

Submission to the UN Working Group on Arbitrary Detention on detention in the context of drug policies, pursuant to Human Rights Council Resolution 42/22

Submitting organisations:



Lembaga Bantuan Hukum Masyarakat (LBH Masyarakat) is a not-for-profit non-governmental organisation that provides free legal services for the poor and victims of human rights abuses in Indonesia. We advocate for the promotion of the rule of law and human rights protection through strategic litigation, research and analysis, campaign and public education, and community legal empowerment. We focus on the abolition of the death penalty, drug policy reform, HIV and human rights, mental health, and the protection of LGBT rights.



The **Institute for Criminal Justice Reform (ICJR)** is an independent research institute established in 2007. ICJR focuses on criminal law and justice reform, and general law reform in Indonesia. ICJR takes initiative by providing support in the context of establishing respect for the Rule of Law and at the same time establishing a fervent human rights culture in criminal justice system.



Harm Reduction International (HRI) is a leading NGO dedicated to reducing the negative health, social and legal impacts of drug use and drug policy. HRI promotes 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. HRI is a non-governmental organization in special consultative status with ECOSOC.

Introduction

LBH Masyarakat, ICJR, and HRI welcome Human Rights Council resolution 42/22 renewing the mandate of the Working Group on Arbitrary Detention (WGAD); and requesting the WGAD to prepare and present a report on arbitrary detention related to drug policies.

The following submission provides information on detention in the context of drug policy in Indonesia, following the structure of the questionnaire circulated by WGAD on 4th February 2020.

Issue 1

Indonesia's drug policy is markedly punitive.¹ Narcotics Law 35/2009 envisages harsh – and disproportionate - penalties for drug use, possession for personal use, and trafficking. As an example, possession of heroin and methamphetamine (among others) is punished with minimum four to maximum twelve years' imprisonment and a fine;² while manufacturing and trafficking of minimum five grams of the same substances can be punished with imprisonment from five to twenty years, life imprisonment, or death.³ Drug use is punished with one, two, or four years' imprisonment based on the substances (with mandatory treatment prescribed as a possible alternative).⁴

The government of Indonesia provides data on the number of individuals held in pre-trial detention, however the figures are not disaggregated by crime. For this reason, figures on pre-trial detention for drug offences specifically are not available.

The table below illustrates the number of prisoners convicted of drug offences, vis a vis total prisoners and prison capacity.⁵

	# persons convicted for drug use	# persons convicted for other drug offences	# total prisoners	# prison capacity
February 2020	44,180	88,272	268,967	131,931
December 2019	39,775	72,617	201,643	131,931
December 2018	38,755	73,223	183,274	131,931
December 2017	37,088	63,311	161,345	131,931
December 2016	28,647	53,291	139,006	131,931
December 2015	26,330	37,023	119,207	131,931
December 2014	28,609	33,213	110,469	131,931

¹ See for example, Inside Indonesia, *Drugs and Drug Policy*, ed. 137: Jul-Sep 2019, <https://www.insideindonesia.org/drugs-and-drug-policy>

² Law of the Republic of Indonesia No. 35 of 2009 on Narcotics, Article 112. Available at: http://www.flevin.com/id/lqso/translations/JICA%20Mirror/english/4868_UU_35_2009_e.html

³ Ibid., Article 113

⁴ Ibid., Article 127

⁵ Figures from the Department of Correctional Service of the Ministry of Law and Human Rights, accessible at <http://smslap.ditjenpas.go.id/>. Official data does not disaggregate based on sexual orientation or HIV status.

As of 11 February 2020, 14.204 prisoners were women.⁶ Slightly more than half of them, 7.584, were imprisoned for drug-related offences, of which 6.046 convicted and 1.538 waiting for trial.

Notably, drug crimes are not clearly defined, and the Narcotics Law fail to clearly and efficiently distinguish between ‘drug dealers’ and people who possess drugs for personal use. As a consequence, not all those convicted for possession for personal use (meaning pursuant to Article 127 of the Narcotics Law) are people who use drugs; at the same time, many prisoners convicted for illicit drug trafficking are in fact are people who use drugs. For example, a 2016 study found that 61% of people who use drugs in a specific region were charged and convicted as drug dealers.⁷ Therefore, the actual figure of people who use drugs in prisons may be higher than the official number mentioned above.

