



Reforming criminal justice responses to drugs

Drug policies have traditionally sought to achieve a 'drug-free world' through crop eradication campaigns, drug seizures and the incarceration of all actors involved in the illicit drug market. This has resulted in law enforcement targeting those at the lowest levels of the drug chain, such as drug couriers, low-level dealers, subsistence farmers engaged in illicit crop cultivation, and people who use drugs. This approach has led to an increase in drug-related violence, corruption, mass incarceration and prison overcrowding, while patterns of drug production, trafficking and consumption have tended to evolve in order to evade law enforcement actions.

According to United Nations estimates, one in five people currently in prison around the world are there because of a drug offence, 83 per cent of whom are imprisoned for possession offences.¹ The criminalisation of people who use drugs has had little effect on the overall prevalence of drug use worldwide,² while it has driven people away from health-based interventions in the community.³

The mass incarceration of low-level drug offenders has led to an overloading of the criminal justice system in many countries – rendering courts unable to tackle serious crime cases. This ten-point plan details how states can effectively and appropriately deal with the issue of drugs through a health and human rights-based approach rather than solely a criminal justice response.

01 Decriminalise

Decriminalisation entails the removal of criminal penalties for offences such as drug use, cultivation and possession of drugs for personal use, and possession of drug use paraphernalia, such as needles and syringes, crack pipes, etc. These offences can then be dealt with through a variety of approaches, including: referrals to health and social services, imposing administrative sanctions against people who use drugs (provided such sanctions are less severe punishment than those imposed under criminalisation), or removing all sanctions. Drug trafficking offences usually remain criminalised. When implemented in line with harm reduction principles, decriminalisation can provide a supporting and enabling legal framework within which people who use drugs can access health interventions without fear of stigma, arrest and detention.

1. Commission on Crime Prevention and Criminal Justice, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice*, 2014, E/CN.15/2014/5, https://www.unodc.org/documents/data-and-analysis/statistics/crime/ECN.1520145_EN.pdf <accessed 18 January 2016>.

2. In its 2015 World Drug Report, UNODC declared: 'illicit drug use has in fact remained stable'. See: United Nations Office on Drugs and Crime, *UNODC World Drug Report 2015*, <http://www.unodc.org/wdr2015/> <accessed 18 January 2016>.

3. Count The Costs, *The war on drugs: Threatening public health, spreading disease and death*, April 2013, <http://www.countthecosts.org/sites/default/files/Health-briefing.pdf> <accessed 18 January 2016>.

A number of countries and jurisdictions around the world have removed criminal penalties for people who use drugs.⁴ Decriminalisation is also widely supported by UN agencies and other multilateral bodies.⁵ The key objective is to end the punishment and stigmatisation of people who use drugs, and to provide an enabling and supportive environment for the provision of harm reduction,⁶ drug dependence treatment, and other health and social services that people who use drugs may need. In Portugal, for example, the government decriminalised drugs in 2001, applying a range of administrative sanctions and alternative measures instead while also re-investing resources into health and treatment services. As a result, prison overcrowding has significantly dropped, the number of new HIV infections among people who use drugs decreased from 907 cases in 2000 to 79 in 2012, and the number of drug overdose deaths in Portugal is now the second lowest in the European Union.⁷

Similarly, the criminalisation of subsistence farmers involved in the cultivation of crops destined for the illicit drug market has led to significant harm. Forced crop eradication campaigns have often had no other effect than to push farmers into new regions and further into poverty.⁸ Their continued punishment constitutes a breach of international human rights law, in particular social and economic rights,⁹ and a significant barrier to development.¹⁰

It should be noted that decriminalisation differs from legalisation, which is a process by which all drug-related behaviours (use, possession, cultivation, trade, etc.) become legal activities, although they may still be subject to regulation.

