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Contributions from IDPC, WOLA and CELS to the OHCHR report on 'Human Rights in the administration of justice – non-discrimination and vulnerable groups – causes and effects of overincarceration and overcrowding'

Further to Human Rights Council Resolution 30/L.16 on human rights in the administration of justice, adopted in September 2015, we welcome the opportunity to provide the Office of the High Commissioner for Human Rights (OHCHR) with relevant information as a contribution to the report on the non-discrimination and vulnerable groups, in particular in detention, and with regard to the causes and effects of overincarceration and overcrowding.

This submission, made by the Washington Office on Latin America (WOLA),¹ the International Drug Policy Consortium (IDPC)² and the Centro de Estudios Legales y Sociales (CELS),³ will address the human rights implications of incarceration on women – an issue that was raised in the 2015 OHCHR *Study on the impact of the world drug problem on the enjoyment of human rights*.⁴

The information provided in this brief is based on the activities of the Working Group on Women, Drug Policy and Incarceration, which advocates for drug policy reform in the Americas.⁵

A drastic increase in female incarceration rates

According to the Institute for Criminal Policy Research World Female Imprisonment List, more than 700,000 women and girls are currently being held in penal institutions throughout the world.⁶ The data shows that the number of women and girls in prison has increased by about 50% since the year 2000, a period in which the general world population rose by just 18%. The data identifies particularly sharp increases in Guatemala, El Salvador, Brazil, Colombia, Cambodia and Indonesia. According to Brazil's Ministry of Justice, the country's female prison population increased by 567% between 2000 and 2014.

Harsh drug laws drive up the female prison population

The highest levels of incarceration of women can be found in East and South East Asia, where the mass incarceration of individuals charged with low-level, non-violent drug offences has led to severe prison overcrowding. As of 2015, over 47,000 women are behind bars in Thailand, and about 80% of them are convicted

¹ www.wola.org

² www.idpc.net

³ www.cels.org.ar

⁴ http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_65_E.docx

⁵ To access more information and to view all activities and publications produced by the working group, see <https://www.wola.org/women-drug-policies-and-incarceration-in-the-americas/>

⁶ http://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_third_edition_0.pdf

of drug offences.⁷ In the Philippines, in early 2016 the Bureau of Corrections reported that about half of the women awaiting or undergoing trial in the Correctional Institute of Women were detained for drug-related offences. It is important to note, however, that this figure has likely significantly increased since President Duterte launched his war on drugs in the Philippines, leading to over 7,000 deaths and mass incarceration.

The profile of women incarcerated for drug offences

Studies conducted on women deprived of their liberty or awaiting sentences for drug-related offences show that these women often have little or no schooling, live in conditions of poverty, and are heads of household responsible for the care of young, elderly or disabled dependents.⁸ They may also be in need of treatment and harm reduction services for drug dependence, and for mental or physical health problems. Most women are not imprisoned for large-scale trafficking offences or violent activities, nor are they leaders or major protagonists in criminal networks. Rather, most are performing low-level, high-risk tasks in the illicit trafficking chain as a way to make ends meet or to support their own drug habits. In some cases, women are coerced into drug dealing and trafficking by male relatives or intimate partners. Many have been driven to small-scale drug distribution as a way to survive poverty and social exclusion, as they are unable to find job opportunities in the licit economy.

Incarceration of foreign nationals

Women incarcerated for drug use, or for working as “human couriers” or “mules” in Latin America and South East Asia typically have no prior criminal record and many are incarcerated outside of their home country. Women in foreign criminal justice systems face additional challenges on top of those experienced by all women in prison. In many cases the women’s family, social, and institutional ties are interrupted, and they also face difficulties dealing with unfamiliar criminal justice proceedings and language barriers.

The impact of women’s incarceration

The incarceration of women for low-level, non-violent drug offences contributes little to reducing the overall scale of the illicit drug market or improving public security, as these women are usually replaced in the illicit drug trade by other, equally vulnerable, women. However, their incarceration – often for disproportionate amounts of time – can have severe and long-lasting consequences on their lives, but also on their families and communities. In the absence of strong social protection networks, their dependents are exposed to abandonment and are further marginalised. In addition, women coming out of prison with a criminal record because of a drug offence may be unable to find employment – perpetuating a cycle of poverty, vulnerability and renewed involvement in crime.⁹

Motherhood and prison

A large proportion of women in prisons worldwide are mothers. This includes 87% in Brazil, 80% in the United States, 66% in the United Kingdom, and 82% in Thailand. In November 2014, there were 267 pregnant women in the Thai prison system and 256 children living in prison with their mothers. A survey of 194 women in Ugandan prisons found that 92% of the women had children, totalling 276 children, 35 of whom were living with their mothers in prison. The impact of incarceration of mothers on their dependents is devastating, with many young people and children abandoned or sent into care, leading to the breakdown of many families.

