idpc International Drug Policy Consortium

Advocacy Note

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Drug policy in Africa: Towards a human rights-based approach

'We reiterate our commitment to respecting, protecting and promoting all human rights, fundamental freedoms and the inherent dignity of all individuals and the rule of law in the development and implementation of drug policies'

The Outcome Document from UN General Assembly Special Session (UNGASS)[1]

Introduction

The predominant drug control approach used around the world has been rooted in punitive criminal justice responses, at the expense of human rights and public health – with more resources being spent on police, judges, prosecutors and prisons now than ever before.[2] Today, more people than ever are being imprisoned for producing, trafficking, selling or using drugs, and yet the problems remain unsolved: in the world today, there are more producers and consumers of drugs than ever before.[3] The United Nations Office on Drugs and Crime (UNODC) has openly identified a number of 'unintended negative consequences' of the so-called 'war on drugs', including severe human rights violations directly related to the criminalisation and stigmatisation of people who use drugs and vulnerable people involved in illicit drug production and trafficking.[4]

This situation has led Paul Hunt (the UN Special Rapporteur on the right to health between 2002 and 2008) to conclude that the UN human rights system and the global drug control regime behaved 'as though they exist in parallel universes'.[5] Global drug control is based on three international conventions from 1961, 1971 and 1988, which all open with a commitment to promote the 'health and welfare of mankind'.[6] Yet the 1961 and 1971 Conventions make no reference to human rights, and the term only appears once in the 1988 Convention in the context of crop eradication. As for the current UN human rights system, it dates back to the 1945 UN Charter, which is built around three pillars: human rights, peace and security and development.[7] In Articles 55 and 56, the UN and its member states pledge to promote social development and universal respect for, and observance of, human rights and fundamental freedoms for all. Three years after the Charter was adopted, the Universal Declaration of Human Rights was also approved, outlining 30 universal rights that set 'a common standard of achievement for all peoples and all nations'.[8] Several decades later, in 1981, the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) was agreed,[9] and has since been ratified by every African country except South Sudan.[10] The Banjul Charter outlines more than 20 rights – including several that this report focuses on below.

Under the UN Charter, human rights norms sit atop the hierarchy of international law, and therefore international and national drug policies must be fully in line with human rights. Crucially,

human rights are not only statements of principles – governments have a binding responsibility under international law to respect, protect and fulfil them. In a 2015 report the United Nations Office of the High Commissioner for Human Rights (OHCHR) highlighted that renewed efforts were needed to address the impacts of drugs and drug policy through the employment of human rights norms and principles.[11] Furthermore, human rights-based drug control approaches at all levels should also be working towards achieving the Sustainable Development Goals (SDGs),[12] the universal, intergovernmental agreement reached in September 2015 to end poverty, protect the planet and ensure that all people enjoy peace and prosperity.[13] Although not a specific focus of any of the 17 Goals, drug policy clearly impacts across the majority of them – not least the Goals on poverty (SDG 1), health (SDG 3), equality (SDG 10) and peace (SDG 16).[14]

Current drug policies in Africa continue to be very repressive, with the widespread marginalisation and treatment of people who use drugs as criminals, morally weak 'addicts' and/or social outcasts; while non-violent low-level drug offenders generally make up the largest share of those sent to the criminal justice system. This approach has often exacerbated human rights abuses, such as ill-treatment and extortion by police, mass incarceration and arbitrary detention, in many cases without trial or due process. In recent years, the media in Ghana, Liberia and Sierra Leone have documented incidents of people who use drugs being killed or injured by police officers during raids.[15] These issues require urgent redress across Africa.

Both the Economic Community of West African States (ECOWAS)[16] and the African Union[17] have developed action plans on drugs which highlight the need to respect, protect and fulfil human rights. This IDPC advocacy note attempts to provide a non-exhaustive overview of how current drug policies violate universal human rights, and what a rights-based approach to drug policy looks like in practice, based on the Banjul Charter. This advocacy note should be read alongside its sister publication: 'Drug policies in Africa: What is the "health-based" approach?'.[18]

The right to be free from discrimination

Article 2 of the Banjul Charter

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

In many societies across the region, people who use drugs are stigmatised, demonised or simply ignored and, as a result, human rights abuses against them (especially those committed in the name of drug control) often go unreported and unaccounted for. The criminalisation of this population across Africa has exacerbated stigma and discrimination against people who use drugs, fundamentally impacting on how they are perceived and treated by institutions, governments, the media and the rest of society. Experience tells us that criminalisation does not deter drug use,[19] whereas the negative consequences can be life-long, since this approach intensifies and perpetuates existing inequalities.

