



UN Office of the High Commissioner for Human Rights report on the implementation of the UNGASS Outcome document on the world drug problem, in regard to human rights

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Submission by Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society. Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

Introduction

1. The right to a fair trial and the due process safeguards that accompany it are enshrined in a host of international and regional human rights instruments.¹ In recognition of this, the outcome document of the thirtieth special session of the General Assembly, committed to “promote and implement effective criminal justice responses to drug-related crimes to bring perpetrators to justice that ensure legal guarantees and due process safeguards.”² Criminal prosecution of drug use has resulted in a significant increase in criminalisation and incarceration globally, despite an overall drop in crime rates. Between 2000 and 2015, prison populations rose over 20%,³ putting enormous pressure on justice systems, including courts, prisons, investigatory bodies, and public defenders.
2. The vast majority of drug prosecutions are for simple use and possession, the prosecution of which increased globally between 2003 and 2013, while the number of prosecutions for drug trafficking remained stable.⁴ It is estimated that 83% of drug offences recorded by law enforcement and criminal justice systems are possession offences.⁵ The Inter-American Commission for Human Rights (IACHR) has expressed concern that prosecution of minor drug

¹ These include but are not limited to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, the African Charter on Human and People's rights and the ASEAN Human Rights Declaration

² “Our joint commitment to effectively addressing and countering the world drug problem” as adopted by Assembly in the annex to its resolution S-30/1 of 19 April 2016. Opo4

³ Penal Reform International, “Global Prison Trends 2018.” p.7 Available at: https://www.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf. NB rising rates of imprisonment vary by region – rising quickly in the Americas for example while prison populations are dropping in much of Europe.

⁴ International Centre for the Prevention of Crime, Trends in Crime and its Prevention, 2016, Chapter 1.

⁵ UN Commission on Crime Prevention and Criminal Justice, World crime trends and emerging issues and responses in the field of crime prevention and criminal justice, 2013, E/CN.15/2013/9, p.6 www.unodc.org/documents/data-and-analysis/statistics/crime/World_Crime_Trends_2013.pdf.

offences has driven rates of imprisonment, in particular of women.⁶ It has also noted that drug offences are subject to mandatory pre-trial detention regimes in some countries,⁷ further inflating prison populations and undermining due process guarantees in the pre-trial period.

3. The burden that drug prosecutions place on criminal justice systems has led states to seek methods by which to increase the efficiency with which they process high volumes of cases. In many instances, these efficiency measures have the effect of reducing procedural guarantees for defendants in ways that fail to fulfil the fair trial obligations outlined in the UNGASS Outcome Document and under international law.

Trial Waiver Systems

4. Fair Trials has documented the growth of “trial waiver systems”⁸ worldwide as part of a global push for efficiency in criminal justice procedures.⁹ These systems include plea bargaining and guilty pleas, cooperation agreements and abbreviated proceedings. The adoption of trial waiver systems worldwide mirrors the global growth in incarceration – their incidence has increased globally by 300% since 1990, with 66 of the 90 jurisdictions studied in the report using some form of trial waiver system by 2016, up from only 19 in 1990.¹⁰
5. Although trial waiver systems are perceived as a means of reducing prison overcrowding and pre-trial detention by increasing efficiency, they may in practice have the opposite effect by allowing countries to process larger volumes of cases with less judicial oversight. In the USA for example, trial waivers in the context of harsh drug and sentencing laws have helped to drive mass incarceration. 46.2% (over 79,000 people) of the US federal prison population is currently incarcerated for drug offences,¹¹ in a system in which 97% of cases are resolved through guilty pleas.¹²

⁶“Measures to Reduce Pre-Trial Detention,” July 2017, IACHR, p.59 n.142: According to CICAD/OAS, at present drug-related crimes are the first or second leading cause of the incarceration of women, and in men it is the second, third, or fourth leading cause. CICAD/OAS, Technical Report on Alternatives to Incarceration for Drug-related Offenses, 2015, p. 14.

⁷ “Measures to Reduce Pre-Trial Detention,” *id* at n. 143: IACHR, Expert Consultation “Measures to Reduce Pretrial Detention in the Americas,” Washington D.C., May 20, 2016; WOLA, IDPC, Dejusticia, CIM, and OAS, Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean, 2016, pp. 20 and 22; IACHR, Public hearing “Measures to reduce pretrial detention in the Americas,” 157th Regular Period of Sessions, April 5, 2016; Giacomello, Corina, Informational document “Proposals for Alternatives to Criminal Prosecution and Incarceration for Drug Related Offenses in Latin America,” International Drug Policy Consortium, June 2014. See also International Drug Policy Consortium, Las Cortes de Drogas. Los alcances y retos de una alternativa a la prisión preventiva,” May 2012, p. 2. For example, in the area of legislation, the Federal Code of Criminal Procedure of Mexico provides for automatic application of pretrial detention for the crimes against health provided for in Articles 194 and 195 of the Federal Criminal Code “On the production, possession, trafficking, proselytizing, and other acts related to narcotics.” Federal Code of Criminal Procedure, Mexico, published on March 5, 2014, in force as of June 18, 2016, Article 167.

⁸ Fair Trials has defined a “trial waiver system” as “A process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences.”

⁹ “The Disappearing Trial,” April 2017, Fair Trials International, p.4 available at: <https://www.fairtrials.org/wp-content/uploads/2017/12/Report-The-Disappearing-Trial.pdf>

¹⁰ *Ibid*.