⁷ Kittayrak, K., *For female offenders, jail often no solution*, Bangkok Post, 9 June 2015, <http://www.bangkokpost.com/opinion/opinion/586901/for-female-offenders-jail-often-no-solution>

⁸ See <https://www.oas.org/en/cim/docs/WomenDrugsAmericas-EN.pdf> and <http://idpc.net/publications/2013/11/idpc-briefing-paper-women-drug-offences-and-penitentiary-systems-in-latin-america>

⁹ WOLA, IDPC, DeJusticia, CIM, OAS (2016), *Women, drug policies, and incarceration – A guide for policy reform in Latin America and the Caribbean*, <https://www.wola.org/analysis/women-drug-policies-and-incarceration/>

Women who use drugs and human rights

Women who use drugs face significant stigma and are often unable to access harm reduction, drug dependence treatment or basic healthcare. In contexts where drug use remains criminalised, women may face additional violence or harassment from law enforcement officers, as was widely reported in Central Asia.¹⁰ Women with children or who are pregnant may also face losing custody of their children, forced or coerced sterilisation, or forced abortion or criminal penalties for using drugs during pregnancy.¹¹ In certain jurisdictions, women who use drugs during pregnancy may be subject to detention,¹² or criminal liability for exposing the fetus to a controlled substance.¹³ The Special Rapporteur on the right to health has found that the criminalisation of drug use during pregnancy impedes access to healthcare, infringing on the right to health of pregnant women,¹⁴ and the UN Working Group on the issue of discrimination against women in law and in practice has considered such practices to be discriminatory.¹⁵

A rights- and gender-based approach to the administration of justice

The UN Special Rapporteur on violence against women,¹⁶ as well as the Committee on the Elimination of all forms of Discrimination against Women,¹⁷ have both called upon States to develop gender-sensitive alternatives to incarceration, and promote a paradigm shift away from incarceration and towards community-based sentencing for female offenders. This will also require a review of national drug laws and policies to ensure proportionate penalties for drug offences, including the consideration of mitigating factors such as socio-economic vulnerability, being the sole carer of dependents, drug dependence, etc.

The rights to equality and non-discrimination are protected under international law, from which different obligations arise. Under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and other human rights treaties and standards, States are obliged to ensure equal rights to men and women in all respects, including equal access to health care services for both men and women.¹⁸ Similarly, the UN Rules for the Treatment of Women Prisoners (Bangkok Rules) protect the principle of non-discrimination and the right to health, requiring States to address the specific challenges that women confront in the criminal justice and penitentiary systems. This includes the need to provide adequate harm reduction and treatment services for women dependent on drugs in prison or other forms of detention.¹⁹ WHO, UNAIDS and UNODC guidelines have also emphasized the need to ensure comprehensive health and reproductive services for women who use drugs, including HIV-related services.²⁰

¹⁰ <http://www.harm-reduction.org/library/law-enforcement-and-women-who-use-drugs>

¹¹ Office of the High Commissioner on Human Rights, “Study on the impact of the world drug problem on the enjoyment of human rights”, 4 September 2015, UN Doc. A/HRC/30/65, para. 53.

¹² Office of the High Commissioner on Human Rights, “Study on the impact of the world drug problem on the enjoyment of human rights”, 4 September 2015, UN Doc. A/HRC/30/65, para. 53.

¹³ Alabama Code Section 26-15-3.2: Chemical Endangerment of Exposing A Child to an Environment in Which Controlled Substances are Produced or Distributed; Amnesty International, “Tennessee ‘fetal assault’ law a threat to women’s health and human rights” (AMR 51/3623/2016), 11 March 2016

¹⁴ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011, UN Doc. A/66/254, para 41.

¹⁵ Report of the Working Group on the issue of discrimination against women in law and in practice, 8 April 2016, UN Doc. A/HRC/32/44, para. 39

¹⁶ Report of the Special Rapporteur on violence against women, ‘Pathways to, conditions and consequences of incarceration for women’, 21 August 2013, UN Doc. A/68/340, para. 85

¹⁷ Committee on the Elimination of Discrimination against Women, General Recommendation 33 on women’s access to justice, 3 August 2015, UN Doc. CEDAW/C/GC/33, para. 48

¹⁸ Convention on the Elimination of all forms of Discrimination Against Women, articles 12 and 2

¹⁹ United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders. ECOSOC resolution 2010/16, December 2010.

²⁰ http://www.who.int/hiv/pub/idu/idu_target_setting_guide.pdf

Recommendations

1. Recent, relevant, and reliable national prison data disaggregated by sex is often unavailable from countries and this hinders the possibility of designing effective policies to meet the needs of vulnerable and underrepresented groups. We recommend that the OHCHR urge states to commit to generating and gathering comprehensive data from penitentiary authorities that details the nature and extent of global incarceration for both women and men.²¹
2. Openly and actively support better proportionality in sentencing for drug offences, in order to avoid the imposition of lengthy sentences for women who have committed non-violent drug offences such as possession of small quantities of drugs, or engagement in the drug trade as drug couriers – the objective being that incarceration is used as a last resort.²²
3. Encourage the implementation of alternatives to incarceration for women, in particular for those who are pregnant or in charge of dependents.²³
4. Ensure that in cases where women have young children in her custody, the best interest of the child should be the guiding principle in processing her sentence.
5. Facilitate the transfer of foreign women deprived of liberty, so that they can serve their sentences in their home country, if they wish to do so.
6. Ensure that States commit to a rights- and gender-based harm reduction approach to women who use drugs, and end the criminalisation, stigmatisation, forced treatment and incarceration of women who use or have used drugs.

²¹ For more information on data collection with a gender perspective, see:

https://www.wola.org/sites/default/files/Data%20English_FINAL.pdf

²² For more information, see: WOLA, IDPC, DeJusticia, CIM, OAS (2016), *Women, drug policies, and incarceration – A guide for policy reform in Latin America and the Caribbean*, <https://www.wola.org/analysis/women-drug-policies-and-incarceration/>

²³ For more information on alternatives to incarceration with a gender perspective, see:

https://www.wola.org/sites/default/files/Alternatives%20to%20Incarceration_English_Final_0.pdf