In 2009, the UN High Commissioner for Human Rights, Navi Pillay, declared that 'Individuals who use drugs do not forfeit their human rights'.[20] Similarly, article 2 of the Banjul Charter protects the enjoyment of human rights by all African citizens, regardless of any status that may be used as the basis for discrimination. This commitment is mirrored in the national constitutions and relevant instruments of many African countries. In order to fulfil these commitments, African governments should stop the demonisation of people who use drugs, and protect them against human rights abuses. This can be achieved through sensitisation, capacity building and education for policy makers, service providers, law enforcement and criminal justice officers, community leaders and the media on issues related to drug use.

It is also important to enable communities and networks of people who use drugs to have their voice heard in public discourse and policy-making processes. Awareness-raising campaigns such as Support. Don't Punish[21] can be useful in this

Activists in Mauritius gather on 26th June – the UN International Day Against Drug Trafficking and Drug Abuse – as part of the Support. Don't Punish campaign calling for decriminalisation and harm reduction[22]

context, especially to empower people who use drugs to have their stories told and understood in the media and by the general public.

The prohibition of torture and cruel, inhuman and degrading treatment

Article 5 of the Banjul Charter

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

From a human rights perspective, the negative consequences of overly punitive drug policies in Africa include the brutality of police raids, and the arbitrary arrest, harrassment and inhumane punishment of people who use drugs – including dangerous, forced detoxification during incarceration. Other abuses include death threats and beatings to extract information, the extortion of money or confessions through forced withdrawal without medical assistance, judicially sanctioned corporal punishment for drug use, denial of meals, sexual abuse and threats of rape, isolation, and forced labour.[23] These practices go unchecked as people who use drugs are rarely empowered to report such violations for fear of stigma, discrimination and threats to their own safety. In many cases, people who use drugs are also unaware of their rights.[24]

Crucially, 'torture, cruel, inhuman or degrading punishment and treatment', which are specifically prohibited in the Banjul Charter, are also too often used under the guise of drug dependence treatment. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Méndez, stated that the 'experience of health-care [for people who use drugs] is often one of humiliation, punishment and cruelty… violations of patient confidentiality… [and] further ill-treatment by health providers'.[25] Across much of Africa, drug dependence treatment is unregulated and poorly monitored, and may programmes do not adhere to the globally-agreed and evidence-based standards. According to UNODC's International Standards for the Treatment of Drug Use Disorders, effective and ethical drug treatment should be accessible, appropriate, based on scientific evidence, founded on good clinical governance, and constantly monitored and evaluated.[26] The West Africa Commission on Drugs has also proposed minimum standards for effective drug treatment, stating that services should be flexible, affordable and accessible to all who need it, and must be voluntary.[27] Governments need to offer a balanced menu of evidence-based treatment services to those in need – including opioid substitution therapy (OST).[28] Forced treatment, forced withdrawal, incarceration in the name of 'rehabilitation' and forced labour – all commonplace in Africa – have no place in a drug treatment setting and represent further violations of the human rights of people who use drugs.

Mass incarceration is also an important negative effect of the so-called 'war on drugs'. Globally,

it is estimated that one-fifth of all prisoners are serving sentences for drug crimes – most of them for non-violent and low-level offences.[29] In many African countries, data is hard to come by; however the punitive approach towards drugs is likely to significantly increase the number of low-level drug offenders being incarcerated in prisons that are already overcrowded and inhumane. Today, countries such as Burundi, Cameroon, Kenya, Rwanda and Zambia have the world's most overcrowded prisons.[30] Prisoners in Africa 'face years of confinement in often cramped and dirty quarters, with insufficient food allocations, inadequate hygiene, and little or no clothing or other amenities… [which] needs to be addressed through prison reform and attention to human rights'.[31] A recent documentary on the plight of Ghanaian prisoners showed that many have been subjected to degrading conditions and human rights violations, some being forced to stand throughout the night.[32] Prison overcrowding can be tackled with reforms that ensure more proportionate penalties for non-violent drug offences, and also offer alternatives to incarceration for people accused of non-violent, low-level drug offences.[33]

The right to liberty and fair trial

Article 6 of the Banjul Charter

Every individual shall have the right to liberty… In particular, no one may be arbitrarily arrested or detained.

Article 7 of the Banjul Charter

Every individual shall have the right to have his cause heard. This comprises… the right to an appeal to competent national organs… the right to be presumed innocent until proved guilty by a competent court or tribunal… the right to defense… the right to be tried within a reasonable time by an impartial court...

