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Treatment and care for people with drug use disorders in contact with the criminal justice system

Alternatives to Conviction or Punishment

Disclaimer

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Outline

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Introduction

This initiative is developed, *inter alia*, considering resolution 58/5 of the Commission on Narcotic Drugs (CND) entitled "Supporting the collaboration of public health and justice authorities in pursuing alternative measures to conviction or punishment for appropriate drug related offences of a minor nature". The Commission on Narcotic Drugs invited UNODC - in consultation with States and, as appropriate, other relevant international and regional organizations - to "*provide guidelines or tools on the collaboration of justice and health authorities on alternative measures to conviction or punishment for appropriate drug-related offences of a minor nature*".[1]

In response to this, UNODC and the World Health Organization (WHO), launched the initiative "Treatment and Care of People with Drug Use Disorders in Contact with the Criminal Justice System: Alternatives to Conviction or Punishment" at the 59th session of the Commission on Narcotic Drugs in 2016. This initiative aims to enhance the knowledge, understanding, scope and potential for alternative measures to conviction or punishment. In line with the international drug control conventions[2] and other relevant international instruments, including human rights treaties and UN standards and norms in crime prevention and criminal justice,[3] it explores options to divert people with drug use disorders who are in contact with the criminal justice system to treatment.

As part of this initiative, UNODC and WHO developed this publication on treatment of drug use disorders as alternatives to conviction or punishment.

This publication is intended to serve as an introductory reference, outlining the options available to States that are in line with the international drug control conventions and other relevant international instruments. The focus of the publication is on practical information for policy makers and justice,

[1] Resolution 58/5 Supporting the collaboration of public health and justice authorities in pursuing alternative measures to conviction or punishment for appropriate drug related offences of a minor nature.

[2] The three International Drug Control Conventions are the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

[3] These instruments will be mentioned throughout this publication and include for example the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for Non-custodial Measures and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders. For compilations of relevant instruments, see OHCHR, The Core International Human Rights Treaties (2014) and UNODC, Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (2016).

health and other practitioners to identify the scope of the problem in their community, resources that can be used to address it, gaps that need to be filled and practical approaches for moving forward.

This publication aims to provide relevant information to policy makers about the rationale and the existence of a variety of practices for treatment and care for people with drug use disorders who come into contact with the criminal justice system. One of its aims is to help criminal justice actors understand how treatment works and treatment actors how the criminal justice system works. More importantly, it aims to discuss opportunities to bring drug use disorder treatment and criminal justice systems into alignment and to help readers understand the multiple possible perspectives regarding this cooperation.

Because of the different criminal offences, the different nature of drug use disorders, and the variation in legal and health systems in different countries, a complete list of every possible response is not feasible nor the intent of this publication. Its purpose is to outline a framework for developing options for providing treatment and care as an alternative to conviction or punishment that are effective from both security and health perspectives, and in line with the international legal framework and related principles. This document can be read in conjunction with other publications from relevant international organizations, a list of which is included in the additional reading list at the end of this publication.

This publication consists of five chapters.

- Chapter 1 defines the scope of the problem and the reasons to consider the provision of treatment as an alternative to conviction or punishment.
- Chapter 2 discusses the rationale behind promoting treatment alternatives to conviction or punishment within the international legal framework.
- Chapter 3 provides a synopsis of the key elements and evidence-based practices relevant to drug use disorder treatment services, including screening and assessment. An overview of effective treatment interventions for offenders with drug use disorders is also provided.
- Chapter 4 identifies the diversion options to treatment, as an alternative or in addition to conviction or punishment.
- Chapter 5 concludes by stating the main principles of treatment as an alternative to conviction or punishment.

Each chapter includes a section titled "**Take-home messages**", summarizing the key messages of each chapter and actions that could be addressed by everyone interested in setting up alternatives to conviction or punishment.

The scope of this publication has been limited as follows:

1. This publication focuses on persons *with drug use disorders* in contact with the criminal justice system who may benefit from and be eligible for a diversion from the criminal justice system to drug dependence treatment services. As a result, this publication focuses on alternatives to conviction or punishment in which drug treatment is the main component and during which offenders are diverted out of the criminal justice system. Alternatives that do not involve drug use disorder treatment are excluded from this publication. Treatment inside the prison setting is not the main focus of this publication.
2. The inclusion of any particular example of treatment or care within this publication is not intended as an endorsement of specific treatment modalities or practices.
3. This publication focuses on *adults* with drug use disorders in contact with the criminal justice system. It does not deal with children or adolescents (persons under the age of 18), recognizing that international standards and norms require specialized frameworks and age-appropriate approaches for children or adolescents in conflict with the law that prioritize alternative measures to formal judicial proceedings.
4. Although the needs of specific populations (such as persons with co-occurring mental health and drug use disorders, persons with cognitive and intellectual disabilities; racial and ethnic minorities or (pregnant) women) is of key concern, an in-depth discussion is beyond the scope of this publication.
5. *"Drug use"* refers to the use of substances under the control of the international drug control conventions. Alcohol is not included, unless in combination with controlled substances. However, similar principles and approaches as discussed in this publication may apply to offences committed by those under the influence of alcohol or with other substance use disorders permeating the criminal justice system.
6. This publication mainly covers those alternatives with a diversion to treatment of drug use disorders, which provide the individual with a *choice* to opt for treatment. The decision to enter treatment remains with the offender.

Chapter 1. Scope of the problem and reasons to consider the provision of treatment as an alternative to conviction or punishment

1.1 Drug use and drug use disorders

According to the 2017 World Drug Report,[4] around 5 percent of the global adult population had used drugs[5] at least once in 2015. Globally, 11 per cent of them experienced drug *dependence* and could benefit from treatment. There are several variations across countries regarding prevalence and trends in drug use.[6] Cannabis use - the most commonly used drug worldwide - has increased in parts of North and South America, while its use is declining or stabilizing in parts of Europe. The use of amphetamines, particularly methamphetamine, is increasing in North America, Oceania and most parts of Asia. The use of MDMA ("ecstasy") remains high in Oceania -in particular in Australia and New Zealand-, Europe and North America and its use is increasing in Western and Central Europe. High-prevalence figures of cocaine are found in North America, Western and Central Europe and Oceania. Opioid use remains a concern in many countries, particularly in North America, where, combined with an increase in fentanyl use, it has resulted in an increase in morbidity and mortality related to opioids. There are also indications of a recent increase in heroin use in parts of Western and Central Europe. Compared with drug use among men, overall cannabis, cocaine and amphetamines use remains low among women. By contrast, women are more likely than men to use prescription drugs, particularly prescription opioids and tranquillizers.[7] In 2015, opioids and cannabis are the primary drugs of use among people in treatment[8]. Data on the number of people seeking treatment for the first time, show an increasing trend in opioid related disorders, in North and South America, as well as in Eastern and South-Eastern Europe, where nearly a third of people in treatment for opioid use disorders were first-time treatment seekers. Accounting for more than half of those treated, the proportion of people

[4] UNODC, World Drug Report, Booklet 2, 2017

[5] Substances under control under the international drug control conventions

[6] UNODC, World Drug Report, Booklet 2, 2017

[7] UNODC, World Drug Report, Booklet 2, 2017

[8] Treatment ranges from brief interventions in an outpatient setting, to a more comprehensive treatment plan involving the treatment of other co-morbidities in an outpatient or inpatient setting (World Drug Report, 2017)

seeking treatment for cannabis use disorders for the first time, remains high at the global level.[9] In general, women account for only one out of five people in treatment for drug use disorders even though one in three persons using drugs would be a woman.

Almost 12 million people worldwide inject drugs, of whom one in eight (1.6 million) are living with HIV and more than half (6.1 million) are living with hepatitis C.[10] Moreover, studies have found that people who inject stimulants engage more in high-risk sexual behaviour, resulting in a higher risk of HIV infection than for those injecting opiates[11]. In 2015, drug use disorders account for 17 million years of healthy life lost worldwide, due to premature death and disability.[12] This is especially related to opioid use disorders although large increases would also be attributed to disorders resulting from using amphetamines and cocaine.[13]

1.2 Balancing criminal justice and health care responses to drug use

While a range of effective treatment options have been described for drug use disorders, the coverage of treatment at a global level is low. According to UNODC estimates[14] only 1 in 6 people in need of treatment has access to it and it is estimated that in many countries, less than 10% of people with drug use disorders are receiving treatment[15].

Globally, an estimated one in three prisoners have used an illicit substance at some point while incarcerated (median lifetime prevalence of 32.6 per cent, based on data from 32 studies), with 20.0 per cent reporting use in the past year (median past-year prevalence from 45 studies) and 16.0 per cent reporting current use (median past-month prevalence from 17 studies)[16]. People with drug use disorders are estimated to account for more a high proportion of the prison population in many countries. While criminal sanctions no doubt deter some people from drug use, those with more severe drug use disorders are relatively insensitive to the threat of criminal sanctions, and higher incarceration rates have not led to reduced drug use in the community. At the same time, incarceration has severe negative consequences for people with drug use disorders, their families and their

[9] World Drug Report, 2017
[10] UNODC, World Drug Report, Booklet 2, 2017
[11] UNODC, World Drug Report, 2016.
[12] UNODC, World Drug Report, Booklet 2, 2017
[13] UNODC, World Drug Report, Booklet 2, 2017
[14] United Nations Office on Drugs and Crime (UNODC). World Drug Report 2015. https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf
[15] http://www.who.int/substance_abuse/publications/Media/en/
[16] UNODC World Drug Report, 2017

communities, and can worsen the underlying health and social conditions that are associated with drug use. More and more, States are looking for ways to increase the number of people who are receiving effective treatment for drug use disorders, and to reduce the number of those who are incarcerated.

When a person with a drug use disorder comes into contact with the criminal justice system, it is an opportunity to encourage that person to receive appropriate treatment. This can be done either by simply facilitating a referral to treatment, or by a process of interaction between the criminal justice system and the health care system whereby the person with a drug use disorder is given an opportunity to receive treatment and the criminal justice system actions vary depending on whether the person with a drug use disorder takes up the treatment option or not as well as the reasons for which the person with the drug use disorder came into contact with the criminal justice system.

The process of facilitating treatment as an alternative to conviction or punishment (or as an addition to conviction or punishment) is foreseen in the international drug control conventions, although it is not universally applied.

1.3 Prison population and prison overcrowding

People who use drugs often continue to do so while incarcerated, and other prisoners may initiate drug use or injecting while in prison[17].

The size of the prison population throughout the world is growing, placing an enormous financial burden on governments and at a great cost to the social cohesion of societies. It is estimated that more than 10.3 million people, including sentenced and pre-trial prisoners, were held in penal institutions worldwide in October 2015.[18] This means that 144 out of every 100,000 people of the world were in prison at that time.[19] Prison populations grew in 54 per cent of countries and territories between 2013 and 2015.[20] Since about the year 2000 the world prison population total has grown by almost 20%.

[17] World Drug Report, 2017

[18] World Prison Population List, Eleventh Edition, International Centre for Prison Studies (http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf)

[19] Ibid.

[20] Ibid. and World Prison Population List, Tenth Edition, International Centre for Prison Studies (http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf)

Although women only constitute 6.8 per cent of the world's prisoners, the female prison population has increased by 50% since 2000, while the equivalent figure for the male prison population is 18%.[21]

Imprisonment rates[22] vary considerably between different regions of the world and between different parts of the same region. For example, the median rate for western African countries is 52 whereas for southern African countries it is 188; the median rate for south American countries is 242, and for Caribbean countries it is 347; for south central Asian countries (mainly the Indian subcontinent) it is 74, whereas for central Asian countries it is 166; for western European countries, it is 84 and for countries spanning Europe and Asia it is 236. In Oceania, the median rate is 155.[23]

Numerous studies have shown that drug use including injecting drug use is highly prevalent in many prisons, with the sharing of needles and syringes commonplace. Unsafe injecting practices in prison, where rates of HIV are high, place people who inject drugs at an increased risk of HIV through the use of contaminated needles and syringes[24]. Globally, an estimated 2.8 per cent (2.05 per cent to 3.65 per cent) of prisoners have active tuberculosis, with the highest rates in Eastern Europe and Central Asia (4.9 per cent), and East and Southern Africa (5.3 per cent). Compared with the general population, people who use drugs in prison have a higher risk of contracting tuberculosis because of their history of drug use and because they are confined in an environment that puts them at a higher risk of infection[25].

[21] World Prison Population List, Eleventh Edition, International Centre for Prison Studies (http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf)

[22] The imprisonment rates refers to the number of prisoners per 100,000 of the general population. See also: http://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

[23] Ibid.

[24] World Drug Report, 2017

[25] World Drug Report, 2017

1.4 Rationale for treatment as an alternative to conviction or punishment

1.4.1 RATIONALE 1 : Many people with drug use disorders are in contact with the criminal justice system and many people in the criminal justice system have a history of drug use and drug use disorders

There is a dynamic relationship between drug use and offending[26]. Because of this relationship, many people with drug use disorders come into contact with the criminal justice system. This publication explores access to treatment for people with drug use disorders in contact with the criminal justice system as an alternative to conviction or punishment, as a component of a comprehensive health and justice response which is in line with good medical practice, which helps to reduce prison overcrowding, thus contributing to public health and public safety in line with international legal and medical standards and tools.

A significant number of drug users have experience with committing crime.[27] Research also reveals that persons in the criminal justice system have higher rates of drug use (disorders) compared to the general population. In general, there are differences across regions, countries and types of drugs and offences committed, but this relationship exists around the globe, [28] both among drug using populations and criminal justice populations at every stage of the criminal justice system.[29]

[26] Hough, M. Drug user treatment within the criminal justice context. Substance use misuse, 2002, 37, 985-996

[27] Best, D., Sidwell, C., Gossop, M., Harris, J., & Strang, J. Crime and expenditure amongst poly drug misusers seeking treatment - the connection between prescribed methadone and crack use, and criminal involvement. British Journal of Criminology, 2001,41, 119-126; Lo, C.C.& Stephans, R.C. Drugs and Prisoners: Treatment Needs on Entering Prison. American Journal of Drug and Alcohol Abuse, 2000, 26, 229-245; Grann, M., & Fazel, S. Substance misuse and violent crime: Swedish population study. British Medical Journal, 2004, 328, 1233-1234.

[28] Bennett, T. & Holloway, K. Drug use and offending: summary results of the first two years of the NEW-ADAM programme. London: Home Office, Research, Development and Statistics Directorate, 2004 ;Simpson, M. The relationship between drug use and crime: a puzzle inside an enigma. International journal of drug policy, 2003, 14, 307-319; Stevens, A. When Two Dark Figures Collide: Evidence and Discourse on Drug-Related Crime, Critical Social Policy, 2007, 27, 77-99

[29] Bennett, T., Holloway, K. & Farrington, D. The statistical association between drug misuse and crime: a meta-analysis. Aggression and violent behavior, 2008, 13, 107-118.

Studies in the United States, Australia, Canada and Europe found that more than 60 percent of the *arrestees*[30] tested positive[31] for at least one drug type at the time of arrest.[32] Additionally, a higher proportion, compared to the general population, of the people on *probation* in the UK and US are using drugs.[33] High rates of drug use have also been found among *prisoners*.[34] Based on data from 74 countries, UNODC estimated that among convicted prisoners, drug-related personal consumption offences account for an estimated 18 per cent of the global prison population.[35] The percentages vary across several countries, but the percentages of criminal justice clients, including prisoners, using drugs are higher than those among the general population.

People with drug use disorders may be involved in different types of offences. They may engage in possession, purchase or cultivation of controlled drugs for non-medical personal consumption, drug supply related offences and other kinds of behavior that States Parties are expected to establish as criminal offences pursuant to the international drug control conventions.[36] They may also engage in offences such as robbery, theft, assault, burglary and more serious crimes that are driven by drug use and drug use disorders as an underlying factor.[37]

According to the typology of Goldstein,[38] relevant offences may be classified as psychopharmacological, economic-compulsive and systemic offences. Psychopharmacological offences are offences

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[30] Suspected offenders arrested by the police.

[31] An urine analysis test usually detects use of controlled drugs (cannabis, opiates, cocaine, amphetamines), benzodiazepines and methadone.

[32] Stevens, A., Berto, D., Kerschl, V., Oeuvray, K., van Ooyen, M., Steffan,E., Heckmann, W. & Uchtenhagen, A. Summary Literature Review: The International Literature on Drugs, Crime and Treatment. Canterbury: European institute of Social Services, University of Kent, 2003; Fitzgerald, J. & Chilvers, M. Multiple drug use among police detainees, Sydney: Contemporary issues in crime and justice, 2002; Bennett, T., & Holloway, K. Drug use and offending: summary results of the first two years of the NEW-ADAM programme. London: Home Office: Research, Development and Statistics Directorate, 2004.