As illustrated by the figures in the table, the number of persons in detention for drug offences has been steadily increasing between 2015 and 2018, and driving the surge in prison population (over half of the prison population is convicted for drug-related offences). Prisons are structurally overcrowded – some over 800% -⁸ under-resourced, and understaffed. This situation exposes prisoners to inhumane conditions of detention, lack of adequate healthcare, psychological abuse, and violence.⁹

From October 2018 to October 2019, a total of 54 new death sentences were handed down by either first instance or appellate court for drug offences, more than double those pronounced in 2018. 61% of the 271 people that were on death row in October 2019 have been sentenced for drug offences.¹⁰ Prisoners are typically held on death row for excessive periods of time; a review of the time spent on death row by the fourteen individuals who were executed in 2015 and 2016 found an average death row detention of ten years.¹¹

Issue 4

In case of arbitrary arrest, the victim can submit a petition to review whether the arrest is conducted according to the law, which will be heard through pre-trial hearing, pursuant to Article 77 of the Criminal Procedure Code.

Unlawful detention also occurs when the period of detention has exceeded the length prescribed by law – which is the same for all prisoners. According to the Criminal Procedure Code, pre-trial detention may last up to 230 days while during trial, the defendant may be detained for 150 days at the first stage, another 150 days at the appeal stage, and 170 days at the cassation stage.¹²

⁶ Data received by the Institute of Criminal Justice Reform on 24 March 2020 through correspondence with the Department of Correctional Service of the Ministry of Law and Human Rights.

⁷ Institute for Criminal Justice Report (2019), *Strategies to Reduce Overcrowding in Indonesia: Causes, Impacts, and Solutions*, 73. Available at: <http://icjr.or.id/data/wp-content/uploads/2019/03/Strategies-to-Reduce-Overcrowding-in-Indonesia.pdf>

⁸ Ibid.

⁹ Ibid. Also Penal Reform International and Institute for Criminal Justice Reform (November 2019), *EU-Indonesia Human Rights Dialogue: 8 November 2019 – Policy Briefing*. Available at: <http://icjr.or.id/data/wp-content/uploads/2019/11/EU-Indonesia-HR-Dialogue-Policy-brief-PRi-and-ICJR.pdf>

¹⁰ Sander et al. (2019), *The Death Penalty for Drug Offences: Global overview 2019* (London: Harm Reduction International). Available at: <https://www.hri.global/death-penalty-2019>

¹¹ Institute for Criminal Justice Reform (June 2016), ‘Torture remains a part of Criminal Law Enforcement in Indonesia’. Available at: <https://icjr.or.id/torture-remains-a-part-of-criminal-law-enforcement-in-indonesia/>

¹² Law of the Republic of Indonesia No. 8 of 1981 concerning the Law of Criminal Procedure, Articles 24-29. Available at: https://www.unodc.org/res/cld/document/idn/law_number_8_year_1981_concerning_the_criminal_procedure_html/I.2_Criminal_Procedure.pdf

Issue 5

While individuals arrested for other crimes can be held upon arrest for 24 hours only, persons arrested for drug-related offences can be held for a total of 72 hours (3 x 24 hours), which can be further extended for another 72 hours.¹³ Legal aid lawyers report that it is rare for persons arrested for drug-related offences to get bail.

Issue 6

Despite repeated calls by civil society as well as international mechanisms, Indonesia has not criminalised torture under its domestic law – although obliged to do so under the Convention Against Torture (CAT) of which the country is a signatory. Indonesia has not signed the CAT Optional Protocol. A culture of violence within the police is routinely denounced, together with a lack of effective oversight and complaint mechanisms

Torture and ill-treatment are routinely reported against people imprisoned for drug-related offences in Indonesia, both at the pre-trial stage – often with the aim of eliciting confessions - and after conviction.¹⁴ In 2015, a person accused of drug trafficking was kicked and beaten by police officers seeking a confession, until death. A judicial investigation found the officers responsible for his death and imposed a three years' sentence, while no reparations for the victim's family nor further investigations were decided.¹⁵

A 2012 study by LBH Masyarakat focusing on individuals imprisoned for drug offences found that 79% of interviewees experienced abuse in the arrest phase; while 86.6% (336 persons) reported torture and ill-treatment in detention.¹⁶

Research on the implementation of the rights to fair trial on death penalty cases in Indonesia conducted by ICJR has confirmed that a number of individuals tried for drug-related offences, and witnesses in the cases, experienced torture as well as inhuman and degrading treatment during police interrogation.¹⁷ At least eight defendants and nine witnesses in drug-related cases were forced by police officers to confess and provide incriminating statements through physical violence and psychological abuse.