All African countries criminalise drug use and/or possession in some form. In many settings a conviction for non-violent, low-level drug offences such as drug possession for personal use or low-level dealing can carry highly disproportionate minimum prison sentences of 10 years or more. Many national legal systems also fail to distinguish between people who use drugs and those at the lower end of drug markets, and between the latter (who are generally poor and usually engage in the illicit trade for lack of licit alternatives) and the 'big fish' (who are making substantial profits and gain from drug trafficking and production).

At the 2016 UN General Assembly Special Session (UNGASS) on drugs, African states were party to the global commitment to 'Ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings, including practical measures to uphold the prohibition of arbitrary arrest and detention and of torture and other cruel, inhuman or degrading treatment or punishment and to eliminate impunity… and ensure timely access to legal aid and the right to a fair trial'.[34] Nevertheless, drug laws and policies across many African countries continue to include various forms of criminal or administrative detention – many of which meet the threshold of arbitrariness for lack of legally prescribed safeguards.[35] According to Youth RISE Nigeria, young people who use drugs in the country reported witnessing arbitrary arrest and detention by law enforcement officials, extortion and physical harm.[36] People who use drugs, subsistence farmers and low-level dealers are easy prays for police officers working to fulfil arrest quotas – and arrests can often be made with little, if any, evidence or justification.

These harms can best be addressed by ensuring fair legal processes and access to legal support – especially for the most marginalised in society. It is also critical to raise awareness among people who use drugs and low-level drug offenders of their legal rights – and to facilitate peer-based legal support where possible. In addition, more sensitisation and capacity building should be directed at judges, prosecutors and lawyers so that they are aware of available options for alternatives to incarceration, and can appropriately use them.

African governments should also commit to the regional harmonisation and modernisation of their drug laws – in order to end disproportionate responses such as mandatory sentences and life imprisonment, promote the use of mitigating factors (such as gender sensitivities, being in a situation of dire poverty, first offence, etc.), and promote flexibilities in the imposition of the sentence to include the possibility of suspended sentences, parole, pardons or amnesties such

as those available for other categories of non-violent crime.[37]

The right to health

Article 16 of the Banjul Charter

Every individual shall have the right to enjoy the best attainable state of physical and mental health… States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The enjoyment of the highest attainable standard of physical and mental health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.[38] Over time, this recognition has been reiterated in a wide array of formulations, in international, regional and national human rights instruments – including article 25 of the Universal Declaration of Human Rights,[39] article 12 of the International Covenant on Economic, Social and Cultural Rights[40] and article 16 of the Banjul Charter.

An overly punitive approach towards people who use drugs directly undermines public health: the criminalisation, mass incarceration and stigmatisation of people who use drugs around the world fuels the HIV epidemic,[41] hepatitis transmission,[42] tuberculosis, overdose deaths and a range of other harms. To confound this, many people who use drugs are unable or unwilling to access health services, treatment and basic healthcare for fear of discrimination, abuse or arrest. This approach therefore has significant implications for the health of people who use drugs, but also for broader public health in Africa – a continent that has already been hardest hit by HIV and other epidemics. According to UN data, while the global prevalence of HIV in the general population was around 0.8% in 2015,[43] it has reached 14% among people who inject drugs.[44] In prisons, HIV prevalence among prisoners has been recorded as high as 13% in Mauritius, 24% in Mozambique, 27% in Zambia and 28% in Zimbabwe – while more than one in three prisoners in Swaziland is living with HIV.[45]

In order to tackle these harms, African governments should commit to, and fund, the provision of evidence-based, cost-effective harm reduction approaches[46] – as is increasingly the case in countries such as Kenya, Tanzania, South Africa, Mauritius, Senegal and Morocco, among others.[47] It will also require the development of comprehensive and evidence-based drug dependence treatment programmes operating in line with relevant international quality standards: i.e. they should be voluntary, integrated into broader health systems, be well regulated, and available and accessible to all those who need treatment (including women, young people and other key populations).[48] Only about one in ten people who use drugs experience dependence and will require treatment – this is another key aspect to consider when developing effective treatment programmes. In addition, people who use drugs have varying and often complex needs which require a diverse range of treatment options. To ensure that a treatment system is humane and adequately responds to the users' needs, it is critical that people who use drugs are fully engaged in the design, delivery and monitoring of these programmes at the local and national level. Moving towards the efficient provision of these services in Africa will require a paradigm shift to acknowledge drug use as a health and social issue, and not a criminal one. Such a move will pave the way towards the implementation of a range of health-based interventions funded by rebalancing national drug control budgets towards public health rather than exclusively towards law enforcement.[49]