[33] Stevens, A., Berto, D., Kerschl, V., Oeuvray, K., van Ooyen, M., Steffan,E., Heckmann, W. & Uchtenhagen, A. Summary Literature Review: The International Literature on Drugs, Crime and Treatment. Canterbury: European institute of Social Services, University of Kent, 2003

[34] Lo, C.C.& Stephans, R.C. Drugs and Prisoners: Treatment Needs on Entering Prison. American Journal of Drug and Alcohol Abuse, 2000, 26, 229-245.Stevens, A. When Two Dark Figures Collide: Evidence and Discourse on Drug-Related Crime, 2007, Critical Social Policy, 2, 77-99

35 UNODC World Drug report, 2016

[36] It should be noted that the 1988 Drug Control Convention requires State Parties to criminalize the supply of drugs (Article 3(1), 1988 Convention), whereas the requirement to criminalize the possession, purchase or cultivation of drugs for personal consumption is subject to a State Party's constitutional principles and legal system (Article 3(2), 1988 Convention). It should also be noted that drug consumption itself is not among the kinds of behavior that States Parties are expected to establish as criminal offences pursuant to the international drug control conventions.

[37] See A/Conf.213/3, p. 14.

[38] Goldstein, P.J. The drugs/violence nexus: A Tripartite conceptual framework. Journal of Drug Issues, 1985, 15, 493-506.

committed under the influence of drugs,[39] e.g. violent behavior[40] and violent property offences[41]. Economic-compulsive offences are property offences committed to finance drug use. They are mostly associated with the illicit use of controlled drugs and the fear of experiencing withdrawal symptoms by a discontinuation of drug use and often related to homelessness and social exclusion.[42] Research supports this theory,[43] particularly focusing on the link between opiate use and income-generating offences.[44] Systemic offences are offences connected to the negative interactions of the illicit drug market with the actions of supply and demand. These offences are committed in relation to the use, distribution, and supply of drugs.[45] This category includes, among others, theft in relation to a failed deal (about the quality or quantity of the product), rip-off deals, theft of electricity in relation to the start-up of a cannabis plantation or disputes over territory between rival drug dealers, as well as assaults and homicides committed within dealing hierarchies.

Different types of drugs may be linked to several manifestations of offending. For example, economic-compulsive offences are often property offences committed by persons suffering from opioid use

[39] Regarding illicit drugs, different studies have noted the correlation between the psychopharmacological effect of some illicit drugs (cocaine, phencyclidine, amphetamines, including methamphetamines, some hallucinogens, and sedatives) and violent behavior. A study among offenders who have committed violent property indicated that 52.8 percent of the offenders reported being under the influence of illicit drugs at the time of their offence.

[40] Kuhns, J. & Clodfelter, T.. Illicit Drug-Related Psychopharmacological Violence: The current understanding within a causal context. Aggression and Violent Behavior, 2009, 14, 1, 69-78; Patkar, A, Mannelli, P, Peindl, K, Hill, K, Gopalakrishnan, R & Berrettini, W. Relationship of disinhibition and aggression to blunted prolactin response to meta-chlorophenylpiperazine in cocaine-dependent patients. Psychopharmacology, 2006, 185, 123-132; OAS/CICAD. Exploring the relationship between drugs and crime: a comparative analysis of survey data from prisoners in four Caribbean countries. Washington D.C.: Organization of American States, 2012

[41] Indermauer, D. Violent property crime, Sydney: Federation press, 1995

[42] Stevens, A., Berto, D. & Heckmann, W., Kerschl, V., Oeuvray, K., van Ooyen, M., Steffan, E. & Uchtenhagen, A. Quasi-compulsory treatment of drug-dependent offenders: an international literature review. Substance use and misuse, 2005, 40, 3, 269-283; Alberta health Services-Addiction and Mental Health. Challenging assumptions: The association between substance use and criminal behavior. Edmonton: Alberta Health Services, 2009

[43] Gottfredson, D.C., Kearley, B.W. & Bushway, S.D. Substance Use, Drug Treatment, and Crime; an examination of intra-individual variation in a drug court population. Journal of Drug Issues, 2008, 38, 2, 601-630.

[44] A European study indicated that 85 percent of a sample of 221 opiate users in treatment reported that their offences (especially shoplifting, fraud, deception, and drug dealing) were mainly committed to finance their own drug use. Coid, J., Carvell, A., Kittler, Z., Healey, A. & Henderson, J. The impact of methadone treatment on drug misuse and crime. London: Home Office Research, Development and Statistics Directorate Research Finding, 2000. In 2002, 25 percent of convicted property and drug offenders had committed their crimes to finance their drug use. Karberg, J. & James, J. Substance Dependence, Abuse and Treatment of Jail Inmates, 2002, Washington,D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2005. Lastly, a Caribbean studyamong prisoners indicated that 9-33 percent committed the crime, for which they were imprisoned, in order to acquire drugs for their personal use. OAS/CICAD. Exploring the relationship between drugs and crime: a comparative analysis of survey data from prisoners in four Caribbean countries. Washington D.C.: Organization of American States, 2012

[45] Teplin, L.A., McClelland, G.M., Abram, K.M. & Mileusnic, D. Early violent death among delinquent youth: a prospective longitudinal study. Pediatrics, 2005, 115, 1586-1593

disorders. Psychopharmacological offences are mostly violent offences linked to the mild to severe acute intoxication due to use of alcohol, cocaine or amphetamines. [46]

1.4.2 RATIONALE 2: To provide drug dependence treatment (including as an alternative to conviction or punishment) is an effective public health strategy

Drug dependence is considered to be a complex, multifactorial, biopsychosocial brain disease often taking the course of a chronic and relapsing disorder. Several dimensions contribute to the pathogenesis of the addictive process including: (1) repeated exposure to psychoactive drugs which affect brain function, (2) genetic predisposition influencing temperament and personality traits, and (3) adverse life experiences. Each of these factors contributes to long-term changes in brain function that constitute the neurobiological basis for the development of addictive behaviour. Drug use disorders can be described along a clinical continuum from harmful drug use to drug dependence (see Chapter 3).

In general, drug use disorders should be seen as health-care conditions and should be treated in the health-care system. People with drug use disorders need the availability of accessible, affordable and evidence-based drug dependence treatment and care services along a continuum of care[47] including outreach, screening and brief interventions, assessment and treatment planning, psychosocial and pharmacological treatment interventions at the outpatient and inpatient level, and continued support for recovery through rehabilitation and reintegration[48]. Treatment requires the involvement of the health care system and may benefit from the involvement of the larger community and social support systems,[49] and should be conducted with informed consent by professionals who have suitable training and practical experience.[50]

Drug Use Disorders can be effectively treated using a range of pharmacological and psychosocial interventions. The effectiveness of the majority of these interventions has been tested using scientific

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[46] Friedman, A. Substance use/abuse as a predictor to illegal and violent behaviour: a review of the relevant literature. Aggression and violent behaviour, 1998, 3, 339-355; Martin, SE., Maxwell, CD., White, HR and Zhang, Y. Trend in alcohol use, cocaine use and crime: 1989-1998. Journal of drug issues, 2004, 34, 333-359; Markowitz, S. Alcohol, drug and violent crime, International review of law and economics, 2005, 25, 20-44.

[47] UNODC/WHO, *Principles of drug dependence treatment*, 2009, available at: https://www.unodc.org/docs/treatment/Principles_of_Drug_Dependence_Treatment_and_Care.pdf.

[48] UNODC/WHO (2017). International Standards for the Treatment of drug Use Disorders.

[49] Rule 13.4. of the United Nations Standard Minimum Rules for Non-custodial Measures, General Assembly resolution 45/110, annex (the Tokyo Rules).

[50] Rule 13.2. of the Tokyo Rules.

methods developed for the treatment of other medical disorders. Effective treatment approaches will have a positive impact such as helping to a) reduce drug use and cravings for drug use, b) improve health, well-being and social functioning of the affected individual, and c) prevent future harms by decreasing the risk of complications and relapse[51].

1.4.3 RATIONALE 3: Applying alternatives to conviction or punishment (including drug dependence treatment for those in need) is an effective criminal justice strategy[52]

Imprisonment comes at a high cost for individuals, families and the community as a whole, and creates a significant burden on State budgets. The direct costs of imprisonment worldwide, including building and administering prisons as well as housing, feeding and caring for prisoners, is hard to calculate, with past estimates indicating an annual figure of $62,5 USD billion.[53] Moreover, numerous studies have shown the indirect costs of imprisonment and its disproportionate impact on the poor. The loss of income of prisoners affects the economic status of the rest of the family and after release, former prisoners often have no prospects for employment due to their criminal record and are subjected to a cycle of poverty, marginalization, criminality and re-imprisonment.[54] Research from many countries also shows that the imprisonment of mothers has additional negative consequences, as they are more often the sole or primary carer-givers within a family, and that children of imprisoned parents are more likely to come into conflict with the law. [55]

Despite regional variances, prison overcrowding has developed into an acute global challenge. According to a recent UNODC report, as many as 115 countries (or 58 per cent) had a rate of prison occupation above 100 per cent of capacity (overcrowding), 79 (or 40%) had a rate of prison occupation above 120 per cent of capacity (critical overcrowding), and as many as 51 (26%) faced a situation of extreme overcrowding (above 150% of capacity).[56]

Prison overcrowding severely impacts on the quality of nutrition, sanitation, prisoners' activities, physical and mental health conditions and the care available for vulnerable groups, in addition to

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[51] UNODC/WHO (2017). International Standards for the Treatment of drug Use Disorders.
[52] cfr. p. 7-8 of the UNODC Handbook on Strategies to Reduce Overcrowding in Prisons)
[53] Based on 1997 statistics; *see* Farrell, Graham / Clark, Ken (2004): What does the world spend on criminal justice? Paper No. 20 of the European Institute for Crime Prevention and Control (HEUNI), affiliated with the United Nations, p. 20.
[54] UNODC Handbook on Strategies to Reduce Overcrowding in Prisons, p. 15.
[55] *See* UNODC Handbook on Women and Imprisonment (2014), 2nd edition, p. 17; Quaker United Nations Office (2012): Collateral convicts: Children of incarcerated parents.
[56] UNODC report on world crime trends and emerging issues and responses in the field of crime prevention and criminal justice (E/CN.15/2016/10)

generating prisoner tension and violence.[57] Many prisoners do not have access to education, work and other programmes in prison, thus reducing the prospects of assisting them with their rehabilitation. Accordingly, Member States have recognized that overcrowding has become "a global human rights, health and security issue for offenders, their families and their communities".[58]

When alternatives to conviction or punishment are used to replace imprisonment, they contribute directly to the reduction of the prison population. A further advantage of using alternatives to imprisonment is that they can help reduce reoffending, and thereby help reduce the prison population in the long term. Numerous studies have shown that reoffending rates are generally lower in the cases of those sentenced to non-custodial sanctions, in comparison to imprisonment. Further, recidivism itself can lead to a much higher prospect of imprisonment for a second or third offence in some countries, resulting in a self-perpetuating cycle of imprisonment and release.[59]

A 2010 study in the Netherlands confirmed prior research findings that offenders recidivate significantly less after community service than after imprisonment.[60] In the short term as well as in the long term, people sentenced to community service were less likely to reoffend than people sentenced to imprisonment. The study found that community service lead to a reduction in recidivism of 46.8% compared to recidivism after imprisonment. It also found that recidivism was reduced for various types of offences, for example, recidivism for property crimes was 67.7% less than that after imprisonment and for violent crimes, recidivism was reduced by 60%.

A 2012 study in the USA examined the effects of imprisonment and non-custodial measures on reoffending in Florida.[61] The study found that offenders sentenced to prison were significantly more likely to reoffend than those on the non-custodial community programme. Not only did prison have a criminogenic effect, making reoffending more likely, the study also found possible indications that the non-custodial programme had a deterrent and rehabilitative effect.

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[57] UNODC Handbook on Strategies to Reduce Overcrowding in Prisons, p. 11.
[58] Commission on Crime Prevention and Criminal Justice, Report on the eighteenth session (18 April 2008 and 16-24 April 2009), E/2009/30 - E/CN.15/2009/20, para. 57.
[59] UNODC Handbook on Strategies to Reduce Overcrowding in Prisons, p. 109.
[60] Wermink H.T., Blokland A.A.J., Nieuwbeerta P., Nagin D. & Tollenaar N. (2010), Comparing the effects of community service and short-term imprisonment on recidivism: A matched samples approach, Journal of Experimental Criminology 6(3): 325-349.
[61] William D Bales and Alex R Piquero "Assessing the impact of imprisonment on recidivism" Journal of Experimental Criminology March 2012, Volume 8, Issue 1, pages 71-101.

A 2017 study in Belgium confirmed the results of international research about the effects of electronic monitoring of convicted offenders serving non-custodial penalties.[62] Based on an analysis of official prison data about offenders convicted to prison sentences between six months and three years, the study found that a lower proportion of offenders serving at least 90 per cent of their sentence under electronic monitoring outside of prison are re-incarcerated than a comparison group of offenders serving their sentence in prison.

1.4.4 RATIONALE 4: Treatment as an alternative to conviction or punishment contributes to public health and public safety in an integrated way

Drug use disorders are associated with a range of somatic and mental health disorders as well as negative social consequences such as loss of livelihood, instability of relationships -family, partner, broken families, (supportive) social networks-, association with deviant peers, isolation of convenient social networks, job instability and late job market entrance.[63] Drug use disorders therefore may place a significant burden on not only the affected individuals but also on their families and communities.[64] This could lead to a further weakening of interpersonal contacts, reducing school and professional commitments, compromising family bonding and developing concomitant mental health disorders.

Drug use disorders and associated negative health and social consequences may also bring about significant costs to society, including loss of productivity, security challenges, crime and lawlessness and increased health care costs.[65] Given the complexity of drug use disorders, a comprehensive approach applying effective interventions and involving different sectors is considered most beneficial. Effective treatment and care of drug use disorders will help to reduce both drug use and recidivism to crime for people with drug use disorders that have committed an offence.

Where treatment and care as an alternative or complementary non-custodial measure is provided for in law, its success in both dimensions depends to a great extent on an effective collaboration between

[62] Robert L., Maes E., Blokland A.A.J. & Wermink H.T. (2017), 'Virtual' versus 'real' prison: which is best? Comparing the re-incarceration rates after electronic monitoring and imprisonment in Belgium. In: Blokland A.A.J, Geest V. van der (red.) The Routledge International Handbook of Life-Course Criminology. London: Taylor & Francis Ltd. 417-435.
[63] McLellan, A.T., Lewis, D.C., O'Brien, C.P. & Kleber, H.D., Drug dependence, a chronic medical illness: implications for treatment, insurance and outcomes evaluation, JAMA, 2000, 284, 13, 1689-95; Laudet, A.B. & White, W.What are your priorities right now? Identifying service needs across recovery stages to inform service development. Journal of substance abuse treatment, 2010, 18, 1, 51-59.
[64] UNODC/WHO, International Standards for the Treatment of Drug Use Disorders, 2016
[65] UNODC/WHO, International Standards for the Treatment of Drug Use Disorders, 2016

public health and justice authorities.[66] It is essential that police, prosecutors, judges and other officials are aware of the potential benefits of available non-custodial measures and apply them. It is equally essential that qualified and well-trained health and social service providers implement evidence-based treatment, care and other services with a keen understanding of the realities that patients face in their interactions with the justice system.

A large body of research indicates that the success rates of treatment of people in contact with the criminal justice system are comparable to that of non-offenders. While effective treatment services, including primary health care and low-threshold services, should be the general point of contact with the health system for people with drug use disorders, a contact with the criminal justice system, where necessary and appropriate, could be considered as an additional opportunity to encourage people to start treatment for their drug use disorder and to offer them access to appropriate educational, social and health services. Like for any other health intervention (outside concrete emergency situations), the decision whether or not to enter treatment should remain voluntary[67] and require the informed consent of the patient.[68]

Given furthermore the additional risk factors associated with the prison environment and the costs associated with imprisonment, alternative measures should be applied wherever possible from a public health perspective and criminal justice perspective and the provision of evidence-based treatment as an alternative to conviction or punishment will not only help to reduce risks associated with a prison stay but also help to reduce recidivism and relapse rates of people with drug use disorders in contact with the criminal justice system.

1.4.5 RATIONALE 5: Treatment as an alternative to conviction or punishment is in line with the international legal framework

Health is a fundamental human right indispensable for the exercise of other human rights.[69] Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The right to health has been acknowledged in numerous international, regional

[66] See Commission on Narcotic Drugs resolutions 58/5 and 55/12.
[67] UNODC, From Coercion to Cohesion: Treating Drug Dependence Through Health Care, Not Punishment, Discussion paper, 2010, p. 5.
[68] See, e.g., Principle 11 of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (United Nations General Assembly resolution 46/119, annex).
[69] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 of the Covenant)*, E/C.12/2000/4, 11 August 2000.

and national documents, including Article 25.1 of the Universal Declaration of Human Rights, according to which "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services".