Torture and ill-treatment towards defendants and witnesses in the investigation phase are enabled by a lack of fair trial rights. For instance, the right to legal counsel is only guaranteed when the defendant faces more than fifteen years' imprisonment or death penalty;¹⁸ while many defendants only have access to a lawyer at the trial stages, while they are left unassisted in the investigation stage, when they are particularly vulnerable to ill-treatment and torture.¹⁹

Monitoring and reporting procedure are also unsatisfactory.²⁰ Acts of alleged ill-treatment or torture by police officers are to be reported to the police itself – which perpetuates impunity and prevents many from reporting for fear of repercussions. When defendants or witnesses claim at trial that they were subject to during at the investigation stage, in many cases the

¹³ LBH Masyarakat (2012), *Reality Behind Bars: A Brief Report on Documentation of Human Rights Violations of Drug Suspects at the Investigation Stage in Jakarta*. Available at: <https://lbhmasyarakat.org/wp-content/uploads/2016/04/Reality-Behind-Bars.pdf>

¹⁴ Among others, see Asian Human Rights Commission, 'Indonesia: Torture occurs repeatedly as perpetrators enjoy impunity' (Press Release, 23 June 2017). Available at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-060-2017/>

¹⁵ Asian Human Rights Commission, 'Indonesia: Light punishment for four police officers who tortured to death a victim' (Press Release, 1 March 2016). Available at: <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-014-2016/?searchterm=>

¹⁶ LBH Masyarakat (2012), *Reality Behind Bars: : A Brief Report on Documentation of Human Rights Violations of Drug Suspects at the Investigation Stage in Jakarta*

¹⁷ Zainal Abidin et. al. (2019), *Menyelidik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia* (Jakarta: Institute for Criminal Justice Reform), 165-169. Available at: <http://icjr.or.id/data/wp-content/uploads/2019/01/Menyelidik-Keadilan-Yang-Rentan.pdf>

¹⁸ Law of the Republic of Indonesia No. 8 of 1981 concerning the Law of Criminal Procedure, Article 56

¹⁹ Sander et al. (2019), *The Death Penalty for Drug Offences: Global overview 2019* (London: Harm Reduction International).

²⁰ Institute for Criminal Justice Reform (June 2016), 'Torture remains a part of Criminal Law Enforcement in Indonesia

judges do not order a separate investigation, but rather merely interrogate the police officers involved. If no physical evidence is available (maybe because the signs of the ill-treatment disappeared and were not recorded in time) the claim is dropped. There is no specific provision under the Criminal Procedure Law requiring judges to rule out evidence illegally obtained.²¹

Issue 7

Indonesia operates compulsory drug detention centres, with the latest available data indicating that in 2017 over 18,000 people were detained.²²

Narcotics Law 35/2009 and the Criminal Procedure Code envisage compulsory drug detention and rehabilitation (“medical rehabilitation and social rehabilitation”) for people (1) convicted of drug use, (2) self-reporting to the authorities as drug users (compulsory since 2011), or (3) reported by their families.²³ No distinction is made between drug use and drug dependence.

Other technical provisions regulating drug treatment are:

- a. Circular Letter of Supreme Court Number 3/2011
- b. Joint Decree of the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Minister of Health, the Minister of Social Affairs, the Attorney General, the Chief of Indonesia National Police Agency, and the Head of National Narcotics Board Number 01/PB/MA/III/2014 a.k.a. Number 03/2014 a.k.a. Number 11/2014 a.k.a. Number 3/2014 a.k.a. Number PER-005/A/JA/03/2014 a.k.a. Number 1/2014 a.k.a. Number PERBER/01/III/2014/BNN
- c. Regulation by the Head of National Narcotics Board Number 11/2014
- d. Attorney General Rule Number PER-29/A/JA/12/2015
- e. Circular Letter of the Criminal Division of the Indonesia National Police Agency Number SE/01/II/2018/Bareskrim

According to these regulations, there are several factors that should be considered in order to admit people who use drugs into a drug treatment centre: (a) the amount of drug possessed; (b) urine testing; and (c) the result of medical and psychological assessment to be performed by a team consisting of medical staff, psychologist, and legal staff. The team will decide whether the accused should be hospitalised (in case of medical/psychological conditions emerged), admitted into drug treatment centres, or receive treatment in detention centres (depending on whether the amount of drug possessed is above or below certain thresholds). Also, a 2016 report by the Indonesian Network of People Who Use Drugs (PKNI) found that in many cases police investigators fail to arrange for such assessment, unless this is specifically requested by the family or non-governmental organisations. In these cases, the cost of the assessment and other costs will be borne by the family.²⁴

Compulsory drug rehabilitation is a core strategy of the National Narcotics Board (BNN), with support from the Government; BNN pledged to ‘rehabilitate’ 100,000 drug users in 2015, aiming to double these numbers every year.²⁵ Accordingly, the BNN also pushes families to report people who use drugs to the authorities.²⁶