02 Modernise drug law enforcement strategies

As the 'war on drugs' approach has failed to reduce drug markets, and has exacerbated drug-related harms, a new approach should be adopted to target the most harmful aspects of the illicit market (eg. high-level and violent criminals, those involved in corruption and money laundering), rather than attempting to suppress all drug trafficking, production and use.¹¹ Drug law enforcement should also prioritise partnerships with health and social authorities to ensure that people who use drugs are referred to the services that they need. Finally, instead of seeking to reduce the overall scale of the illicit market, drug law enforcement should aim to reduce violence via community policing and stronger actions on arms trafficking and the availability of weapons.¹² This approach entails the development of a new set of indicators to measure the performance of law enforcement activities around reducing drug-related crime and violence, and improving health and social outcomes.¹³

4. Fox E, Eastwood N and Rosmarin A, *A quiet revolution: Drug decriminalisation policies in practice across the globe*, Version 2, 2016, <http://www.release.org.uk/publications/policy-papers> <accessed 18 January 2016>.
5. These include UN AIDS, the World Health Organization, UN Development Programme, UN High Commissioner for Human Rights, UN Women, and the Organization of American States.
6. Harm reduction can be defined as policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of legal and illegal psychoactive drugs without necessarily reducing drug consumption. See: Harm Reduction International, *What is harm reduction? A position statement from the International Harm Reduction Association*, 2010, <http://www.ihra.net/what-is-harm-reduction> <accessed 2 March 2016>.
7. Institute for Drugs and Drug Addiction, *2013 National Report to the EMCDDA: 'Portugal' – New developments, trends and in-depth information on selected issues*, May 2014, p84, <http://www.emcdda.europa.eu/html.cfm/index228487EN.html> <accessed 2 March 2016>.
8. UN Development Programme, *Addressing the development dimensions of drug policy*, p14, June 2015, <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/addressing-the-development-dimensions-of-drug-policy.html> <accessed 18 January 2016>.
9. For example the eradication of crops leaving many farmers with no means of subsistence, the destruction of land, food crops and water supplies due to aerial spraying, or the denial of the rights of Indigenous groups to use controlled substances for traditional and religious purposes.
10. International Drug Policy Consortium, *IDPC Drug Policy Guide*, 3rd edition, London, 2016.
11. Felbab-Brown V, *Modernising Drug Law Enforcement: Report 2: Focused deterrence, selective targeting, drug trafficking and organised crime: Concepts and practicalities*, International Drug Policy Consortium, February 2013, http://dl.dropbox.com/u/64663568/library/MDLE-report-2_Focused-deterrence.pdf <accessed 16 February 2016>.
12. See, for example: US Department of Justice, *Reducing gun violence: The Boston Gun Project's Operation Ceasefire*, Research report, 2001, <https://www.ncjrs.gov/pdffiles1/nij/188741.pdf> <accessed 18 January 2016>; and Heller S B, Shah A K, Guryan J, Ludwig J, Mullainathan S and Pollack H A, 'Thinking, fast and slow? Some field experiments to reduce crime and dropout in Chicago', *NBER Working Paper*, 2015, <http://www.nber.org/papers/w21178> <accessed 18 January 2016>.
13. International Drug Policy Consortium, *IDPC Drug Policy Guide*, 3rd edition, London, 2016.

03 Ensure due process, including fair trials

Drug control efforts have sometimes been associated with lack of due process, including lack of a fair trial. In some places, people accused of drug offences can be held in pre-trial detention for months, sometimes years. In Mexico or Bolivia, pre-trial detention is mandatory for drug offences, whether the offence is serious or of a minor nature. In Bolivia, the percentage of people held in pre-trial detention for a drug-related offence is an alarming 67 per cent.¹⁴ The overuse of pre-trial detention has contributed to prison overcrowding and violations of human rights as people are held without trial for lengthy periods of time. Pre-trial detention should only be used as a last resort, and only where there is sufficient evidence to deem it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses, or posing a clear and serious risk to others. Pre-trial detention should be avoided particularly for pregnant women and women with children, as their incarceration can have a significant impact on their family, especially when they are the sole care provider for their children.

At trial, the offer of a reduced sentence if suspects plead guilty¹⁵ risks encouraging innocent but poor defendants (such as many people who use drugs, low-level dealers or drug couriers) to plead guilty if they cannot afford legal counsel. It is therefore important that drug offenders should be offered legal aid to ensure that they know their rights and take informed decisions throughout their trial. Any defendant who does not speak the language(s) of the court should have access to translation and interpretation. This is particularly important for foreign nationals (such as drug couriers), and for Indigenous groups.