It is understood that the right to health is associated with the accessibility of educational, social and health services without discrimination.[70] The right to health extends to any person in contact with the criminal justice system.[71] It logically follows that people with drug use disorders who are in contact with the criminal justice system should thus be provided with effective treatment of drug use disorders, and the prevention and treatment of other conditions commonly found in people who use drugs such as HIV, hepatitis, tuberculosis, mental disorders, and drug overdose.

States parties to the international drug control conventions committed themselves to take all practicable measures for the prevention of the illicit use of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of persons involved with the illicit use of drugs (see also chapter 2).[72]

When people with drug-use disorders commit an offence, treatment, education or social reintegration can be applied as alternative measures to conviction or punishment, or in addition to conviction and punishment in the following cases, as determined by national legislation:

- Offences related to personal consumption of drugs;[73]
- Offences of drug trafficking and related conduct in cases of a minor nature.[74]

When people with drug use disorders commit a more serious drug-related offence[75] or any other particularly serious offence and are sentenced to prison, treatment and care should be provided in the prison setting, following the same quality standard as in the community.[76].

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[70] See United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 of the Covenant), E/C.12/2000/4, 11 August 2000.
[71] This includes, for example, prisoners and detainees (United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 of the Covenant), E/C.12/2000/4, 11 August 2000, para. 34), who should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services (Rule 24 of the Nelson Mandela Rules).
[72] Article 38 of the 1961 Convention and article 20 of the 1971 Convention.
[73] See article 3, paragraph 2 and subparagraph 4(d) of the 1988 Convention.
[74] See article 3, paragraph 1 and subparagraph 4(c) of the 1988 Convention
[75] See article 3, subparagraphs 4 (a), 4(b) and paragraph 5, of the 1988 Convention.
[76] UNODC, *Drug Dependence Treatment: Interventions for drug users in prison*, Good practice documents, 2008, available at http://www.unodc.org/docs/treatment/111_PRISON.pdf.

In addition, there are other offences, for which there is no specification under the international drug control conventions, such as non-violent property crimes, for which treatment and care can be applied as alternatives to imprisonment for people with drug use disorders, in appropriate cases, as stipulated in national legislations.

1.5 Take home messages

Scope of the problem and reasons to consider the provision of treatment as an alternative to conviction or punishment

1. A drug dependence is a complex biopsychosocial health condition that often takes the course of a chronic and relapsing disorder.
2. Drug use disorders are associated with a range of broader **physical or mental health** problems as well as negative social consequences.
3. A range of evidence-based treatment and care interventions exists that can help people with drug use disorders in terms of reducing or stopping drug use and improving their quality of life.
4. There is a correlation **or a 'dynamic relationship'** between **drug use and offending.**
5. Persons in the criminal justice system have higher rates of drug use disorders and associated health problems compared to the general population.
6. People with drug use disorders enter the criminal justice system for different types of offences and some of these offences are linked with the use of drugs
7. It is rationale both from a public safety and a public health perspective to provide treatment as an alternative to conviction or punishment for eligible people with drug use disorders in contact with the criminal justice system.

Chapter 2. Choosing treatment and care in line with the international legal framework

This chapter discusses the fundamental principles arising from the international legal framework relating to treatment as an alternative to conviction or punishment. Over the years, United Nations Member States have adopted an extensive body of international normative instruments –treaties, conventions, resolutions, declarations – that establish international obligations, standards and norms addressing issues ranging from drug control and human rights to the treatment of offenders and prisoners.[77]

The aim of this chapter is not to discuss each relevant international instrument in detail, but to provide an answer to some key questions that countries may be dealing with when setting up alternatives to conviction or punishment for people with drug use disorders in contact with the criminal justice system. Among such questions might be: a) *What offences are eligible for an alternative to conviction or punishment, in line with the international legal framework*?; b) *What principles and guidelines are enshrined in the different legal instruments concerning the treatment of persons with drug use disorders in contact with the criminal justice system*?; c) *How can the international legal framework be implemented in the domestic legal framework of specific countries*?

2.1 Offences for which people with drug use disorder enter the criminal justice system

People with drug use disorders may be involved in a variety of offences, as mentioned in Chapter 1. While the determination of appropriate punishments (or alternatives to conviction or punishment) is largely within the discretion of States, international instruments establish a number of important exceptions. For instance, the use of inhuman or degrading forms of punishment is excluded[78] and the

[77] For compilations of relevant instruments in each of these fields, see UNODC, The International Drug Control Conventions (2013); OHCHR, The Core International Human Rights Treaties (2014); UNODC, Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (2016).

[78] See, e.g., UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment: Inter-American Convention to Prevent and Punish Torture; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

use of alternatives to conviction or punishment for criminal offences is encouraged.[79] In particular, States are expected to develop alternative measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.[80]

The type of offences for which such alternatives may be applied is not limited, but depends on domestic law and established criteria in respect of the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.[81] For offences established pursuant to the international drug control conventions, alternatives to conviction or punishment are explicitly allowed, and the Conventions require States Parties to give special attention to providing treatment for people with drug use disorders (disregard of whether offences were committed).[82] Moreover, the Conventions provide a certain flexibility in the choice of criminal sanctions and stipulate that States Parties utilize the most severe penalties for particularly serious forms of offences, such as drug trafficking committed by international organized criminal groups for criminal profits.[83]

THE UN DRUG CONTROL CONVENTIONS OFFER THE POSSIBILITY OF LIMITING SEVERE SANCTIONS TO SERIOUS FORMS OF OFFENCES, SUCH AS LARGE SCALE DRUG TRAFFICKING.

[79] See the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) in General Assembly resolution 45/110, annex, as well as the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) in General Assembly resolution 65/229, annex.

[80] Rule 1.5 of the Tokyo Rules.

[81] Rule 3.2 of the Tokyo Rules.

[82] Articles 36, para. 1 (b) and 38, of the 1961 Convention as amended by the 1972 Protocol; articles 20 and 22, para. 1 (b), of the 1971 Convention; and articles 3(4)(c-d) and 14(4) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

[83] See United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, article 3, paragraph 5.

2.1.1 Examples of offences and possible responses according to the international legal framework

This section highlights a number of examples of offences that may be committed by persons with drug use disorders, to examine the scope States have to provide treatment as an alternative to conviction or punishment with regard to each.

a) Possession, purchase or cultivation of controlled drugs for non-medical or non-scientific use and personal consumption

States Parties to the international drug control conventions are obliged to establish this conduct as a criminal offence under domestic law, subject to the constitutional principles and the basic concepts of each country's legal system.[84] They may, however, provide treatment and other measures as an alternative or in addition to conviction or punishment.[85] Decisions on whether to apply alternative or additional measures and selecting the appropriate measure will depend on an assessment of established criteria concerning the offence and the background of the offender, as indicated above. [86] Depending on the constitutional principles and the basic concepts of the legal system, a non-criminal response may be permissible, but States Parties remain bound by their general obligation to limit the use of drugs exclusively to medical and scientific purposes[87] and to prohibit their possession, except under legal authority.[88]

b) Small-scale drug sale to finance a drug habit or international transport of limited quantities of drugs

States Parties to the international drug control conventions are obliged to establish the illegal sale and transport of drugs as criminal offences under domestic law,[89] liable to sanctions that take into account the grave nature of such offences.[90] However, in appropriate cases of a minor nature, States Parties may provide treatment and other measures as alternatives to conviction or punishment.[91] Determining whether the case is one of a minor nature will depend on domestic criminal law and the circumstances

[84] Art. 3(2) of the 1988 Convention.
[85] Art. 3(4)(d) of the 1988 Convention.
[86] Tokyo Rule 3.2.
[87] Art. 4 para 1(c) of the Convention 1961; art. 5 para 2 of the Convention 1971.
[88] Art. 33 of the Convention 1961; art. 5 para 3 of the Convention 1971.
[89] Art. 3(1)(a)(i) of the 1988 Convention.
[90] Art. 3(4)(a) of the 1988 Convention.
[91] Art. 3(4)(c) of the 1988 Convention.

of each case. As mentioned, an assessment of established criteria concerning the offence, the offender and any victims will be crucial in the selection of alternative measures. [92]

c) Large-scale drug production and distribution involving violence or organized crime

States Parties to the international drug control conventions are obliged to establish the illegal production and distribution of drugs as criminal offences under domestic law,[93] liable to sanctions that take into account the grave nature of such offences. [94] Circumstances that make these offences particularly serious include for example the involvement of the offender in organized crime, the use of violence or the victimization of minors.[95] States Parties may provide in such cases, in addition to conviction or punishment, that the offender shall undergo measures such as treatment.[96] Offenders detained pending trial or imprisoned upon conviction, should enjoy the same standards of health care that are available in the community and have access to necessary health-care services free of charge without discrimination. Health-care services should be organized in close relationship with the general public health administration and in a way that ensures continuity of treatment and care, including for drug dependence.[97]

d) Non-violent property offences to finance a drug habit

Theft and other property offences are crimes in virtually all States. As in the other examples, States are expected to use alternative measures that exist in their legal systems and decisions thereon will depend on the established criteria highlighted above. In this case, this would include considering the non-violent nature of the offences, in addition to the drug use disorder and its role in the choice of or opportunities for committing the offences.

e) Violent offences under the influence of drugs

Assault and other violent offences are crimes in virtually all States. As in the other examples, States are expected to use alternative measures that exist in their legal systems and decisions thereon will depend on the established criteria highlighted above. In this case, this would include considering the

[92] Tokyo Rule 3.2.
[93] Art. 3(1)(a)(i) of the 1988 Convention.
[94] Art. 3(4)(a) of the 1988 Convention.
[95] Art. 3(5) of the 1988 Convention.
[96] Art. 3(4)(b) of the 1988 Convention.
[97] Rule 24 of the Nelson Mandela Rules.

degree of violence involved in the offence and the resulting harm for the victim and society, in addition to the drug use disorder and its role in the choice of or opportunities for committing the offences. As mentioned, in case the offender is detained pending trial or imprisoned upon conviction, he or she should have access to drug dependence treatment and other necessary health-care services at the same standards of health care that are available in the community.[98]

2.2 Fundamental principles enshrined in the international legal framework concerning treatment of persons with drug use disorders in contact with the criminal justice system

The applicable international legal framework embodies numerous principles that relate to the treatment of individuals who come into contact with the justice system. Below are seven principles drawn from various components of the international legal framework that relate directly to the critical need to utilize treatment and care strategies for individuals with drug use disorders who come into contact with the justice system.

THE INTERNATIONAL LEGAL FRAMEWORK POINTS TO THE CRITICAL NEED OF UTILIZING TREATMENT AND CARE STRATEGIES FOR OFFENDERS WITH DRUG USE DISORDERS

Principles
1. Drug use disorders are a public health concern requiring responses that are health-centred. Individuals with drug use disorders should not be punished for their drug use disorder but provided with appropriate treatment.
2. The use of alternatives to conviction or punishment at all stages of the criminal justice system for offenders with drug use disorders based on an assessment of established criteria should be encouraged
3.Proportionality is required during all stages of the diversion and supervision process
4.A diversion to treatment should be made with the informed consent of the offender
5. The implementation of alternatives to conviction or punishment should respect legal and procedural safeguards
6. Specific attention to special groups and their access to treatment as an alternative to conviction or punishment is required to avoid discrimination
7.Prisoners with drug use disorders may not be deprived of their right to health and are entitled to the same level of treatment as the general population

[98] Rule 24 of the Nelson Mandela Rules.

2.2.1 Principle 1. Drug use disorders are a public health concern requiring responses that are health-centred. Individuals should not be punished for their drug use disorder but provided with appropriate treatment.

The health aspect is an indispensable pillar of the multidimensional approach to drug use disorders. Within the broad framework of human rights obligations that are to be considered in the planning, development and assessment of drug policies by Member States, the right to health deserves particular attention, considering that promoting and protecting public health is a key part of a comprehensive, integrated and balanced approach to addressing and countering the world drug problem.[99] This overall concern with the "health and welfare of mankind" is also reflected in the international drug control conventions.[100] A drug policy that is fully committed to the principles enshrined in these conventions puts health and welfare at its centre and applies a balanced, comprehensive and integrated approach, based on, amongst others, respect for human rights.[101]

The right to health is enshrined in various international and regional human rights treaties,[102] as well as national constitutions around the world. Access to essential medicines, equal opportunity for everyone to enjoy the highest attainable level of health and the right to prevention and treatment of diseases are some of the main entitlements contained in the right to health.[103] In relation to persons with drug use disorders, this could logically be extended to treatment measures contemplated in the conventions to be provided by States Parties for people with drug use disorders, namely "to provide for their early identification, treatment, education, aftercare, rehabilitation and social reintegration…."[104]

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[99] See General Assembly Resolution S-30/1, containing the outcome document entitled "Our joint commitment to effectively addressing and countering the world drug problem", A/RES/S-30/1.

[100] See the preamble of the 1961 Convention as amended by the 1972 Protocol and the preamble of the 1971 Convention.

[101] Werner Sipp, EU National Drug Coordinators Meeting, Malta, 2016

[102] See, e.g., International Covenant on Economic, Cultural and Social Rights of 1966, article 12; International Convention on the Elimination of All Forms of Racial Discrimination of 1965, article 5, subparagraph e (iv); Convention on the Elimination of All Forms of Discrimination against Women of 1979, article 12; Convention on the Rights of the Child of 1989, article 24; and Convention on the Rights of Persons with Disabilities of 2006, article 25. See also the European Social Charter of 1961, article 11; the African Charter on Human and Peoples' Rights of 1981, article 16, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador) of 1988, article 10.

[103] See general comment No. 14 (2000) on the right to the highest attainable standard of health, adopted by the Committee on Economic, Social and Cultural Rights (E/C.12/2004/4), and the Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 31*, Human Rights Fact Sheet Series (Geneva, June 2008).

[104] Article 38 of the 1961 Convention as amended by the 1972 Protocol and article 20 of the 1971 Convention.

Taking into account that countries have varying capacities in establishing and delivering treatment and other health services, relevant instruments envisage that the full realization of the right to health is to be achieved progressively by taking necessary steps to the maximum of available resources.[105] This is important, considering that, globally, the vast majority of "problem drug users continue to have no access to treatment"[106] and significant gaps remain in the delivery of prevention, treatment and rehabilitation services.[107]

Drug use and drug use disorders are thus primarily public health concerns that require a public health response. When the criminal justice system comes into play to deal with offences committed by persons with drug use disorders, it is important to recall that they continue to enjoy the right to health and the State bears the duty to provide access to treatment and other relevant services and measures.

2.2.2 Principle 2. The use of alternatives to conviction or punishment at all stages of the criminal justice system for offenders with drug use disorders based on an assessment of established criteria should be encouraged

Alternatives to conviction or punishment should be provided within domestic legal systems to reduce the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.[108] In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of the victim and the rights of the society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of such alternative measures, at all stages of the criminal justice continuum, from pre-trial to post-sentencing.[109] This is a key response to a general surge in prison overcrowding, including for drug-related offences,[110] along with the recognition of significant shortcomings in prison systems when it comes to reducing offending or promoting social reintegration.[111]

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[105] See, e.g., International Covenant on Economic, Cultural and Social Rights of 1966, article 2(1).
[106] UNODC, *World Drug Report*, 2015, Executive Summary, p. ix.
[107] UNODC/ED/2016/1, para. 4.
[108] Rule 1.5 of the Tokyo Rules.
[109] Rule 3.2 of the Tokyo Rules.
[110] UNODC, *Handbook on strategies to reduce overcrowding in prisons*, 2013, pp. 29-30. See also UNODC, *World Drug Report 2016*, pp. 101-102.
[111] See UNODC, *Handbook of basic principles and promising practices on alternatives to imprisonment*, 2007, pp. 4-7; UNODC, *Handbook on strategies to reduce overcrowding in prisons*, 2013, pp. 19-37.

Under the international drug control conventions, States parties have the flexibility to provide people committing offences of possessing, purchasing or cultivating drugs for personal consumption, or in other situations considered minor in nature, with treatment and other measures, either as an alternative to conviction or punishment or in addition to conviction or punishment, taking into account the gravity of the offence.[112] As reminded by the International Narcotics Control Board (INCB) "*the conventions recognize that, to be truly effective, a State's response to the offences by drug abusers must address both the offences and the abuse of drugs (the underlying cause)*." Taking a health-oriented approach to criminal offences, for which individuals with drug use disorders may be liable, requires flexibility in system of penalties, allowing authorities to provide measures appropriate to each individual.

The number and types of alternatives to conviction or punishment available should be determined in such a way that consistent sentencing remains possible.[113] Apart from sentencing options, such as a referral to an attendance centre or another mode of non-institutional treatment, States should establish options to discharge the offender or provide alternatives to pre-trial detention, as well as early release and other post-sentencing options.[114] The selection of such alternatives should be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.[115]

[112] See preamble of the 1961 Convention as amended by the 1972 Protocol; the preamble of the 1971 Convention; article 4, subparagraph (c), of the 1961 Convention as amended by the 1972 Protocol; and article 5, paragraph (2) of the 1971 Convention and 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art 3, (4) (c-d)
[113] Rule 2.3 of the Tokyo Rules.
[114] Rules 5-9 of the Tokyo Rules.
[115] Rule 3.2 of the Tokyo Rules.