¹¹ US Bureau of Prisons, Inmate Statistics. Last updated April 2018. Available at: https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

¹² United States Sentencing Commission’s 2016 Sourcebook of Federal Sentencing Statistics. Available at: <http://www.ussc.gov/research/sourcebook-2016>

6. It is well established in international law that pre-trial detention should be used only as an exceptional measure, but unfortunately excessive use of pre-trial detention remains the norm in many countries, particularly in relation to drug crimes. Despite the fact that trial waiver systems are often introduced in order to reduce lengthy periods of pre-trial detention, evidence demonstrates that pre-trial detention can actually fuel plea bargaining, creating incentives for investigative authorities to use pre-trial detention to encourage guilty pleas and other trial waivers.¹³ Noting a study from Argentina where people deprived of their liberty said that pre-trial detention was used as a ‘bargaining chip’ to procure plea deals, the IACHR has called on states to ensure that pre-trial detention isn’t used as a means to induce guilty pleas.¹⁴
7. Drug courts, another intervention designed to reduce incarceration, also often employ a form of trial waiver system that can perversely fuel, rather than reduce, incarceration in practice. Defendants are often obliged to plead guilty as a condition of participating in the drug court.¹⁵ If defendants complete treatment, their sentence may be deferred, modified, suspended, or expunged,¹⁶ but if they fail to complete the treatment, they can face harsh criminal punishment, often exceeding what would normally be imposed had the defendant simply been convicted after a normal criminal trial.¹⁷ Furthermore, because defendants must plead guilty, the probative value of their case is not assessed at drug court, and charges are rarely fully investigated.
8. Without the full procedural guarantees of a trial, trial waiver systems can undermine human rights protections. The IACHR has noted the erosion of due process safeguards that has often accompanied the growth in trial waiver systems in Latin American jurisdictions, including lack of access to a lawyer in trial waivers and lack of judicial evaluation of the strength of evidence.¹⁸ For example, it notes that in Peru, there are not enough Public Defenders to handle all cases of guilty pleas.¹⁹ Although there is nearly universal recognition of the right of access to a lawyer in criminal proceedings, when it comes to trial waiver systems, even in jurisdictions which are considered to have quite robust legal aid systems there are indications that defendants are at times agreeing to waive their right to a trial without having had access to a lawyer.²⁰ With respect to Bolivia, the IACHR has expressed concerns that the offer extended to an accused person is based on the seriousness of the offence as opposed to an

¹³ The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges Will Dobbie, Jacob Goldin, Crystal S. Yang, 2017; Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes Megan Stevenson, 2016; THE DOWNSTREAM CONSEQUENCES OF MISDEMEANOR PRETRIAL DETENTION Paul Heaton, Sandra Mayson, Megan Stevenson 2016

¹⁴ Report on the Use of Pre-Trial Detention in the Americas, 2013, IACHR, para 268 p.102 and n.366

¹⁵ Drug Courts: Equivocal Evidence on a Popular Intervention, Open Society Foundations, p.2

¹⁶ Ibid.

¹⁷ Sevigny, Fuleihan, and Ferdik, “Do Drug Courts Reduce the Use of Incarceration?: A Meta-Analysis” ; see also M. M. O’Hear, “Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice,” *Stanford Law & Policy Review* 20, no. 2 (2009): 463–99, (those who do not complete court-supervised treatment program may face sentences two to five times longer than had they been sentenced initially); Gottfredson, Denise C. et al., “Long-Term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study,” *Journal of Experimental Criminology* 2, no. 1 (2006): 67–98.

¹⁸ “Measures to Reduce Pre-Trial Detention,” *id.* para 58 p.43

¹⁹ Ibid.

²⁰ The Disappearing Trial,” April 2017, Fair Trials International para 88 p.52

evaluation of the case, and that the probative elements of cases are not considered by judicial authorities who approve these deals.²¹

9. Where police have engaged in prohibited activity, including unlawful stop, search, arrest and seizure, fabrication of evidence, torture, inhuman or degrading treatment or other rights violations, the primary legal remedy is exclusion of evidence tainted by the unlawful act. When a trial does not occur, these abuses may well not come to light, and are much less likely to be remedied. In extreme cases, plea deals may be used to “cleanse” or “launder” cases too tainted by torture and other human rights abuses to take to trial.²² In less extreme cases, which are much more voluminous and systematic, plea deals may be used to win convictions in cases that may otherwise have ended in dismissal or acquittal due to procedural rights violations or lack of evidence.
10. Some argue that only people that are guilty of an offence will plead guilty. This is not true. In 2016, 44.5% of exonerations in the USA were in cases of guilty pleas (74 out of 166 exonerations). 57 of those 74 cases were drug cases, characterised by faulty drug tests never tested at trial due to the fact that defendants pleaded guilty.

Conclusion and Recommendations

11. Harsh drug policies, the criminalisation of minor drug offences and the failure to divert cases out of the criminal justice system, have created impossible pressures on criminal justice systems across the globe, which have been unable to keep pace with the sheer volume of drugs cases they are forced to process. All too often the response has been abbreviation of the trial process, sacrificing human rights and the legal guarantees and due process safeguards designed to protect them. This can have devastating personal consequences for the people who are pressurised into pleading guilty, can hide gross human rights abuses from public scrutiny and can undermine public trust in the rule of law. States should not use trial waiver systems in place of comprehensive drug policy and criminal justice reform that would divert a substantial proportion of such cases out of the criminal justice system all together.

²¹“Measures to Reduce Pre-Trial Detention,” July 2017, IACHR, para 58 p.43

²² The Disappearing Trial,” April 2017, Fair Trials International para 31 p.15