04 Adopt proportionate sentences

Proportionality of sentencing requires that the severity of any punishment be measured in accordance with the harms caused by an offender's actions, taking into account a wide range of factors and the culpability and circumstances of the offender. Disproportionate sentences for drug offences are commonplace, ranging from lengthy prison terms to the death penalty (see below) and are often harsher than for other offences that cause far more harm, such as murder and rape.¹⁶ Sentences are often determined only on the basis of the quantity of drugs involved, and in line with mandatory minimum sentences laid down by national law, without taking into account other critical factors.

When imposing a sentence against a drug offender, judges should take into account the level of an offender's engagement in the drug trade and their motivations. For example, drug couriers should have significantly lower sentences than drug kingpins, and someone coerced or threatened into drug trafficking should receive greater leniency than someone doing so of their own volition. As with all sentences, a set of mitigating and aggravating factors should be taken into account – such as whether it is a first-time offence and whether the offender was involved in organised crime or violence. The socio-economic circumstances of the offender¹⁷ and whether he/she is the sole or primary carer for children and/or other dependents¹⁸ should also be taken into account. Mandatory minimum penalties should be eliminated to ensure that judges are able to offer a fair and adequate sentence, taking due account of all circumstances in each case.

14. Washington Office on Latin America, *Systems overload: Drug laws and prisons in Latin America*, December 2010, http://www.wola.org/publications/systems_overload_drug_laws_and_prisons_in_latin_america_0 <accessed 18 January 2016>.

15. This is often the case in regions including Latin America, where a prison sentence can be significantly reduced if a person pleads guilty.

16. Guzman D et al, *Addicted to punishment: Disproportionality of drug laws in Latin America*, 2012, <http://www.dejusticia.org/#!/actividad/1391> <accessed 18 January 2016>.

17. Giacomello G, *IDPC Briefing Paper – Women, drug offenses and penitentiary systems in Latin America*, International Drug Policy Consortium, 2013, <http://idpc.net/publications/2013/11/idpc-briefing-paper-women-drug-offenses-and-penitentiary-systems-in-latin-america> <accessed 18 January 2016>.

18. *UN Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders (the Bangkok Rules)*, Rules 58 and 61, <https://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf> <accessed 18 January 2016>.

05 Adopt alternatives to incarceration

Sentences for drug offences should not just involve prison terms: non-custodial sentences should be promoted. Alternatives to incarceration should be widely used, especially for minor, non-violent offences, whether drug-related or committed by individuals in the context of drug dependency. This is part of a broader approach which considers drug use as a health issue, and not one that can be effectively tackled through incarceration. For all minor, non-violent drug offences, incarceration should only be used as a last resort.

Such alternatives can be implemented before or after arrest (generally by the police), or prior to, at the time of, or after sentencing (usually by prosecutors or judges). Alternatives may include voluntary treatment for offenders found to be dependent on drugs, as well as community service and referrals to harm reduction services or other health services and social support (eg. social skills, education, employment and training).¹⁹

06 End the death penalty for drug offences

In international law, the death penalty is prohibited for all but the 'most serious crimes'. International human rights bodies have repeatedly emphasised that the 'most serious crimes' are limited to intentional killing only: in 2015, the UN Special Rapporteurs on Torture and on Extrajudicial Executions said that '[e]xecutions for drug crimes amount to a violation of international law and are unlawful killings'.²⁰ In 2005, the Human Rights Committee (the body of independent experts overseeing the International Covenant on Civil and Political Rights) explicitly stated that drug-related crimes are not the most serious and cannot receive the death penalty.²¹ The International Narcotics Control Board (INCB) has also encouraged UN member states to refrain from imposing the death penalty for drug offences and to consider abolishing it,²² while the Executive Director of the UN Office on Drugs and Crime (UNODC), Yury Fedotov, has expressed his organisation's opposition to the death penalty in all circumstances.²³

Nevertheless, 33 countries retain the death penalty for drug offences, and despite the general global trend away from using the death penalty, the number permitting it for drug offences has risen since the 1980s.²⁴

Existing death sentences for drug offences should immediately be commuted to a sentence commensurate with the severity of the offence. In all cases (including appeals) that involve a potential death sentence, legal aid must be provided, as stated in Principle 3 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

19. For examples of effective alternatives to incarceration, see Chapter 3.4 of: International Drug Policy Consortium, *IDPC Drug Policy Guide*, 3rd edition, London, 2016.