2.2.3 Principle 3. Proportionality is required at all stages of the process

Proportionality should be applied as a guiding principle throughout the criminal justice process, such as when deciding on the eligibility of an offender for diversion, the intensity and the length of supervision and the responses to non-compliance or breaches of conditions.

PROPORTIONALITY AS A GUIDING PRINCIPLE THROUGHOUT THE CRIMINAL JUSTICE PROCESS: WHEN DECIDING ON ALTERNATIVES TO CONVICTION OR PUNISHMENT, THE DURATION OF ALTERNATIVES AND THE CONSEQUENCES OF BREACHING CONDITIONS

Firstly, proportionality is reflected in the notion that a balance is needed between the seriousness of the offence and the severity of the punishment.[116] While the determination of specific offences and sanctions remains the prerogative of States, these sanctions should take into account the gravity of the offence and the culpability of the offender. This general principle is reflected in the international drug control conventions, which allow and encourage States Parties to use the most severe penalties for more serious offences, such as - drug trafficking, while making it clear that offences of a minor nature or the possession of drugs for personal consumption need not necessarily be liable to conviction or punishment.[117]

Secondly, proportionality should guide the application of existing criminal law and procedure, to ensure that the intervention of the criminal justice system is kept to the minimum level needed to protect society. In order to ensure that the criminal justice response to offences is the least intrusive one available, alternatives to conviction or punishment should be used in accordance with the principle of minimum intervention.[118] At the pre-trial stage, the general rule is that persons awaiting trial shall not be detained in custody.[119] Alternatives to pre-trial detention shall be employed at as early a stage as possible.[120] Criminal justice actors should use any powers they may have to discharge the offender

[116] See INCB, Report of the International Narcotics Control Board for 2007, United Nations document E/INCB/2007/1, p. 4. See also UNODC, Drug control, crime prevention and criminal justice: A Human Rights perspective, United Nations document E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1. This general principle of law is explicitly mentioned in concluding observations of United Nations human rights treaty bodies (see, for example, CCPR/C/SDN/CO/3, para. 10; CERD/C/MUS/CO/15-19, para. 12; E/C.12/JPN/CO/3, para. 20; CRC/C/OPSC/BFA/CO/1, para. 31(b); CAT/C/EST/CO/4, para. 15), as well as in various legal instruments, such as article 67 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 or in article 49(3) of the Charter of Fundamental Rights of the European Union and CND resolution 59/7 of 2016 on "Promotion of proportionate sentencing fro drug-related offences of an appropriate nature in implementing drug control policies.

[117] Article 3(4) (c-d), 1988 Convention

[118] Rule 2.6 of the Tokyo Rules

[119] Article 9(3), ICCPR.

[120] Rule 6.1 of the Tokyo Rules.

– if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims – or impose suitable non-custodial measures for minor cases.[121] When sentencing offenders or deciding on parole or early release, courts and other competent authorities should have at their disposal a range of non-custodial measures and should take into consideration the rehabilitative needs of the offender and assist in his or her early reintegration into society.[122]

Thirdly, proportionality is also crucial in the implementation of alternatives to conviction or punishment. The most suitable type of supervision and treatment provided as part of an alternative to conviction or punishment should be determined for each individual case and should be periodically reviewed and adjusted as necessary.[123] Moreover, there should be an option for early termination of the measure if the offender has responded favourably to it.[124] The conditions to be observed shall be practical, precise and as few as possible, and may need to be modified by the competent authority in accordance with the progress made by the offender.[125]

Finally, proportionality should guide the response to non-compliance or breaches of conditions attaching to alternatives to conviction or punishment. The failure of an alternative measure (for example when breaching the treatment conditions) should not automatically lead to the imposition of a custodial measure.[126] Rather, the competent authority should attempt to establish a suitable alternative before deciding to modify or revoke it, considering that imprisonment might be imposed only in the absence of other suitable alternatives.[127] The violation of all or any of the applicable conditions should not in itself be considered an offence unless it fulfils the legal definition of a separate offence. If violations of conditions were to be considered as offences in themselves, this might result in an accumulation of penalties quite disproportionate to the original offence.[128]

[121] Rule 5.1 of the Tokyo Rules.

[122] Rules 8 and 9 of the Tokyo Rules.

[123] Rule 10 of the Tokyo Rules.

[124] Rule 11.2 of the Tokyo Rules.

[125] Rules 12.2 and 12.4 of the Tokyo Rules.

[126] Rule 14.3 of the Tokyo Rules. In this context, it is also important to remind again of the chronic and relapsing nature of drug use disorders: A relapse is not necessarily a breach of compliance, but characteristic for such a complex and compulsive disorder.

[127] Rule 14.4 of the Tokyo Rules.

[128] See Commentary on the Tokyo Rules, ST/CSDHA/22, p. 27.

2.2.4 Principle 4. A diversion to treatment should be made with the informed consent of the offender

The above mentioned right to health includes the right to be free from torture, non-consensual treatment and experimentation.[129] This means that alternatives to conviction or punishment shall not involve non-consensual medical or psychological experimentation, or undue risk of physical or mental injury to the offender.[130] In general, no treatment should be given to a patient without his or her informed consent and nobody should be compelled to undergo medical treatment against his or her will unless in extreme situations of acute emergency.[131]

In addition to the general requirement of consensual treatment, consent is also important from a criminal justice perspective, in light of the presumption of innocence that applies to non-convicted offenders, in the case of pre-trial measures. While some alternatives can be given without consent of the offender, for example simple admonishment, the offender's consent is required for any alternative to conviction or punishment imposing an obligation on the offender (for example to attend a treatment programme), applied before or instead of formal proceedings or trial.[132]

Providing access to treatment as part of such alternatives can be essential to fulfil the right to health of offenders with drug use disorders in need of treatment or care. In order to realize this right, the coercive power of the criminal justice system may be used, but treatment as such needs not be compulsory. It should not force individuals into treatment without their consent. If treatment and care are made possible through the criminal justice system, this may be considered a 'quasi-compulsory' referral. Offenders with drug use disorders have also the right not to choose treatment. They may choose between accepting treatment and care or facing criminal or administrative consequences.[133] The decision whether or not to enter the treatment or care programme remains with the person concerned, who accepts the consequences of their choice.

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[129] See Committee on Economic, Social and Cultural Rights, General comment N° 14 (2000) on the right to health.
[130] Rule 3.8 of the Tokyo Rules.
[131] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly in its resolution 46/119. See also UNODC, From coercion to cohesion. Treating drug dependence through health care, not punishment, discussion paper, 2010.
[132] *Rule 3.4 of the Tokyo Rules*
[133] UNODC, From coercion to cohesion. Treating drug dependence through health care, not punishment, discussion paper, 2010

When individuals leave a treatment programme they had accepted previously, they may become subject to the original sanction or other responses for non-compliance, which should be proportionate as outlined above. In particular, the consequences of the criminal justice sanction should not be more severe than it would have been had the person not been offered a choice. [134]

THE CRIMINAL JUSTICE SANCTION SHOULD NOT BE MORE SEVERE THAN IT WOULD HAVE BEEN HAD THE PERSON NOT BEEN OFFERED A CHOICE

For example, an offender may consent to a treatment programme in which there is a goal and an expectation of complete abstinence. This is commonly the case with drug court alternatives. If the offender fails to demonstrate complete abstinence for the duration of the programme, he or she may be required to leave that treatment programme and may be returned to the court for sentencing. Any sentencing that does not take into consideration the efforts to comply with treatment could be interpreted as resulting in a greater burden to the offender than the initial criminal sanction. A reduction in the quantity and frequency of drug use, or other benefits of treatment harder to quantify are also valuable from a crime reduction perspective, even if complete abstinence is not demonstrated. Participation in treatment, regardless of the individual outcome, is worth encouraging.

2.2.5 Principle 5. The Implementation of alternatives to conviction or punishment should respect legal and procedural safeguards

A number of legal and procedural safeguards need to be in place to protect the rights of people with drug use disorders during the implementation of alternatives to conviction or punishment. It is crucial that competent authorities adhere to relevant laws, which should define and prescribe the application of alternative measures,[135] the specific conditions for supervision that a competent authority must observe,[136] and the power to arrest and detain the offender under supervision in cases where there is a breach of the conditions.[137] During implementation, the offender's rights may not be restricted further than was authorized by the competent authority that rendered the original decision,[138] and the period established by the competent authority in accordance with the law may not be exceeded.[139] Special attention should be paid to respecting the rights to dignity and privacy, including the

[134] UNODC, From coercion to cohesion. Treating drug dependence through health care, not punishment, discussion paper, 2010
[135] Rule 3.1 of the Tokyo Rules.
[136] Rule 10.2 of the Tokyo Rules.
[137] Rule 14.5 of the Tokyo Rules.
[138] Rule 3.10 of the Tokyo Rules.
[139] Rule 11.1 of the Tokyo Rules.

importance of keeping the offender's personal records strictly confidential and limiting access to such records to persons duly authorized or directly concerned with the disposition of the offender's case.[140]

Another set of crucial safeguards is to provide people with drug use disorders with the possibility to apply for review of decisions on alternatives to conviction or punishment or to seek recourse through an independent body to complain about arbitrary or unfair implementation or the violation of relevant human rights.[141] People with drug use disorders should also have the right to appeal against a decision to modify or revoke the alternative in the event of a breach of conditions to be observed.[142] Access to legal aid and relevant information in a way and in a language that they understand is a prerequisite to use these remedies.[143]

At the beginning of treatment as an alternative to conviction or punishment, the offender should receive an explanation, orally and in writing, of the conditions, including his or her obligations and rights.[144] The nature, consequences, risks and benefits of (breaching the conditions of) the alternative should be communicated, including the likely impact on criminal proceedings, the treatment information to be revealed to the court, the possibilities to revoke the alternative to conviction or punishment in case of lack of compliance.[145] Treatment should only be conducted by professionals who have suitable training and practical experience.[146]

2.2.6 Principle 6. Specific attention to special groups and their access to treatment as an alternative to conviction or punishment is required to avoid discrimination

Specific attention is warranted towards the particular needs of populations such as women, young adults, persons with co-occurring mental health and drug use disorders, persons with cognitive and

[140] Rules 3.9, 3.11 and 3.12 of the Tokyo Rules.
[141] Rules 3.5-3.7, 6.3 and 9.3 of the Tokyo Rules.
[142] Rule 14.6 of the Tokyo Rules.
[143] See United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly resolution 67/187, annex, of 20 December 2012.
[144] Rule 12.3 of the Tokyo Rules.
[145] UNODC, From coercion to cohesion. Treating drug dependence through health care, not punishment, discussion paper, 2010
[146] Rule 13.2 of the Tokyo Rules.

intellectual disabilities, racial and ethnic minorities. The principle of non-discrimination and related international obligations[147] require not only an effort to avoid that measures discriminate on the basis of sex, age, race, disability or any other factors, but also the adoption of specific measures to eliminate existing forms of discrimination faced by particular groups. This applies to laws, policies, institutions and measures, whether in the area of justice or health.

ENSURE THAT NO ONE IS LEFT BEHIND: IDENTIFY SPECIAL GROUPS & ADDRESS THEIR SPECIAL NEEDS

For example, women offenders and prisoners have distinctive needs, such as caretaking responsibilities, particular health and treatment needs or a history of prior victimization, which are often not adequately met by criminal justice systems dealing with a majority of male offenders and prisoners.[148] Providing for such needs in order to accomplish substantial gender equality cannot be regarded as discriminatory.[149] Gender-specific options for diversionary measures as well as pre-trial, sentencing and post-trial alternatives should be implemented wherever appropriate and possible.[150] Especially when sentencing women offenders, courts should have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct.[151] Women with drug use disorders should be diverted or referred to and supported in accessing gender-sensitive, trauma-informed treatment programmes in the community.[152] Where available, women-only drug use disorders treatment services should be an option. Residential treatment should either be women-only or have the capacity for clear gender segregation in order to increase safety and treatment outcomes for women with drug use disorders.[153]

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[147] See, e.g., articles 2-3 of the International Covenant on Economic, Social and Cultural Rights; articles 2-3 of the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; the Convention on the Elimination of All Forms of Discrimination against Women of 1979; and the Convention on the Rights of Persons with Disabilities of 2006.

[148] UNODC, Handbook on Women and Imprisonment (2014).

[149] Rule 1 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229, annex, of 21 December 2010.

[150] Bangkok Rules 57-58

[151] Bangkok Rule 61

[152] Bangkok Rule 62

[153] https://www.unodc.org/docs/treatment/Toolkits/Women_Treatment_Case_Studies_E.pdf, http://www.unodc.org/documents/drug-prevention-and-treatment/unodc_2016_drug_prevention_and_treatment_for_girls_and_women_E.pdf, http://www.who.int/substance_abuse/publications/pregnancy_guidelines/en/

2.2.7 Principle 7. Prisoners with drug use disorders may not be deprived of their right to health and are entitled to the same level of treatment as the general population

Not all persons with drug with drug use disorders may be eligible for treatment as an alternative to conviction or punishment. However, even when in prison – whether untried or convicted – they continue to enjoy the right to health (see Chapter 4: Diversion options to treatment, as an alternative or in addition to conviction or punishment). The provision of health care for prisoners is a State responsibility.[154] Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.[155] Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for mental and behavioural disorders including drug dependence.[156] In this regard, it is important to note that the relationship between health-care professionals and prisoners should be governed by the same ethical and professional standards as those applicable to patients in the community, including in particular the adherence to prisoners' autonomy with regard to their own health and informed consent in the doctor-patient relationship.[157]

2.3 Implementing the international legal framework in the domestic legal framework of individual countries

The international legal framework allows for choosing treatment and care, when offenders with drug use disorders come into contact with the criminal justice system.

Treatment and care as alternatives to conviction and punishment have already been effectively implemented in a variety of legal systems. While many countries' legal systems are predominantly influenced by a particular legal tradition,[158] many have converged to varying degrees, reflecting

[154] Rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), General Assembly resolution 70/175, annex, of 17 December 2015.
[155] Rule 24(1) of the Nelson Mandela Rules.
[156] Rule 24(2) of the Nelson Mandela Rules.
[157] Rule 32(b) of the Nelson Mandela Rules.
[158] "A "legal tradition" is the rationale and methodology behind how laws are created, interpreted and enforced in a country (see United Nations Office on Drugs and Crime, Manual on Mutual Legal Assistance and Extradition (Vienna, 2012), p. 8). The Manual also provides a description of the three legal traditions most commonly found in the world:

elements of each of these systems.[159] The development and implementation of treatment and care alternatives must take into account the individual legal system and tradition. In particular, the process, timeframe, and role of judicial actors will likely differ in each of the systems, depending upon the procedures used for handling cases involving people with drug use disorders. Another key difference is the point at which these alternatives can come into play.

While the process for developing treatment and care strategies as alternatives to conviction or punishment for offenders with drug use disorders will vary from country to country, there are certain common challenges that should be borne in mind in the implementation of the international legal framework at the domestic level. The most critical challenges discussed in this section relate to the different perspectives of the health and justice sectors, the degree of discretion that exists permitting the implementation of treatment as an alternative to conviction or punishment, as well as the role of the different judicial actors in the process.

2.3.1 Coordinating health and justice sector perspectives to provide treatment as an alternative to conviction or punishment

The process of promoting the development of treatment and care alternatives to conviction and punishment, in line with the international legal framework, must take into account the different perspectives of the health and justice sectors on key issues that arise in this regard.

These issues include, for example:

a) ***Responses to non-compliance:*** From a criminal justice perspective, punitive sanctions may need to be applied when an individual fails to comply with a court order or other directive. From a medical perspective, however, noncompliant conduct and relapse by individuals

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• The civil law tradition is premised on the system of codification of laws, thus giving clear direction to a State's citizenry as to what the law is. It is the most commonly found legal tradition in the world.
• The common law tradition is premised on the law being developed through jurisprudence, essentially meaning that the courts make the law. Common law originated in England and is the legal tradition typically followed in the Commonwealth countries of the former British Empire and the United States of America. It is the second most commonly found legal tradition in the world.
• The Islamic legal tradition is premised on the fact that there is no distinction between a legal system and other controls on a person's behaviour. The tradition operates under the assumption that Islam, as a religion, provides all the answers to questions about appropriate behaviour and acceptable conduct. It is important to note that not all Muslim societies are bound solely by Islamic law and that some have a blended approach to their laws that incorporates other legal traditions.
• There are many countries whose legal system has elements of more than one legal tradition.

