HRI\\_DeathPenaltyReport2019.pdf](https://www.hri.global/files/2020/02/28/HRI_DeathPenaltyReport2019.pdf).