20. UN OHCHR, 'Using the death penalty to fight drug crimes violates international law, UN rights experts warn World Day Against the Death Penalty – Saturday 10 October', *OHCHR website*, 10 October 2015 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16581&LangID=E> <accessed 18 January 2016>.

21. UN Human Rights Committee, 84th Session, *Concluding Observations of the Human Rights Committee: Thailand*, 27 July 2000, CCPR/CO/84/THA, para. 14.

22. International Narcotics Control Board, *Report of the International Narcotics Control Board for 2014*, 2015, piii, <http://www.incb.org/incb/en/publications/annual-reports/annual-report-2014.html> <accessed 18 January 2016>.

23. UNODC, 'Statement of the UNODC Executive Director Yury Fedotov on the use of the death penalty in Indonesia', *UNODC website*, 29 April 2015, <https://www.unodc.org/unodc/en/press/releases/2015/April/statement-of-the-unodc-executive-director-yury-fedotov-on-the-use-of-the-death-penalty-in-indonesia.html> <accessed 2 March 2016>.

24. World Coalition Against the Death Penalty, *Death Penalty and Drug Crimes: Detailed Factsheet*, 2015, p1.

07 Provide health-focused services in prison

Under the principle of equivalency of care, prisoners have the same right to health as those living outside prisons, including access to treatment and harm reduction measures. The revised Standard Minimum Rules for the Treatment of Prisoners (Rules 24-35) make it clear that the provision of healthcare to prisoners is a state responsibility and should be organised in close relationship with the general public health administration, which in practice is best achieved if managed by the Ministry of Health. The provision of healthcare in prison should be provided without discrimination, include mental health services, and be governed by the same ethical principles of medical ethics as in the community.

Prisoners who use drugs should be permitted access to evidence-based and, when relevant, gender-sensitive healthcare and harm reduction measures to reduce risks of transmission of infections such as HIV, hepatitis and tuberculosis, all of which are much more prevalent in prison than in the community.²⁵ UNODC, the International Labour Organization (ILO) and the United Nations Development Programme (UNDP) have identified a 'comprehensive package' of 15 key interventions that should be implemented in prison settings.²⁶ Overdose prevention and management advice is also essential, in particular upon release.²⁷

Evidence-based treatment for drug dependence should be offered to all of those in need, and should include a range of options such as substitution therapy, psychosocial and mutual aid approaches. It is important to note that not all drug use is dependency and, as with all medical procedures inside and outside of prisons, drug dependence treatment should be voluntary and confidential. Furthermore, failure to complete the programme should not lead to further sanctions.

08 Support post-release social reintegration

Upon release from prison, individuals may find it difficult to reintegrate into society. Inter-institutional networks of health and social services should be established to facilitate former prisoners' reintegration into society. Barriers to reintegration should be eliminated.

In addition, estimates show that globally, approximately one in three people detained have used drugs at least once while in prison.²⁸ Evidence also shows that the prevalence of HIV, hepatitis B and C, sexually transmitted infections and tuberculosis are significantly higher in prison than among the general population.²⁹ It is therefore critical that effective links with community-based services are established to ensure continuity of care – both following entry in prison, and post-release – so that the benefits of treatment started before or during imprisonment are retained.

25. Sanders G, 'Preventing infectious diseases in prisons: A public health and human rights imperative', *Penal Reform International blog*, 2015 www.penalreform.org/blog <accessed 2 March 2016>; WHO Europe, UN Office on Drugs and Crime, International Committee of the Red Cross, Pompidou Group, Council of Europe & Schweizerische Eidgenossenschaft, *Prisons and health*, 2014.

26. UNODC, ILO and UNDP, *Policy brief: HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions*, July 2012, http://www.unodc.org/documents/hiv-aids/HIV_prisons_advance_copy_july_2012_leaflet_UNODC_ILO_UNDP_Ebook.pdf <accessed 2 March 2016>.

27. See, for example: WHO, *Prevention of acute drug-related mortality in prison populations during the immediate post-release period*, World Health Organization Regional Office for Europe, Copenhagen, 2010.

28. UN Office on Drugs and Crime, *UNODC World Drug Report 2015*, Chapter 1, p4, referencing several studies, <http://www.unodc.org/wdr2015/> <accessed 18 January 2016>.