[159] See "Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits. Geoffrey C. Hazard and Angelo Dondi.39 Cornell Int'l L.J. 59 (2006).

suffering from drug use disorders and associated mental health and related disorders is generally considered indicative of the disorder, warranting a treatment response (e.g., increase treatment, change treatment protocol, etc.), rather than a punitive one. Failure to demonstrate abstinence does not equate to treatment non-compliance.

b) ***Key decision-makers and disposition:*** From a criminal justice perspective, decisions on the appropriate response to offences, including those committed by people with drug use disorders, should be made by the justice system. From a medical perspective, however, progress or lack of progress in treatment should be addressed by a treatment professional. In principle, police, prosecutors and judges should not make treatment decisions and treatment professionals should not make justice system decisions. However, when people with drug use disorders in contact with the criminal justice system are concerned, there is a need to ensure that decisions by criminal justice actors are informed by health professionals. Developing a collaborative approach and parameters to make this interdisciplinary partnership work, protecting both the health and the human rights of the individual and the public safety and public health of the community, is a continuing challenge.

2.3.2 The degree of discretion to divert to treatment and care and point of introduction

Different criminal justice actors have varying degrees of discretion to divert people with drug use disorders to treatment in most systems. Even where it appears that current laws permit no discretion in their application, such as with mandatory sentencing provisions, there may be some opportunity for discretion at other stages.

Often there is discretion at multiple points in the process, such as the decision to arrest, to prosecute, to convict or suspend a sentence.

IN COMMON LAW SYSTEMS TREATMENT AND CARE ALTERNATIVES CAN BE INTRODUCED EARLY IN THE PROCESS. THE JUDGE HAS SUBSTANTIAL DISCRETION

In many common law legal systems, treatment and care alternatives to the traditional conviction and punishment process can be introduced at an early stage of the criminal justice system. The prosecution typically has wide discretion as to whether to prosecute a case, which is generally not subjected to judicial review.[160] Prosecutors also enjoy significant discretion, when proceedings have

[160] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons (2013), p. 103.

been commenced, to decide whether to withdraw specific charges or the entire proceedings, or to conditionally discontinue the case.[161] Many common law systems also allow the prosecution and defence to engage in pre-trial bargaining on either the charge or plea, in order to encourage the efficient resolution of the case.[162] If agreed by both parties, alternatives can be incorporated into a joint proposed case disposition, which the prosecution and defence then present to the judge. If the judge agrees, they are then incorporated in the sentence. Regardless of whether the parties engage in charge bargaining or sentence bargaining, it is critical that the process is transparent and that the defendant understands the nature and consequences of his or her options and sufficient facts to support the guilty plea are on record.[163] If not agreed to at the initiation of the case, the potential for the use of alternatives can be considered at other points along the process, including sentencing. In many instances, the authority for using proposed alternatives may be grounded in both case precedent and the enabling statute(s) establishing the court, which generally provide substantial discretion to the judge to carry out "justice".

In civil law systems, the authority for using alternatives has traditionally been more limited at the pre-trial stage and is more frequently incorporated into sentencing provisions. In many States following the civil law legal tradition, the prosecutor is in principle required to prosecute every case where there is sufficient evidence to sustain a prosecution, although several countries have increased their degree of discretion to provide alternatives to prosecution.[164] In this way, the role of the judge in the criminal justice process within civil law systems is key. The judge determines the matters in dispute, identifies the evidence needed, schedules necessary hearings, and formulates the final judgement based on the evidence submitted and the applicable code.

IN CONTINENTAL LAW SYSTEMS THE USE OF ALTERNATIVES RELIES PRIMARILY ON THE APPLICATION OF EXISTING LAW

Notwithstanding the procedural differences that often exist between legal systems that follow the common law and civil law legal traditions, it is important that the key decision-making actors of the criminal justice system and the health sector should work together to review current policies and practices, to determine the points at which discretion may be applied to provide treatment as an alternative to conviction or punishment for people with drug use disorders in line with the international legal framework.

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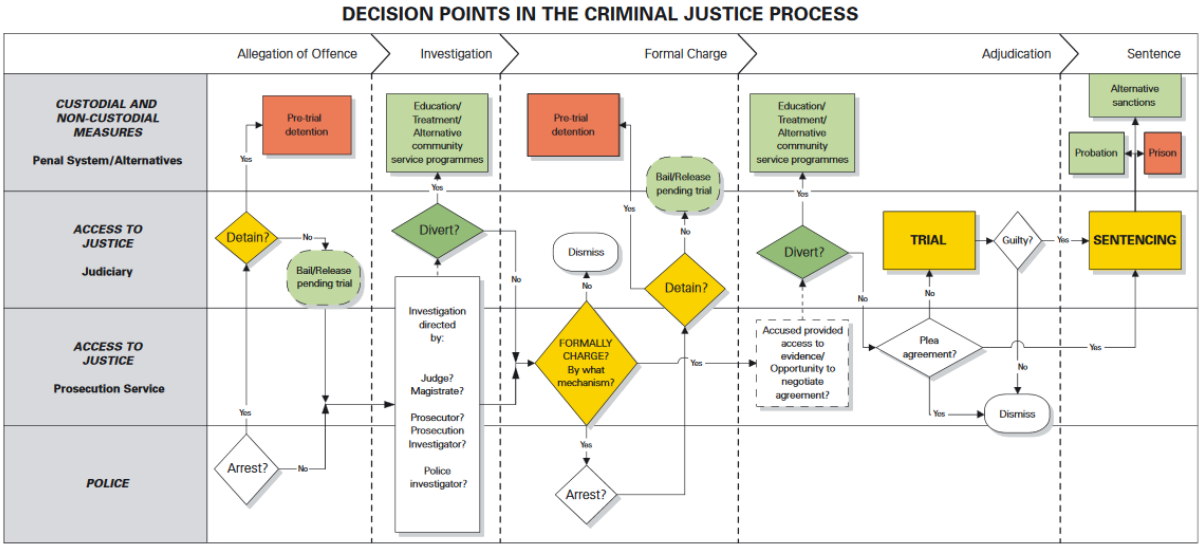
[161] See UNODC, The Status and Role of Prosecutors (2014), p. 9.
[162] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons (2013), p. 103.
[163] See UNODC, The Status and Role of Prosecutors (2014), p. 43.
[164] See UNODC, The Status and Role of Prosecutors (2014), p. 9 and 46; UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons (2013), p. 103.

Wherever a criminal justice institution is given discretion, there is a need to ensure that actors and agencies responsible are held accountable for the decisions that they make. It is important that measures are put in place to avoid arbitrary decisions or corrupt practices. Such measures should include, at least, the careful recordkeeping of decisions and monitoring by independent bodies. In societies where corruption represents a major challenge in all spheres of life, it may be very difficult to ensure accountability, which must be taken into account when deciding on the extent of police and prosecutorial discretion.[165]

2.3.3 The role of judicial actors with regard to diversion to treatment in different legal systems

While the criminal justice process follows similar steps in the different legal systems - (1) allegation of offence, (2) investigation, (3) formal charge, (4) adjudication and (5) sentence - the process and role of the "judicial actors" differ.



WHO TAKES THE LEAD?

In many civil law systems, the "investigation" phase is usually conducted by the public prosecutor, often together with the police, followed by the examination phase also conducted by the public prosecutor, with the active involvement of the examining judge. Unlike the common law system, where the prosecutor and defence can negotiate and agree on a "deal" to avoid a lengthy trial (plea bargaining), in civil law

[165] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons (2013), p. 104.

systems, the judge must apply the provisions of the applicable codified law to the facts of the case. Unlike the common law system, precedents, or prior case decisions of similar cases, often play little, if any, role in the decisions of courts following the civil legal tradition.

In a common law system, the investigator, prosecutor, the defence, and the trial judge serve separate functions. The primary role of the judge in a common law system is to ensure that the rules of court procedure are followed by the prosecution and defence and to then serve as an "arbiter", applying the facts of the case at issue that the prosecution and the defence present – generally through oral testimony of witnesses -- to the legal situation at issue. Because the testimony of witnesses can address relevant research findings, experience, and other factors that may be relevant, the judge can consider these factors in issuing his/her decision. Using the "adversarial" process, each side argues for the case disposition they are advancing, primarily by presenting oral testimony of witnesses and/or other experts to support their respective positions, with the opportunity for the opposing side to cross-examine the witness to identify potential weaknesses in the position they are advancing. When this "adversarial" process is completed, each "side" then makes an argument to the judge on why he/she should accept or reject prior case rulings that might apply. The judge then takes all the testimony and evidence presented into account and issues his/her opinion, relying on prior case decisions to the extent possible.

Regardless of the specific process and whether the legal system is grounded in the common law or the civil law legal tradition, a key task in implementing treatment and care as an alternative to conviction or punishment requires sensitizing the key judicial actors – judge, prosecution, and defence – on: (1) the importance of these alternatives, their rationale, the services and supervision entailed, and the rehabilitation, public safety and community interests in providing them; and (2) promising evidence-based drug treatment and care practices and services that should be considered.

2.4 Take home messages

Alternatives to conviction or punishment in line with the international legal framework

1. The instruments comprising the international legal framework encourage the provision of access to treatment for people with drug use disorders in contact with the criminal justice system. This is consistent with recognizing their right to health. Such treatment may be provided as an alternative to conviction or punishment, depending on criteria relating to the offence, the offender, victims and society. People with drug use disorders who are deprived of their liberty continue to be entitled to treatment at the same level of health care available in the community. When people are returned to the community from a closed setting, efforts should be made to ensure the continuity of drug treatment, including opioid maintenance treatment.
2. The laws and policies of most countries provide for some discretion by the criminal justice system in determining the appropriate response to offences committed by individuals with drug use disorders.
3. Treatment and care as an alternative to conviction or punishment have been implemented in different legal systems. The process, timeframe and key judicial actors, in particular the roles of the prosecutor and the judge, will however differ.
4. A key task in implementing treatment and care requires provision of appropriate sensitization and training to the key judicial actors – judge, prosecution and defense.

Chapter 3. Treatment and care for offenders with drug use disorders

3.1 Categorization of drug use disorders

The International Classification of Diseases, 10th Edition (ICD-10)[166] classifies drug use disorders as either harmful use of drugs or drug dependence.

Drug dependence is considered a multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease. It is a syndrome characterized by the strong and overpowering desire to take the drug and an inability to control drug use with resulting use of increased amounts and spending excessive amount of time on drug-related activities. Over time, the use of the drug takes on a much higher priority for a given individual, displacing other activities that once had greater value. Individuals with this disorder often lose interest in and neglect family and social life, education, work and recreation. People suffering from drug dependence often continue to use drugs despite recurrent social or interpersonal problems, engage in high-risk behaviours, and continue use despite knowledge of persistent problems resulting from drug use. Drug dependence is associated with a range of negative health and social consequences and co-occurring mental and somatic disorders.

With recent advances in neuroscience, it is also clear that drug dependence is as much a disorder of the brain as any other neurological or psychiatric illness. Drugs affect normal perceptual, emotional and motivational processes in the brain. Different drugs have different ways of acting in the brain to produce their effects. They bind to different receptor types, and can increase or decrease the activity of neurons through several different mechanisms. Consequently, they have different behavioural effects, different rates of development of tolerance, different withdrawal symptoms, and different short-term and long-term effects. While the behavioural output is complex, it is mostly related to the short-term or long-term effects of psychoactive substances on the brain[167].

[166] http://www.who.int/classifications/icd/en/bluebook.pdf

[167] WHO (2004). Neuroscience of psychoactive substance use and dependence: summary.

Harmful drug use is the term used for drug use which is causing harm to physical or mental health of the individual but which does not meet diagnostic requirements for substance dependence.

3.2 Health screening and assessment of offenders with drug use disorders in contact with the criminal justice system

Each individual who comes into contact with the justice system and has indications of drug use (e.g. drug possession related offences) needs to be further screened and assessed to identify health and social needs associated with drug use and drug use disorders that then would need to be addressed further in order to enhance health and criminal justice outcomes of the offender. Criminal justice actors could play a role in identifying people with a high likelihood of drug use and ensure that access to further health screening and potentially assessment is being provided. Screening can be provided by a non-specialist staff whereas an assessment normally requires the presence of a trained health staff. Individuals should be informed upfront about who will have access to the screening and assessment information and how this information will be used. Once the presence of harmful drug use or drug dependence has been confirmed and the offender has indicated openness to participate in a treatment and care intervention, suitable options for the treatment and care of drug use disorders can be explored in a process involving the health experts, criminal justice authorities and the offender eligible[168]. Decisions regarding treatment can be made not on the basis of the offence they allegedly committed, but on the basis of health status and the specific treatment needs of people with drug use disorders identified at the assessment stage. Treatment of drug use disorders as an alternative to conviction or punishment should be considered in all eligible and suitable cases.

3.2.1 Interception points for screening and assesment in the criminal justice system

At the earliest point of contact with the criminal justice system the eligibility for alternatives to conviction or punishment should be considered and implemented including for offenders with drug use disorders. Opportunities for screening and assessment for health disorders including drug use disorders should be present at all points of contact within the criminal justice system.

Interception points (opportunities for linkage to services and for prevention of further penetration into the criminal justice system) exist at different stages of the criminal justice system, ranging from pre-

[168] In the criminal justice system, screening often is equated with *eligibility* (to determine whether a drug use disorder is present), and assessment often is equated with *suitability* (to define the nature of the drug use disorder, and to develop specific treatment recommendations for addressing the disorder). SAMHSA, Substance Abuse Treatment For Adults in the Criminal Justice System, 2005

trial, trial/court to post-sentencing (see Chapter 4). Examples include contact with law enforcement officers, arrest and initial detention, court hearings, probation or parole. Every actor at each interception point has an opportunity to identify indicators of potential drug use and drug use disorders and to ensure a further screening and assessment of the offender for drug use disorders to be conducted the soonest. Following a positive screening, a comprehensive assessment should occur, conducted by trained health professionals. An early available screening and assessment that allows for consecutive health interventions is especially needed to avoid an unnecessarily painful and in some cases dangerous withdrawal process for people with drug dependence in custody, therefore screening for drug use disorders should be an integral part of a standard health screening whenever people are taken into custody by the criminal justice system.

Screening and assessment are continuous processes that could be repeated by different persons in different settings, for example an initial assessment at pre-trial level and one later on in jail or prison. There are several reasons that could be identified to rescreen or reassess, such as a change in the perceived need for treatment, changes in motivation or evolutions on life domains related to their drug use disorder. Suicide risk needs to be particularly considered.

3.2.1.1 Screening

As mentioned earlier, screening is defined as a quick scan or a brief process to identify indicators for the presence of a specific condition that reflect an individual's need for treatment and to determine whether a thorough assessment is warranted.[169]

Screening tools can be grouped in two categories:

- Self-report tools and structured interviews schedules (interviews, self-report questionnaires) and
- Biological markers (breathalyzer, blood alcohol levels, saliva or urine testing, serum drug testing).

They should be selected for their application to criminal justice populations, cost, ease of and time needed for administration. Many screening instruments require little or no special training to

[169] UNODC/WHO, International Standards for the Treatment of Drug Use Disorders, 2016; SAMHSA, Screening and Assessment of Co-Occurring Disorders in the Justice System, 2015

administer, score, and interpret findings, and these tools can be applied in different stages of the criminal justice system.

Self-report tools (e.g. questionnaires, interviews) have the advantages of being physically non-invasive and inexpensive. Characteristics of a good self-report screening tool include that it is brief (10 or fewer questions), flexible, easy to administer, easy for the patient, addresses alcohol and other drugs, indicates the need for further assessment or intervention when appropriate, and that it has a clinically acceptable degree of sensitivity and specificity. The accuracy of self-report can be enhanced when the patient is given written assurances of confidentiality, when the patient is interviewed in a setting that encourages honest reporting, when the patient is asked clearly worded and objective questions, and when the patient is provided with memory aids (calendars, response cards). Additionally, self-report can clearly be misrepresented if the patient is under the influence of drugs when making the report, but this should not preclude the initial screening process. When selecting which screening tool to use, practitioners should select a tool that is standardized and empirically validated for use with the population being served. The ASSIST (Alcohol, Smoking and Substance Involvement Screening Test) has been developed by the World Health Organization. It consists of 8 questions asking about alcohol, tobacco and drug use (including injecting drug use). The questions give information about hazardous, harmful or dependent use including injecting drug use. It has been especially developed for a primary care setting and is recommended in an interview format (WHO, 2010)[170] . When screening results indicate a potentially serious problem, further assessments should be performed by specialized health professionals upon referral to ensure adequate follow-up.

Biological markers may be useful when a patient is not able to respond to an in-person interview, but information is required to attain a screening result (i.e. an unconscious). However, for conscious patients it is preferable to use a self-report screening tool.