²¹ Zainal Abidin et. al. (2019), *Menyelidik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia* (Jakarta: Institute for Criminal Justice Reform)

²² Unpublished research. Source available with the submitting organisations and available upon request

²³ Law of the Republic of Indonesia No. 35 of 2009 on Narcotics, Articles 54, 103 and 127; Law of the Republic of Indonesia No. 8 of 1981 concerning the Law of Criminal Procedure, Article 21(4)b

²⁴ Persaudaraan Korban Napza Indonesia (2016), *The War on Drugs in Indonesia*. Translated version with HRI and available upon request;

²⁵ Claudia Stoicescu (12 July 2015), ‘Forced Rehabilitation of Drug Users in Indonesia Not a Solution’, *The Conversation*. Available at: <https://theconversation.com/forced-rehabilitation-of-drug-users-in-indonesia-not-a-solution-43184>

²⁶ Republika (23 May 2015), ‘BNN: Drug Addicts Must Have Rehabilitation’, <https://www.republika.co.id/berita/nasional/hukum/15/05/23/norwnd-bnn-pecandu-narkoba-wajib-jalani-rehabilitasi>

Compulsory drug detention is clearly recognised by international human rights mechanisms as a form of arbitrary detention. ‘Treatment’ in compulsory centres is abstinence-based and essential medicines – such as methadone and antiretroviral treatment – are often missing or withheld.²⁷ In addition, inhuman and degrading treatment was reported in these centres, in the form of “forced urine testing, corruption, extortion, intimidation, and confidentiality breaches”. Physical and verbal abuse – although not widespread – have also been reported, often as part of ‘treatment’.²⁸

Drug rehabilitation centres also operate within prisons and police and military training academies – against international human rights standards.²⁹

Issue 8

Dozens of private rehabilitation centres operate in Indonesia, with sources reporting over 400 public and private centres.³⁰ Most centres charge a fee, and are in some cases very expensive.³¹

Although little information exists on these centres, non-governmental actors report varying degrees of quality of the infrastructures and the treatment provided. Most centres are focused on abstinence and impose non-evidence based forms of treatment which are often degrading, including “magic, prayer, beatings, and shackling drug users in cages with a ball and chain.”³²

Issues 9 - 11

No drug courts nor specialised criminal courts for drug offences operate in Indonesia. Military courts have jurisdiction on drug offences if the defendants are military personnel.

Issue 14

No Needle and Syringe Programs, condoms distribution, nor distribution on naloxone are available in Indonesian prisons. Antiretroviral treatment is provided, and Opioid Agonist Therapy was reported in 11 prisons in 2018.³³ In many cases, prisoner who were enrolled in an OAT programme outside of prison access methadone only through their family members or lawyers.

Issue 15

Juveniles are detained for drug offences in Indonesia – although in detention centres specialised for minors, and with a shorter sentence than adults. Law Number 11/2012 on Juvenile Justice System prescribes that pre-trial detention of juveniles can last for maximum 25 days, while detention during trial is permitted for up to 85 days in total (from the first stage until cassation stage).³⁴ A problematic aspect is that juveniles can be detained in Centres of Social Rehabilitation for Children Needing Special Protection, and this detention will not be counted, as these are not regular detention centres. As a consequence, the length of pre-trial detention or detention during trial may in practice be longer than prescribed by Law 11/2012.

²⁷ Wyria and Misero (2016), *The Trip to Nobody Knows Where* (Jakarta: LBH Masyarakat), 33. Available at <https://lbhmasyarakat.org/en/the-trip-to-nobody-knows-where/>

²⁸ *Ibid.*, 59

²⁹ Claudia Stoicescu (12 July 2015), ‘Forced Rehabilitation of Drug Users in Indonesia Not a Solution’, *The Conversation*

³⁰ Slank (25 March 2015), ‘Free Drug Rehabilitation Registration and Reporting Places’, available at <http://slank.com/2015/03/25/tempat-pendaftaran-pelaporan-rehabilitasi-narkoba-gratis/>

³¹ Wyria and Misero (2016), *The Trip to Nobody Knows Where* (Jakarta: LBH Masyarakat), 27

³² <https://theconversation.com/forced-rehabilitation-of-drug-users-in-indonesia-not-a-solution-43184>

³³ Stone and Shirley Beavan (2019), *The Global State of Harm Reduction* (London: Harm Reduction International), 38

³⁴ Law of the Republic of Indonesia No. 11 Of 2012 on Juvenile Justice System, Articles 33-39.