29. UN Office on Drugs and Crime, 'Publications related to HIV in prison settings', *UNODC website*, https://www.unodc.org/unodc/en/hiv-aids/new/publications_prisons.html <accessed 18 January 2016>.

09

Close down compulsory detention centres for drug users

In Asia and Latin America, several governments have introduced compulsory detention centres that rely on coercion, ill-treatment, denial of healthcare and forced labour, as a form of ‘treatment’ for drug dependence.³⁰ These centres are generally run by the police and the military instead of health authorities, and people are sent to these centres for several months or sometimes years, without due process or judicial oversight.

In 2012, 12 UN agencies called for the closure of these centres because they violate international human rights standards and are ineffective at reducing drug use or drug-related harm.³¹ There is an urgent need for compulsory detention centres to be shut down.

10

Adopt a gender-sensitive approach

Although women constitute a minority of prisoners worldwide, the proportion of women incarcerated for drug offences far exceeds that of men. Up to 70 per cent of sentenced women have been convicted of drug-related offences, compared to 21 per cent in the (overwhelmingly male) prison population overall.³² This trend has been attributed to the greater ease with which low-level crimes can be prosecuted, as well as the gender disparities in the ‘war on drugs’.³³

Sentencing practices should take into account the background of female offenders, in particular their typically low-level role and exploitation in the drug trade, possible coercion by male partners, as well as caretaking responsibilities and gender inequalities in access to education and employment. Alternatives to incarceration should also be tailored to adequately respond to the specific needs of women.³⁴

In prison, healthcare services, including drug dependence treatment and harm reduction programmes, need to be offered on an equal basis to men and women and not be available only in male prisons. The services provided should be gender-sensitive and take into account the backgrounds of women prisoners in line with both the UN Bangkok Rules and recommendations of the UN Committee on the Elimination of Discrimination against Women.³⁵ This includes consideration of the high rate at which women offenders have been victims of domestic and sexual violence prior to arrest,³⁶ the high prevalence of mental health problems, and the special needs of pregnant women and women with children. With regard to HIV, Bangkok Rule 14 recommends programmes ‘responsive to the specific needs of women, including prevention of mother-to-child transmission’, encouraging ‘the development of initiatives on HIV prevention, treatment and care, such as peer-based education’.

30. Open Society Foundations, *Treated with cruelty: Abuses in the name of drug rehabilitation*, 2011 <https://www.opensocietyfoundations.org/publications/treated-cruelty-abuses-name-rehabilitation> <accessed 18 January 2016>.

31. ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UNWOMEN, WFP, WHO and UNAIDS, *Joint statement: Compulsory drug detention and rehabilitation centres*, March 2012, http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/JC2310_Joint%20Statement6March12FINAL_en.pdf <accessed 12 February 2016>.

32. UNODC, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice*, 12 February 2014, E/CN.15/2014/5, para. 29; for background on women’s drug dependency issues and a compilation of statistics, see: Penal Reform International, *Women in criminal justice systems and the added value of the UN Bangkok Rules*, 2015, p6 and pp7- 8.

33. Report to the UN General Assembly by Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, *Pathways to, conditions and consequences of incarceration for women*, 21 August 2013, UN-Doc. A/68/340, para. 26. <http://www.ohchr.org/Documents/Issues/Women/A-68-340.pdf>. <accessed 18 January 2015>.

34. Washington Office on Latin America, International Drug Policy Consortium, DeJusticia, Inter-American Commission on Women, *Women, drug policy and incarceration: A policymaker’s guide for adopting, reviewing and implementing reforms related to women incarcerated for drug offenses*, 2016, http://www.wola.org/commentary/women_drug_policies_and_incarceration_in_the_americas <accessed 18 January 2015>.

35. UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined fourth and fifth periodic reports of Georgia*, 24 July 2014, CEDAW/GEO/CO/4-5, para. 31(e).

36. Penal Reform International, *Women in criminal justice systems and the added value of the UN Bangkok Rules*, 2015, pp5-6; Special Rapporteur on violence against women, *Pathways to, conditions and consequences of incarceration for women*, 21 August 2013, A/68/340; UN Office on Drugs and Crime, *Handbook for prison managers and policymakers on women and imprisonment*, 2nd edition, 2014, pp8-10, <http://www.ohchr.org/Documents/Issues/Women/A-68-340.pdf>. <accessed 18 January 2015>.

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