3.2.1.2 Assessment

A comprehensive medical and psychosocial evaluation of a patient should be administered on entry into any treatment programme to determine the unique needs and to develop the treatment plan for each patient. Assessments should therefore include a medical history, presence of chronic and acute diseases and related pharmaceutical therapies, as well as a routine documentation of infectious diseases including HIV, Tuberculosis, Hepatitis etc. A comprehensive assessment also considers other

[170] http://www.who.int/substance_abuse/activities/assist_test/en/

life domains such as employment situation, family situation, legal situation, housing situation among others. An evidence-based assessment tool such as the Addiction Severity Index (ASI), which evaluates severity of drug use problems and associated problems (medical, psychiatric, family, etc.) can be administered by a trained staff member. When the patient is not in acute withdrawal, a structured interview for psychiatric disorders such as the MINI, SCID, or CIDI-SAM may be considered and are particularly useful for both establishing drug use disorders and identifying co-occurring psychiatric disorders. The treatment plan for an individual should be based on a detailed assessment of the treatment needs, the appropriateness of treatment to meet those needs (assessment of appropriateness should be evidence based), the patient acceptance and the treatment availability[171].

3.3 Treatment of drug use disorders

The range of treatment options for harmful drug use and dependence are discussed in detail in the UNODC-WHO International Standards for the Treatment of Drug Use Disorders[172]. Drug Use Disorders can be effectively treated using a range of pharmacological and psychosocial interventions in a variety of in-and outpatient settings. These interventions have been developed with the support of scientific evidence and their effectiveness has been tested using scientific standards used in developing treatments for other medical disorders. The goals of treatment are to: 1) reduce the intensity of drug use or its cessation, 2) improve functioning and wellbeing of the affected individual, and 3) prevent future harms by decreasing the risk of complications and reoccurrence.

Emergency situations, such as acute drug overdose, need to be identified and managed immediately as well.

UNODC-WHO Principles of drug dependence treatment

Principle 1: Treatment must be available, accessible, attractive, and appropriate for needs

Principle 2: Ensuring ethical standards in treatment services

Principle 3: Promoting treatment of drug use disorders by effective coordination between the criminal justice system and health and social services

Principle 4: Treatment must be based on scientific evidence and respond to specific needs of individuals with drug use disorders

Principle 5: Responding to the needs of special subgroups and conditions

[171] UNODC/WHO, International Standards for the Treatment of Drug Use Disorders, 2017

[172] https://www.unodc.org/documents/UNODC_WHO_International_Standards_Treatment_Drug_Use_Disorders_December17.pdf

Principle 6: Ensuring good clinical governance of treatment services and programmes for drug use disorders

Principle 7: Integrated treatment policies, services, procedures, approaches and linkages must be constantly monitored and evaluated

3.3.1 Management of harmful drug use

A full guide to treatment is contained in the International Standards for the treatment of Drug Use Disorders[173]. In summary, to reduce the intensity of drug use people with harmful drug use may only require a brief intervention, such as can be delivered by a trained health care provider in one session or a small number of sessions. To improve functioning and wellbeing they may need screening and treatment of any mental health, physical health or social problems. To prevent future harm, they may need to be educated about the risks of continued drug use, and given the means to prevent such harms. Triggers for relapse can be identified and techniques can be provided to manage such risk situations.

There are several basic steps in an effective brief intervention. Initially the practitioner will introduce the issue of drug use in the context of the patient's health and wellbeing, together with the challenge that brought them to the current session. Since the patient is placed at the centre of the discussion, the practitioner will listen and use non-judgemental strategies such as summarizing and reflection to provide feedback to the patient. The patient will be asked to talk about change and to set realistic goals with regards to their drug using behaviour. At the end of the session, the practitioner will summarize and provide positive feedback to the patient, empowering them to continue to take responsibility for changing their behaviours and as needed provide access to further specialized treatment and care options.

The healthcare provider or practitioner providing brief intervention services should be trained in using motivational techniques to build rapport with the person, avoid defensiveness, and enhance intrinsic motivation to cease risky drug use before more severe problems develop. Brief interventions are a client-centred and strength-based approach which empowers the patient to take responsibility for the change process.

[173] UNODC/WHO (2017). International Standards for the Treatment of Drug Use Disorders

3.3.1.1 Treatment of harmful drug use in the criminal justice context

When an offender with a high likelihood of having a drug use disorder comes into contact with the criminal justice system, further screening, followed by referral to assessment and brief intervention to be conducted by a trained health professional, can be made. The assessment can determine if the offender has drug dependence or harmful drug use, and in the situation, that the diagnosis is harmful drug use can in many cases provide a brief treatment intervention as described above. If the assessment identifies that the person is drug dependent, most likely further drug dependence treatment is needed and should be offered. If other somatic/mental health or social problems are identified in the assessment process, the offender may be referred to services which can provide treatment and care for those issues.

3.3.2 Treatment of drug dependence

Drug dependence is typically more challenging to treat. Reducing or stopping drug use may require a combination of medications, a process of detoxification as well as psychosocial support, and a range of rehabilitation support interventions at both the inpatient and outpatient level. If the offender is at risk of particular harms related to their pattern of drug use, such as injecting drug use or drug overdose, they can be referred to services which can help to reduce that risk. In order to reduce infectious diseases associated with injecting drug use and the use of non-sterile equipment, the provision of clean syringes is an effective way to reduce negative health consequences of injecting drug use. This, of course as part of a comprehensive strategy aimed at recovery. In order to reduce the risk of opioid overdose, several strategies including the provision of the opioid antidote naloxone to first responders and peers have been recommended[174]. Police in some countries also now carry naloxone themselves, so that if they are the first to arrive at the scene of an overdose, they can administer naloxone in order to save that person's life.

[174] WHO Community Management of Opioid Overdose, 2014

3.3.2.1 Treatment of drug dependence - medications

Long acting opioids such as methadone and buprenorphine have been particularly effective in the treatment of opioid dependence, but similar maintenance treatment options are not available for other drug dependencies at this time. Medications (methadone, buprenorphine, lofexidine, clonidine), can furthermore be useful to manage the symptoms of opioid withdrawal and to reduce the risk of relapse for opioid use disorders(naltrexone)[175]. Symptomatic medications can also help to manage withdrawal symptoms associated with other drugs.

3.3.2.2 Treatment of drug dependence – psychosocial support

A range of psychological and social supports have been shown to reduce drug use. These include behavioural approaches (such as the community reinforcement approach and contingency management), cognitive behavioural therapy, motivational enhancement therapy, and involvement of families (couples therapy, multidimensional family therapy). Social supports which support employment and accommodation have also been shown to be beneficial.[176]

3.3.2.3 Treatment of drug dependence in the criminal justice context

When an offender with drug dependence comes into contact with the criminal justice system there is a high likelihood that he/she has not been receiving adequate treatment so far. The interaction with the criminal justice system can provide an opportunity for that person to receive access to the needed treatment of drug dependence. As for the management of harmful drug use and drug dependence, normally the first step is for an adequate assessment by a clinician of the diagnosis, and the kind of treatment that may be indicated. This also requires information on the eligibility and interest of the offender to participate in the available treatment options provided as an alternative to conviction or punishment. Such assessment could also include the presence of other medical, mental or social problems. If the person is open to participating in treatment, there would need to be a discussion of

175 http://www.unodc.org/documents/UNODC_WHO_International_Standards_Treatment_Drug_Use_Disorders_December17.pdf, http://www.who.int/substance_abuse/publications/opioid_dependence_guidelines.pdf

176 http://www.unodc.org/documents/UNODC_WHO_International_Standards_Treatment_Drug_Use_Disorders_December17.pdf

the availability and accessibility of appropriate treatment alternatives. Once these have been determined, the relevant criminal justice system actors need to decide if treatment can be provided as a partial or complete alternative to conviction or punishment, and may outline conditions on which such a decision is taken. Conditions may vary from initial attendance in a treatment intervention to ongoing participation in a treatment programme to particular desired outcomes such as abstinence or reduced drug use. If one treatment approach does not achieve the desired outcome, there may need to be a process for consideration of alternative treatment approaches better matching the health and social care needs of the offender with a drug use disorder.

3.4 Take home messages

Treatment and care of drug use disorders

1. Drug use disorders cover both harmful drug use and drug dependence. Drug dependence syndrome is characterized by the strong and overpowering desire to take the drug and an inability to control drug use with resulting use of increased amounts and spending excessive amount of time on drug-related activities.
2. Effective interventions to reduce drug related harm and to manage harmful drug use and drug dependence exist and can be applied including in the criminal justice setting.
3. Opportunities for diversion and treatment being applied as an alternative to conviction or punishment should be considered as early as possible after contact with the criminal justice process.
4. Screening is a brief process to identify indicators for the presence of a specific condition that reflect an individual's need for treatment and can determine whether a thorough assessment is warranted. The least invasive screening tool should be used. Screening tools should be selected for their application to criminal justice populations, taking into account cost, ease of and time needed for administration
5. A health disorder assessment should only be carried out by a trained health professional.

Chapter 4. Diversion options to treatment as an alternative to conviction or punishment

The different effective assessment and treatment options for offenders with drug use disorders have been discussed before as well as the relevant international treaties providing the framework for treatment as an alternative for conviction or punishment. In this chapter, we will discuss the range of diversion options available at the various levels of the criminal justice system.

Treatment as an alternative to conviction or punishment is as varied as the countries and the jurisdictions in which they operate.[177] Countries have different approaches informed by various considerations, including the characteristics of their legal system, their policy priorities regarding drug offences, the resources at their disposal and cultural factors. It is important to emphasize that what has been shown to work in one country or subpopulation, cannot necessarily be transposed to another. A further key factor is the availability, accessibility and effectiveness of treatment services in the community in order for treatment to be implemented as an alternative to conviction or punishment.

4.1 The range of diversion options in the criminal justice system is broad

There is a range of options to provide treatment to persons with drug use disorders as an alternative to conviction or punishment. Depending on the country, these options exist at different stages of the criminal justice system, ranging from pre-trial, trial/court to post-sentencing.

All the diversion options compiled in this publication are compatible with the international drug control conventions. It is not the aim of this publication to include a complete list of all alternatives to conviction or punishment in all Member States, but to present a general overview to stimulate countries to explore the implementation of models best matching their national laws and realities that are in line with international treaties and medical standards.[178]

[177] Inter-American Drug Abuse Control Commission (OAS/CICAD), Technical Report on alternatives to incarceration for drug-related offences, 2015

[178] For a more comprehensive overview of alternatives to conviction or punishment it is made reference to other documents such as EMCDDA best practice portal, European Commission's study on alternatives to coercive sanctions (2016) or OAS/CICAD's technical report (2015)

The overview includes the options for providing treatment as an alternative to conviction or punishment in which the offender has the choice to participate in the treatment. This means that the individual has the choice to opt for a diversion to treatment (during which the prosecution or the sentence is held in abeyance) or a continuation of the criminal justice process.

Risk-Needs-Responsivity (RNR) assessment instruments can be used in addition to clinical screening and assessment tools for drug use disorders at nearly all points of the criminal justice system to generate information on potential alternatives.

The Risk, Need and Responsivity (RNR) assessment has been developed in North America as a model to effectively guide judicial supervised treatment, to make informed decisions about the management of offenders and their treatment, connecting low to high risk and low to high need offenders to the respective intensity of criminal justice supervision. It can help service providers to conduct a comprehensive assessment of risks, needs and personal learning styles of offenders, including those with drug use disorders and it can be used at nearly all points of the criminal justice system.

- The *risk* assessment component indicates that the risk level of an offender can be predicted and should be matched with the frequency and intensity of the supervision. In other words, a high-risk offender should be placed in programs that provide more intensive intervention and services while low-risk offenders should receive minimal or even no intervention.[179] = **WHO**
- The *need* assessment component indicates that effective interventions should focus on addressing the (unaddressed) needs (e.g. unemployment, family problems, etc.) of the offender that may have contributed to criminal behavior in the first place. These areas of need should be considered in the development of an individualized and comprehensive treatment plan. = **WHAT**
- R*esponsivity* refers to the fact that rehabilitative programming should be delivered in a style and mode that is consistent with the ability and learning style of the offender.[180] = **HOW**

Assessment of risk and needs in a criminal justice context is used to identify those most suited for more or less intensive criminal justice supervision, as well as the factors that comprehensive treatment

[179] Andrews & Bonta, 2006
[180] James, N. Risk and Needs Assessment in the Criminal Justice System, Congressional Research service, 2015

programmes should take into consideration to improve rehabilitation outcomes.[181] Treatment for offenders that incorporates the RNR areas has been shown to be more effective.[182]

At pre-trial stage, RNR instruments could be used when deciding on conditional bail, to help making decisions about which defendants can be released pending trial and what kind of conditions to be placed on the offender. During sentencing, RNR instruments could be used to assist decisions on the nature and level of supervision and which conditions to be placed on the offender. Also, it could help the development of an individualized case management plan. At post-sentencing stage, RNR instruments can help to make decisions about which prisoners can be released and which conditions may be imposed.

Example: Florida's (USA) validated Pre-trial Risk Assessment Instrument

Several Florida counties have a pretrial services programme that gathers information about defendants before the initial pretrial release hearing in order to make a recommendation to the court regarding release. As such, pre-trial service programmes could provide the court information on probabilities of success on pre-trial release and make it possible to tailor supervision strategies corresponding to the assessed levels of risk. The validated risk assessment instrument is also used as a tool to help manage the extent of the pretrial population, assuring that expensive detention space is reserved for those with the lowest probability of success. This in turn, may provide an opportunity for significant cost savings (comparing the cost of one day in jail to one day on pre-trial release in the community).

The final decision whether or not to enter treatment remains with the offender, whereas justice practitioners play a role in assessing eligibility for diversion to different treatment models with more or less justice system supervision and health practitioners in assessing suitable treatment approaches that the offender might benefit from. Treatment of offenders in contact with the criminal justice system usually entails that when the alternative fails because the individual does not complete treatment (for example due to treatment drop-out, continuously breaching conditions) prosecution or sentencing are still a possibility. The consequences of breaching the conditions, varies with the severity of the violation. For example, it could lead to an adaptation of the treatment plan rather than automatically resulting in imprisonment.

[181] Belenko, S., Hiller, M. & Hamilton, L., Treating Substance Use Disorders in the Criminal Justice System, Current Psychiatry Reports, 2013, 15:414.

[182] Taxman FS, Thanner M. Risk, need, & responsivity: It all depends. Crime Delinq. 2006;52:28–52.

Different diversion options are possible at each stage from arrest to incarceration and release from prison. The process from arrest to incarceration or full discharge of the sentence has many decision stages, actors involved and possible outcomes and varies between countries. The following table summarizes the key intervention points and types of diversion programmes that have been implemented in Member States.

ADMINISTRATIVE RESPONSE	**CRIMINAL JUSTICE RESPONSE**		
PRE-ARREST **Police**	**PRE-TRIAL** **Police, Prosecutor, Defence, Examining magistrate**	**TRIAL/SENTENCING** **Judge, Probation officers**	**POST-SENTENCING** **Prison Director, Parole Board, Minister of Justice**
Administrative response with information/referral to treatment	Caution with a diversion to education/treatment	Postponement of the sentence with a treatment element	Early release/parole/pardon with a treatment element
	Conditional dismissal/ Conditional suspension of the prosecution	Deferring the execution of the sentence with a treatment element	
	Conditional bail (alternative to pre-trial detention)	Probation/judicial supervision	
		Special courts/docks (f.e. the Drug Treatment Court)	

The overview of diversion possibilities is related to the different decision stages of the criminal justice system, and the possible outcomes of diversion. Before diversion options within the criminal justice system are being discussed, diversion options integrated in administrative responses should be considered. Situated outside of the criminal justice system, they are still relevant in this section because they are a formal response to drug offences.

4.2 Administrative responses instead of criminal sanctions

Many countries use administrative instead of criminal sanctions to deal with minor breaches of the law, such as road traffic violations. When such violations are committed by people with drug use disorders, the administrative sanction could involve a diversion to treatment (such as brief motivational treatment, short-term treatment, relapse prevention classes). Another example are the non-criminal justice responses to the possession of small quantities of drugs for personal consumption, without aggravating circumstances, which can be found for example in many countries across Europe and the Americas.[183] In such cases of non-criminal justice responses, the possession of controlled drugs is still considered unlawful, and part of measures put in place to limit its non-medical or non-scientific use, but it is dealt with in an administrative rather than a criminal way.

Example: Portugal

In 2001, Portugal eliminated criminal penalties for low-level possession of all types of controlled drugs and reclassified these activities as administrative violations under Law 30/2000.

The acquisition and possession of controlled drugs is deemed an administrative offence (cfr. articles 4 and 36 of the 1961 Single Convention), sanctioned by administrative measures rather than by criminal punishment (as long as the quantity held by the offender does not exceed ten days' worth of personal supply). Drug trafficking and possession of controlled drugs in higher amounts than legally foreseen are still processed through the criminal justice system.

When a person is found in possession of any drugs for non-medical personal consumption, he/she is diverted to a local "Commission for the Dissuasion of Drug Abuse". This commission - the unique cornerstone of the Portuguese approach - is comprised of one justice professional and two representatives from health or social services who determine whether and to what extent the person suffers from a drug use disorder. After examining the personal circumstances of the offender, the Commission evaluates possible treatment, education and rehabilitation measures. The commission could refer a person with a drug use disorder to voluntary treatment, pay a fine or impose other administrative sanctions (such as a warning or a banning from certain places).

[183] EMCDDA, Legal topic overviews: possession of cannabis for personal use: http://www.emcdda.europa.eu/legaltopic-overviews/cannabis-possession-for-personal-usecountries; EMCDDA, Alternatives to punishment for drug using offenders, July 2015: http://www.emcdda.europa.eu/attachements.cfm/att_240836_EN_TDAU14007ENN.pdf

In June 2012, the International Narcotic Control Board (INCB) undertook a mission to Portugal to examine the results of the implementation of Law 30/2000. The Board acknowledged that the Commissions for the Dissuasion of Drug Abuse are an important element of the demand reduction mechanism in Portugal.[184] It noted that the Government is committed to strengthening the primary prevention of drug use disorders. INCB came to the conclusion that the Government of Portugal is fully committed to the objectives of the international drug control treaties since Law 30/2000 has not legalized the possession and acquisition of drugs.

4.3 Pre-trial stage

Criminal justice actors at this stage face a dual important role: they are often the first responders to offenders with drug use disorders (including in cases of emergency such as an overdose) and they are also the first criminal justice actor that could divert them to treatment.

REFERRAL TO TREATMENT AT PRE-TRIAL STAGE MIGHT PREVENT FURTHER INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM. A CHOICE IS MADE FOR TREATMENT INSTEAD OF PROSECUTION. THE UNCERTAINTY REGARDING THE CONSEQUENCES OF THE CASE AND THE FACT THAT GUILT HAS NOT BEEN LEGALLY DETERMINED, SHOULD BE TAKEN INTO ACCOUNT

In this stage, police and the prosecuting authorities should take the lead in diverting eligible offenders out of the criminal justice system. In particular, the police and prosecutors, who introduce offenders into the system, have to exercise a degree of discretion in deciding whom to divert to treatment and whom to arrest or prosecute.[185] Police officers therefore need clear instructions on when they can issue cautions and refer qualifying offenders to treatment (without referring the case to the prosecuting authorities). Similarly, also prosecutors need clear guidelines. [186]

Further involvement in the criminal justice system might be prevented when criminal justice actors at this stage are informed about the drug use disorders of the offender (e.g. because of screening) and when they have the possibilities to divert to treatment (e.g. availability of treatment in the community). Most diversion programmes are operated and controlled by the prosecutor, who has overall responsibility for screening cases for eligibility and monitoring individuals' treatment progress.

[184] See Report of the International Narcotics Control Board for 2012; Statement of the INCB President, 9 December 2015, available at https://www.incb.org/documents/Speeches/Speeches2015/statement_reconvened_CND_side_event_portugal.pdf.

[185] UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment

[186] UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment

If the offender leaves treatment prior to completion, the prosecutor reserves the right to restore the criminal charges and prosecute the case.

Diversion at pre-trial stage means that offenders, facing formal charges or trial, may opt for treatment instead of prosecution. Offenders at pre-trial stage experience uncertainty regarding the status and consequences of their case. This uncertainty can help or undermine their motivation for treatment. For some, it provides motivation leverage to engage in treatment, for others, the stress related to the uncertainty of their case makes them less responsive to treatment.[187] In a pre-trial setting, the question of an individual's guilt has not been legally determined and the presumption of innocence applies. Therefore, it is important to note that (treatment and judicial) professionals are aware that treatment should not compromise the (due process) rights of the defendants and society as well as of the alleged victim.[188]The requirement to plead guilty in order to be considered eligible for alternatives to conviction or punishment, could be seen as an erosion of the due process rights of the defendants.

The possibilities to divert offenders at pre-trial stage to treatment vary from country to country. In some countries pre-trial diversions are restricted to offences related to the personal consumption of drugs. In other countries, this measure is also applicable to other offences.

Diversion options at this stage primarily rely on brief interventions or psychosocial interventions in outpatient settings. The type and intensity of treatment depend on proper assessment.

The typical types of alternatives at this stage are a caution by the police with a diversion to treatment, or actions by the prosecutor including conditional dismissal (with a recommendation to seek treatment or a pretrial diversion to a treatment programme), and a conditional release (with a treatment requirement) as an alternative to pre-trial detention.

[187] Peters, R.H & Wexler, H.K., Substance Abuse Treatment for Adults in the Criminal Justice System, Substance Abuse and Mental Health Services Administration: Rockville, 2005, 365p

[188] Peters, R.H & Wexler, H.K., Substance Abuse Treatment for Adults in the Criminal Justice System, Substance Abuse and Mental Health Services Administration: Rockville, 2005, 365p

4.3.1 A caution with a diversion to treatment

A caution is an alternative to arrest or prosecution. A conditional caution is often used in conjunction with a referral to an education session, assessment and/or a brief intervention or treatment instead of being charged with an offence. Generally, the defendant has to admit the offence and agree to be cautioned. When breaching the conditions, the defendant could be prosecuted. In several countries, a conditional caution is often used in cases of possession of cannabis for personal consumption.

Example: Cannabis Caution Schemes (Australia)

The cannabis cautioning scheme is a diversionary scheme for adults found in the possession of cannabis for personal consumption. This scheme was implemented in 2000, and is used by the police at their discretion. Under this scheme, police officers who find someone in the possession of cannabis can opt to issue them with a caution rather than a formal charge. This caution includes a warning about the legal and health consequences of using cannabis and contains phone numbers for the Alcohol and Drug Information Service (ADIS). The information is provided on a first caution. On a second caution a person is required to contact ADIS and attend an education session about their cannabis use.

4.3.2 Suspension of the prosecution, conditional dismissal

The relevant judicial actor (e.g. the prosecutor) may suspend the proceedings on the condition that the defendant completes treatment and complies with the conditions. In this way, the case does not proceed to the court for trial.

In most countries, the minimum length of the conditional suspension is not explicitly specified and the maximum length varies with examples of 6 months or less to 3 years or longer. The condition(s) may include undergoing medical and/or psychological treatment or participation in special treatment programmes.

When the offender complies with the condition(s), the case will be dismissed. The offender could however be prosecuted for the original offence when he or she does not comply with the conditions (for example breaching conditions, treatment drop-out).

A conditional dismissal is often used in cases involving first-time and less serious offences for which drug use appears to be the driving force for the criminal conduct.

4.3.3 Conditional bail

In most countries, police can only hold a suspect in custody for 24 to 48 hours before charging them or releasing them. After being charged with a crime and while their case is investigated, defendants are either granted (conditional) bail or remanded in custody.

Conditional bail can be granted on the condition of participation in treatment. They are less intensive forms, such as release on recognizance with obligations attached, and more intensive forms, such as long-term residential treatment as a condition of bail. A pretrial supervision agency or probation officers supervises compliance with the conditions. If the offender fails to comply with the conditions, he or she may be sent to jail prior to trial. Successful completion of the conditions may mitigate the sentence if the offender is convicted.

Pre-trial detention is typically applied to prevent the suspects or accused from obstructing the investigation, preventing the commission of further offences or ensuring their appearance in court. The available alternatives to pre-trial detention and their use vary considerably across countries.[189] Conditional bail could be denied because of several reasons, e.g. when there is a risk that the defendant commits further offences, interferes with witnesses or flees.

Contrary to the fundamental right to liberty, the presumption of innocence and the prohibition to detain persons awaiting trial in custody as a general rule,[190] the overuse and long periods of pre-trial detention is endemic in many countries.[191] All over the world, non-convicted prisoners form a large part of the prison population. In some countries they even outnumber sentenced prisoners.[192] In line with the international legal framework and in order to ensure that alleged offenders with drug use

[189] van Kempen, PH (ed.), Pre-trial detention. Human rights, criminal procedural law and penitentiary law, comparative law – Détention avant jugement. Droits de l'homme, droit de la procedures pénale et droit penitentiaire, droit comparé. Cambridge, Antwerp, Portland: Intersentia, 2012

[190] ICCPR, articles 9 and 14.

191 See UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 35.

[192] van Kempen, PH (ed.), Pre-trial detention. Human rights, criminal procedural law and penitentiary law, comparative law – Détention avant jugement. Droits de l'homme, droit de la procedures pénale et droit penitentiaire, droit comparé. Cambridge, Antwerp, Portland: Intersentia, 2012

disorders can access treatment services, it is a good practice to use alternatives to pre-trial detention wherever possible and appropriate.[193]

4.4 Trial/ Sentencing stage

As mentioned in the introduction of this section, most alternatives to conviction or punishment are situated at sentencing level.

REFERRAL TO TREATMENT AT TRIAL STAGE CAN BE USED AS AN ALTERNATIVE TO PUNISHMENT OR CAN BE ADDED TO THE PUNISHMENT. DEPENDING ON THE RESULT, THE SENTENCE IS DEFERRED OR SUSPENDED

Referral to treatment at trial stage can be used as an alternative to punishment or can be added to the punishment. Depending on the result, the sentence is deferred or suspended.

The judicial actors imposing these conditions may need to set up some mechanisms in the community to ensure that the conditions they set, are met.[194] They should also ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferred/suspended/probation period.

When making his decision, the judicial authority should take into consideration the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.[195]

Diversion options at this stage will primarily rely on treatment services provided in intensive, specialized outpatient treatment settings, and to a lesser extent in residential treatment settings. The type and intensity of treatment depend on proper assessment. A critical component should be recovery management (such as relapse prevention).[196]

Some options, including conditionally deferred sentences and suspended sentences, may be used for less serious offences or failed alternatives at pre-trial stage. They may be a sensible option in cases where the offender is unlikely to offend again or where there is a real likelihood of compliance with treatment.

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[193] See UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 108.
[194] UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment
[195] Article 8.1, Tokyo Rules
[196] A technical assistance guide for drug court judges on drug court treatments services

4.4.1 Conditionally deferred sentence

Deferring means that the judge convicts the offender, but does not immediately pronounce a sentence although the facts are considered to be proven. Often, the determination of the sentence is postponed during a certain period of time. During this period, the offender can be diverted to treatment: he participates in treatment while under judicial supervision. Sometimes, trial procedures can proceed simultaneously with the treatment programmes, during which the progress in treatment could be followed up at the sentencing stage.

Depending on the result, a (formal) sentence may not be pronounced. As such, depending on the jurisdiction, no permanent record of the crime will be made[197]. Successful compliance with a treatment programme may be considered as a mitigating factor, which allows for sentencing alternatives to imprisonment.
If the conditions of deferral are not met, a hearing will determine whether the terms have been violated and a sentence will be determined.

4.4.2 Conditionally suspended sentence

In case of a suspended sentence, the judge pronounces a sentence, but its implementation is suspended for a specific period of time and on certain conditions the defendants needs to comply with. Depending on the jurisdiction, there is a declaration of guilt and the measure will be mentioned on a criminal record but there is no deprivation of liberty.

The threat of imprisonment may have a deterrent effect. When a person breaches the conditions, a hearing will determine whether the terms have been violated and he/she will likely have to serve the original sentence.[198] However, suspended sentences should not be triggered automatically: the authorities should decide in each individual case whether imposition of the sentence is appropriate.[199]

There is evidence that offenders who receive suspended sentences have lower rates of reoffending compared to some other alternatives and research findings have also highlighted the importance of

[197] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013
[198] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013
[199] Rule 14 of the Tokyo Rules; see Chapter 3 above.

measures to address specific concerns relating to the application of suspended sentences, such as public acceptance and net-widening.[200]

4.4.3 Probation

Under a probation order, the convicted person is placed under the supervision of a probation officer for a specified length of time. Across countries, probation could be considered equivalent or complementary to a conditionally deferred/suspended sentence or it could be an entirely autonomous legal action.[201] The choice of the conditions of probation is left to the discretion of the relevant actors (e.g. judge, probation commission) taking into account the individual needs of each defendant.

Across the world, different understandings of probation exist. In many countries, probation originated in a social welfare context: a social welfare organisation pays attention to the offender's social needs. In other countries, probation is primarily aimed at ensuring that offenders follow the conditions stipulated by the court. Regardless of the variations, there are some common practices such as supervision, guidance and assistance across Member States during a specific period of time. In most Member States this period is specified as a minimum of 6 months-1 year and a maximum of 3-5 years.

IF RESOURCES (FINANCIAL AND SUPERVISION STAFF) ARE TOO SCARCE, THINK ABOUT DEVELOPING PROJECTS WITHIN EXISTING STRUCTURES

In general, the supervision of offenders within a probation system is considerably less costly than the upkeep of a prisoner. Even in the context of a developing country, the cost of supervising an offender in the community may be considerably lower than that of keeping a person in prison.[202] The establishment of a specific probation service may not be a viable option for those countries where resources are too scarce to implement and maintain a probation system with adequate staff and finances. In these circumstances, the development of existing structures and staff (e.g. of courts, social agencies, community services) for the supervision may be more feasible.[203]

Probation typically entails more intensive supervision of offenders than would be involved in a suspended sentence alone. While this may result in increased control of probation services over offenders, it also provides scope for the provision of necessary psychological, social and material

[200] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 116-117.
[201] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013
[202] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 137-138.
[203] UNODC, Custodial and non-custodial alternatives to incarceration

assistance,[204] as well as an opportunity to avoid that technical violations of conditions automatically lead to imprisonment, although this will depend on the approach adopted by the supervising agency.[205]

4.5 Special courts/dockets

One of the most studied diversion option is the Drug Treatment Court (DTC). Since the establishment of the first DTC in Miami-Dade County, Florida, in 1989, a growing number of countries have implemented the model and other countries are currently exploring the model. While some DTCs in the United States have been operating for over 20 years, most other countries are only in the early stages of development.

The DTC model has been adapted to the specific context and needs of several Member States. The legal eligibility criteria, drug cases considered, screening and referral, the organisation (for example the information exchange) between criminal justice actors and health professionals vary greatly from Member State to Member State.[206] The DTC model may be viable in countries relying on both adversarial and non-adversarial justice systems. The preference for rehabilitative goals, the very active role of the judge, and the collaboration between defence and prosecution in non-adversarial systems are elements highly conducive to the importation of the DTC model[207]. Treatment integration and the challenges in establishing a legal framework for the operation of DTCs may be obstacles to potential adoption of the model. However, several practices of adapting and implementing DTC models in non-adversarial systems have shown promising outcomes so far.[208]

In general, two types of DTCs exist. The first provides post-adjudication/sentencing programmes, requiring the defendant to plead guilty. In the US, most DTCs require the defendant to plead guilty and have their sentences deferred or suspended in order to be diverted to treatment. After completing the

[204] See Rule 10.4 of the Tokyo Rules.
[205] On the important role of different approaches in supervision on responses to non-compliance, albeit in the context of early release, see Dandurand, Y., Christian J., Murdoch, D., Brown, R.E., Chin, V., The International Centre for Criminal Law Reform and Criminal Justice Policy, Conditional Release Violations, Suspensions and Revocations, A Comparative Analysis, 2008.
[206] Inter-American Drug Abuse Control Commission (OAS/CICAD), Technical Report on alternatives to incarceration for drug-related offences, 2015
[207] Vîlcică, E.R., Belenko, S., Hiller, M., & Taxman, F. (2010). Exporting court innovation from the United States to continental Europe: Compatibility between the drug court model and the inquisitorial justice system. International Journal of Comparative and Applied Criminal Justice, 34, 139-172.
[208] For example: Wittouck, C., Dekkers, A., Vanderplasschen, W. & Vander Laenen, F., Psychosocial functioning of drug treatment court clients: a study of the prosecutor's files in Ghent, Belgium, Therapeutic Communities: The International Journal of Therapeutic Communities, 2014, 35 (3) pp. 127 – 140

court proceeding, the sentence could be waived or reduced. The second type provides programmes for people who enter a DTC before being convicted. In these drug courts, a guilty plea is not required and the defendant is only prosecuted if he or she fails to complete the programme.[209] The defendant must however acknowledge having a drug use disorder.

In contrast to other alternatives at trial or sentencing level offered by a judge, DTC's mostly specify the frequency, type and intensity of supervision and monitoring. Furthermore, DTCs focus not only on tackling the drug use disorder, but also aim to address problems on other drug-related life domains. As such, a range of treatment interventions are employed in DTCs. Mostly, more intensive treatment is used during the initial stages of treatment, followed by less intensive involvement in the later stages. Additionally, regular follow up hearing are organized in court to monitor compliance and support pro social behaviour. In consideration of the risk-needs-responsivity (RNR) framework (see chapter 4.1.), drug treatment courts are most effective when they target higher risk and higher need offenders[210]. DTCs that serve only first-time or low-risk offenders are not likely to be cost-effective.

4.6 Post-sentencing stage

At post-sentencing stage, the offender opts to reduce the length of his/her incarceration, serving a conditional supervised release while being in treatment.

AT POST-SENTENCING STAGE AN OFFENDER CAN BE DIVERTED TO TREATMENT IF SERVING A CONDITIONAL SUPERVISED RELEASE

The period surrounding release from prison is a critical time, bearing the potential for a drug-free and crime-free life in the community but also high risks for recidivism and relapse to drugs.[211] The period shortly after release from prison, especially the first two weeks after release, is associated with a higher risk of death for people with drug use disorders, especially for people with opioid use disorders and therefore needs special attention and continuity of services needs to be ensured.

[209] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 128.

[210] NADCP, Douglas B. Marlowe, Research Update on Adult Drug Courts, December 2010; http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf

[211] Leukefeld, C, Oser, CB, Havens, J, et al. Drug Abuse Treatment Beyond Prison Walls. Addiction Science & Clinical Practice. 2009, 5(1):24-30

Comprehensive assessment prior to release is essential to develop an appropriate treatment plan following release.[212] In general, consideration should be given to a prisoner's future after release from the beginning of the sentence and, following release, treatment should be continued and additional support should be provided to released prisoners, especially those who need psychological, medical, legal and practical help to ensure their successful social reintegration.[213]

In cases where treatment has begun inside prison, it is important to seamlessly continue treatment immediately after the individual is released from custody. Coordination and collaboration between prison treatment and community treatment staff is essential to maximize treatment success after release. "Reach-in" models in which community treatment or health providers work with clients inside the prison or jail and then continue providing services after release have been found to be effective.[214]

Opioid maintenance treatment, for example, can be commenced in prison and continued in the community in a way that reduces the risk of overdose on release from prison, reduces the risk of relapse to opioid dependence, and reduces criminal activity. Other ways to prevent opioid overdose include peer trainings on the emergency management of acute overdose and the provision of the opioid-antidote to prisoners upon release from prison[215].

Another critical component should be recovery management (such as relapse prevention, employment support, housing support). Offenders who attend recovery management following prison-based treatment have less drug use and better economic prospects than those who do not.[216]

4.6.1 Early conditional release or parole

Parole or early conditional release means the early release of sentenced prisoners under individualized post-release conditions. A prisoner can be released conditionally after a certain period or when a fixed

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[212] Belenko, S. Assessing released inmates for substance-abuse related service needs. Crime and Delinquency, 2006, 52, 94-113

[213] See Rules 107 and 110 of the Nelson Mandela Rules and Rule 47 of the Bangkok Rules.

[214] Conklin, T., Lincoln, T., & Wilson, R. (2002). Public health manual for correctional health care. Ludlow: Hampden County Sheriff's Department. Retrieved July 29,2013, from http://www.mphaweb.org/documents/PHModelforCorrectionalHealth.pdf; Zaller, N. D., Holmes, L., Dyl, A. C., Mitty, J. A., Beckwith, C. G., Flanigan, T. P., & Rich, J. D. (2008). Linkage to treatment and supportive services among HIV-positive ex-offenders in Project Bridge. Journal of Health Care for the Poor and Underserved, 19, 522-531.

[215] http://www.who.int/substance_abuse/publications/management_opioid_overdose/en/

[216] Leukefeld, C, Oser, CB, Havens, J, et al. Drug Abuse Treatment Beyond Prison Walls. Addiction Science & Clinical Practice. 2009, 5(1):24-30; O'Connell, DJ, et al. Working toward recovery: The interplay of past treatment and economic status in long-term outcomes for drug-involved offenders,Substance Use &Misuse. 2007, 42(7), 1089–1107

proportion of the sentence has been served. This conditional release can be mandatory when it takes place automatically, or it can be discretionary when a decision has to be made whether to release a prisoner conditionally.[217]

This release from prison may depend on several conditions. In the case of prisoners with drug use disorders, the condition often entails referral to treatment. Promoting the individual's compliance with the condition often requires sustained supervision and case management to ensure that underlying factors that might deter compliance – lack of housing, lack of transportation, negative peer relationships, for example – are promptly addressed before non-compliance becomes a problem. When breaching the conditions, the early release may be revoked and the person may be brought back to prison.

IN ANY EARLY RELEASE OR CONDITIONAL RELEASE MODEL, COMPREHENSIVE ASSESSMENT PRIOR TO RELEASE THAT ADDRESSES MULTIPLE DOMAINS AND DYNAMIC RISK FACTORS IS ESSENTIAL TO INFORM APPROPRIATE SERVICE PLANS FOLLOWING RELEASE

Early conditional release decisions are usually made by an (quasi-) independent authority, such as a judicial authority or a parole board, after a comprehensive assessment has taken place.[218]

The role and tasks of the authorities[219] that support social reintegration and supervise the conditions during early release is important in order to achieve a successful transition from life inside prison to life outside. In several countries, the authorities responsible for such supervision have very limited staff, technical capabilities and resources.[220] Their involvement is mainly restricted to periodic reporting.

Reoffending statistics from a number of countries demonstrate that reoffending on parole is low in comparison to reoffending following release.[221] However, a key concern highlighted in relation to the implementation of early conditional release or parole is the increasing rate of revocations, due to technical violations in a number of jurisdictions. In response to this, UNODC developed recommendations to reduce the number of people returning to prison due to technical violations of early release conditions.[222]

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[217] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013

[218] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013; Belenko, S. Assessing released inmates for substance-abuse related service needs. Crime and Delinquency, 2006, 52, 94-113

[219] In many countries, a specialized probation service is responsible for monitoring the conditions.

[220] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 123.

[221] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 120.

[222] UNODC, Handbook on Strategies to Reduce Overcrowding in Prisons, 2013, p. 125.

4.7 Take home messages

Diversion options to treatment as an alternative or in addition to conviction or punishment

1. At the different levels of the criminal justice system -pre-trial, trial/court and post-sentencing level- countries may have a broad range of options to provide offenders with drug use disorders with treatment as an alternative to conviction or punishment.
2. Referral to treatment at pre-trial stage can prevent unnecessary involvement in the criminal justice system. The uncertainty regarding the consequences of the case and the fact that guilt has not been legally determined, should be taken into account.
3. In more serious cases, diversion options to treatment can be provided at the sentencing stage. The sentence may be deferred or suspended while the defendant participates in treatment under judicial supervision.
4. At the post-sentencing stage, the prisoner may choose to attend a treatment programme as a condition of early release. Comprehensive assessment prior to release is essential to develop an appropriate treatment plan following release.
5. When resources (adequate staff and financing) are lacking to implement and maintain new projects, the use of existing structures and staff for supervision may be more feasible.

Chapter 5. Conclusion

In this concluding chapter key principles are presented, as discussed in each of the distinct chapters, that should be taken into account when setting up a diversion to treatment for people with drug use disorders in contact with the criminal justice system.

a. Adopt a health paradigm: drug use disorders can be treated in a health-oriented framework

- Drug use disorders range on a spectrum from harmful drug use to drug dependence.
- They affect not only the wellbeing of the individual and their ability to function but also the wellbeing of their families and the community (domestic violence, work productivity, associated communicable diseases, etc.).
- Although drug use disorder treatment will not be needed by everyone who seeks reduction of drug use and recovery, for some, it may be one of these pathways to recovery. Treatment coverage is however very limited compared to the need.
- Addressing drug use disorders, related problems and the link with offending require multi-sectoral and holistic approaches.
- Treatment and care with a holistic approach generates more positive outcomes than a sole focus on the drug use disorder.
- People with drug use disorders who commit an offence continue to enjoy the right to health and should not be punished for their health condition
- There is a need for accessible, effective and diversified treatment in the community.

b. Use the criminal justice system as a gateway to treatment: the criminal justice system is an important setting for drug-related interventions

- The ineffectiveness of imprisonment by itself in addressing drug use and drug use disorders is widely recognized.
- The criminal justice system can be a gateway to a holistic approach to address drug use disorders, related problems and the link with offending.

- Treating offenders with drug use disorders provides a unique opportunity to foster recovery from drug use disorders and reduction in drug use and associated criminal behavior.
- In order for the criminal justice system to fulfil a crucial role within a comprehensive framework, it needs to make use of treatment as an alternative or in addition to conviction or punishment as prescribed by the law.
- Alternatives to conviction or punishment are a crucial component of proportionate responses to certain criminal offences. They have the potential to reduce re-offending, promote social reintegration and to orient a population in need of adequate treatment.
- Treatment offers the best alternative for interrupting the drug use disorder/criminal justice cycle. Untreated offenders with drug use disorders are more likely than treated offenders to relapse to drug use and return to criminal behavior.
- A diversion away from the criminal justice system may introduce people to treatment who may otherwise not have sought it out or had the ability to participate in it. External pressure makes treatment more attainable and often facilitates the first steps towards recovery and desistance.
- Treatment requires informed consent.

c. Accept that recovery from a drug use disorder is a process: drug use disorders are relapsing conditions

- Drug use disorders often take the course of a chronic and remitting disorder. Although relapse often happens, recovery is possible and achievable, although it may take up years to reach stable recovery.
- Setting realistic eligibility criteria, goals and conditions to be observed is therefore of crucial importance.
- Proportionate responses are required to address non-compliance, with due regard to the nature and severity of the offence.. Imprisonment should remain a measure of last resort when dealing with offenders with drug use disorders.
- Investing in continuity of care is a valuable way of supporting stable recovery.

d. Diversify treatment: not every offender with drug use disorders requires (the same intensity) of treatment

- Treatment aims to reduce or stop drug use and improve the functioning of the affected individual. It can take many different forms and occur in a variety of settings as required with a view to addiction severity.
- It is critically important to identify offenders with drug use disorders in need of drug treatment at each level of the criminal justice system. Participants should be identified at the earliest point possible for eligibility.
- Screening and assessment processes are the basis for a personalized and effective approach to treatment planning and engaging the client into treatment. In the criminal justice system, screening often is equated with *eligibility* (to determine whether a drug use disorder is present), and assessment often is equated with *suitability* (to define the nature of the drug use disorder, and to develop specific treatment recommendations for addressing the disorder).
- Instead of being referred to a one-size-fits-all-treatment approach, tailored interventions should be considered related to the assessment results. No single treatment intervention has been shown to be effective for all persons with drug use disorders.
- A wide array of evidence-based treatment options should be available to address the unique needs of offenders with drug use disorders in need of treatment. Not every offender with drug use disorders needs ongoing, intensive treatment.
- More services will be required at levels of lower intensity. They can prevent people from developing more severe drug use disorders. These services are usually less specialized and less costly, which makes a treatment system designed in line with 'a service delivery pyramid' more cost-effective.
- Treatment and care generate more positive outcomes if other factors such as education, employment, and other social needs are taken into consideration and addressed in the process of treatment and rehabilitation.
- Leave no one behind: pay attention to special groups in the criminal justice system by critically assessing available screening and assessment instruments as well as treatment accessibility.

e. Alternatives to conviction or punishment are in line with the international legal framework

- Providing treatment and care as an alternative to conviction or punishment is in line with the international drug control conventions, which provides for the use of limiting severe sanctions for serious offences such as drug trafficking.

- The punishment for offences has to be adequate and proportionate to the seriousness of the offence and the culpability of the offender.
- One of the purposes of sanctions is to reduce the likelihood of re-offending and alternatives to conviction or punishment are an important tool to achieve this goal.
- Treatment and care strategies should be utilized to respect the right to health of offenders with a drug use disorder and support their recovery.
- Drug use disorder treatment is not only possible as an *alternative* to conviction or punishment, it could also be suggested *in addition to* conviction or punishment. Decisions on whether and which alternatives to apply should depend on established criteria, such as the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.
- Providing treatment and care as alternatives to conviction or punishment can be considered as important to recognizing the right to health of offenders with drug use disorders. In order to help realize this right, the coercive power of the criminal justice system is used, but not in a compulsory manner. It does not force individuals into treatment without their consent.
- Due process and other rights of offenders in the criminal justice system must be respected. This includes the presumption of innocence, a right to appeal relevant decisions, access to legal aid and protection of privacy and dignity.
- The nature, consequences, risks and benefits of (breaching the conditions of) the alternative should be communicated, including the likely impact on their criminal proceedings, the treatment information to be revealed to the court, the possibilities to revoke the judicial alternative in case of lack of compliance.
- The process for developing and implementing alternatives must be tailored to the individual legal system of the individual country.
- The choice that has to be made is to either review legislation, or if possible fit the implementation of alternatives to the existing legal framework.

f. Focus on diversion opportunities

- Alternatives to conviction or punishment, with an element of drug treatment, can be applied at each of the stages of the criminal justice process.
- At different interception points offenders' needs and risks can be matched to appropriate diversion options.

- At the different stages of the criminal justice system - pre-trial, trial/court and post-sentencing - countries may (already) have a broad range of diversion options to provide tailored responses.
- Even where it appears that current laws permit no discretion in their application, there is some opportunity for discretion. Often there is discretion at multiple points in the process, such as the decision to arrest, to prosecute, to convict, etc.
- Diversion options can also be integrated in administrative responses. They are situated outside of the criminal justice system, but they are also a formal response to relevant offences.
- Prosecuting authorities should take the lead in diverting eligible offenders out of the criminal justice system. Further involvement in the criminal justice system might be prevented when criminal justice actors at this stage are informed about the drug use disorders of the offender and when they have the possibilities to divert to treatment.
- Courts and other competent authorities in charge of sentencing offenders or deciding on parole or early release should have at their disposal a range of non-custodial measures and should take into consideration the rehabilitative needs of the offender and assist in their early reintegration into society.
- It is important to design and implement alternatives to conviction or punishment in such a way that will serve the needs of offenders as well as the criminal justice system and society, so that criminal justice stakeholders will encourage offenders to participate in these programmes as appropriate.

g. Create partnerships: the criminal justice system and treatment services could and should work together, taking into account a proper role definition and respect for each other's principles

- Developing treatment alternatives to conviction or punishment of offenders with drug use disorders generally entails the development of new partnerships between treatment and service agencies and the justice system.
- The goals of treatment services and the criminal justice system are different. Despite these differences, it is possible for both to find common grounds.
- Cooperation should strive for an optimal interaction between the criminal justice system and treatment systems. It is important to have clear engagements of all partners involved: judges should not make treatment decisions and treatment professionals should not make justice system decisions.

- Developing the collaborative approach and parameters to make this interdisciplinary partnership work, protecting both the human rights of the individual and the public safety of the community, is a continuing challenge.
- When starting the cooperation between treatment services and criminal justice actors, clear arrangements have to be made with regard to the communication and information exchange between the actors involved, interagency coordination and mechanisms for communication among professionals with different functions, roles and responsibilities. Communication and information exchange are very important aspects of the success of the cooperation.
- As partners in an interagency cooperation, all actors involved need to have (current) knowledge about the other sector's institutional roles and responsibilities. They are in need of a sufficient understanding of each discipline's processes.
- Formal, written, agreements to manage the relationship, such as agreements about the content and procedures regarding information exchange should be developed.
- Police, prosecutors, judges and other criminal justice officials should be provided with basic knowledge about treatment approaches. Likewise, treatment providers should know the basics of the criminal justice process and its actors involved. Training should include cross-training and continuous training to ensure that treatment is provided by qualified specialists and trained staff who engage in continuing professional development.
- Create and use platforms of interagency cooperation.

h. Provide a stimulating environment

- No plan for alternatives can have any chance of acceptance and implementation without the buy-in of key stakeholders. Also, the community itself is an important stakeholder. A positive mindset towards treatment alternatives is required.
- The creation of several alternatives to conviction or punishment requires sufficient staff and resources. Financial resources can be sought from the government system that benefits most from the response. The resources can be looked upon as an investment.
- The implementation of alternative measures should be closely monitored and systematically evaluated, including identifying the target population and monitoring whether it is reached.

Additional readings

This publication builds on existing guidance materials and research, including the knowledge available at the regional level, as well as on national practices and experiences.

The following are some of the key documents that provide guidance on various aspects of the application of treatment and care for people with a drug use disorder in contact with the criminal justice system, from different national and regional perspectives, which are referenced throughout this Guide Book:

- UNODC/WHO. International Standards for the Treatment of Drug Use Disorders. Draft for Field Testing, March 2017[223]
- UNODC, *From coercion to cohesion: Treating drug dependence through health care, not punishment*, 2009[224]
- UNODC. Handbook of basic principles and promising practices on Alternatives to Imprisonment, 2007
- European Commission, *Study on alternatives to coercive sanctions as response to drug law offences and drug-related crimes*, 2016[225]
- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), *Alternatives to punishment for drug-using offenders,* 2015[226]
- Inter-American Drug Abuse Control Commission (OAS/CICAD), *Technical Report on alternatives to incarceration for drug-related offenses,* 2015[227]

[223]Available from: https://www.unodc.org/documents/UNODC_WHO_International_Standards_Treatment_Drug_Use_Disorders_December17.pdf

[224] Available from: https://www.unodc.org/docs/treatment/Coercion_Ebook.pdf

[225] Available from: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/drug-control/eu-response-to-drugs/docs/acs_final_report_new_ec_template_en.pdf

[226] Available from: http://www.emcdda.europa.eu/publications/emcdda-papers/alternatives-to-prison

[227] Available from: http://www.cicad.oas.org/apps/Document.aspx?Id=3203