Many violations of the right to health will also be addressed through the decriminalisation of people who use drugs.[50] This would enable people who use drugs to access health services without fear of arrest, stigma or discrimination. Decriminalisation means that drug use remains prohibited but is no longer considered as a criminal offence. It will instead be dealt with through non-criminal sanctions such as fines, confiscation or community service, or with no sanction at all but instead suitable referrals to drug treatment and harm reduction services.[51]

This approach is no longer a controversial one: the international drug conventions explicitly allow for the provision of 'alternative[s] to conviction or punishment' such as 'treatment, education, aftercare, rehabilitation and social reintegration'.[52] At

Box 1 IDPC recommendations on the decriminalisation of drug use[53]

1. Remove criminal penalties for drug use, possession of drugs for personal use, possession of drug use paraphernalia, and cultivation and purchase for personal use.
2. Instead of punishment, focus on the provision of voluntary, evidence-based health and social services.
3. If administrative sanctions are to be used, they should be applied as part of a framework encouraging access to health and social services, and not lead to net-widening.
4. Differentiate between personal use and intent to supply should be done via indicative quantity thresholds, as well as an assessment of all evidence available on a case-by-case basis (intention to supply or sell must be proven, even if the person is found with quantities above the quantity thresholds
5. Trainings, sensitisation and guidance should be offered to police, judges, prosecutors and lawyers on drug use, harm reduction, treatment and decriminalisation.
6. Decriminalisation measures should be accompanied by investments in health and social programmes (in particular harm reduction services) to ensure maximum health outcomes.

the 2016 UNGASS on drugs, all UN member states also agreed to 'Encourage the development, adoption and implementation… of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature'.[53] Decriminalisation has also been widely endorsed by UN agencies in recent years,[54] and is in place in over 40 countries and jurisdictions worldwide.[55]

Another important consequence of the so-called 'war on drugs' has been the global palliative care and pain management crisis – as many internationally controlled substances (such as morphine) play a crucial role in pain relief management. Access to controlled substances for medical and scientific purposes is one of the fundamental aims of the UN drug conventions.[57] But the system is failing: 75% of the world's population live in countries without sufficient access to essential pain relieving drugs.[58] The reasons for this include fear of diversion to the illicit market, the regulations required by the international drug control system and the resulting legislative and technical barriers at national level, insufficient training of healthcare providers, as well as broader 'opioid-phobia'.[59] African governments should commit to urgently reviewing national drug control regulations using available guidance[60] to address the woefully inadequate availability of controlled medicines for pain relief and for OST in the region. This should be accompanied by adequate training for healthcare, law enforcement and drug control personnel to plug existing gaps.

Conclusion

Policy makers at the national, regional and international levels are increasingly waking up to the evidence that the 'war on drugs' approach has failed, and that the goal for a drug-free world is not only unachievable but also undesirable and damaging. African leaders need to integrate a balanced response to drugs in order to adhere to their regional and international human rights commitments. As well as the Banjul Charter, many African governments are also signatories to other important pieces of international law such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the Convention on the Rights of the Child.[66] Many African countries also have national human rights commissions or charters which mirror these international commitments.

The imported 'war on drugs' approach that characterises the drug control response across Africa undermines human rights in a number of ways, some of which have been discussed in this note. Such violations too often go unreported and unchecked. Africa's drug policies cannot be allowed to operate in a vacuum separate from human rights – they are governed by the same central human rights obligations and legal requirements as all areas of policy around the world.

Box 2 The rights of the child

The UN Convention on the Rights of the Child is frequently cited in the context of drug policy, as it is the only international human rights treaty which specifically mentions drugs: article 33 mandates states parties to 'take all appropriate measures… to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances'.[61] Although this commitment is not mirrored in the Banjul Charter, it is reflected in article 28 of the African Charter on the Rights and Welfare of the Child.[62]

Too often, what is intended as drug prevention to protect young people turns into practices that are neither grounded in evidence nor in human rights. Age-based denial of access to health services, police harrassment and beatings, sexual abuse in detention centres, coersion into drug couriering and dealing, and the aerial fumigation and destruction of crops all directly impact on the lives of African children – exposing them to unacceptable levels of risk and harm. Furthermore, the children of drug-using parents face stigmatisation and vulnerability, as do those whose parents are incarcerated for a drug offence.[63]

In 2016, the Chair of the UN Committee on the Rights of the C hild co-signed an important joint statement prior to the UNGASS on drugs – which stated that 'One of the arguments used in support of the "war against drugs" and zero-tolerance approaches is the protection of children. However, history and evidence have shown that the negative impact of repressive drug policies on children's health and their healthy development often outweighs the protective element behind such policies, and children who use drugs are criminalised, do not have access to harm reduction or adequate drug treatment, and are placed in compulsory drug rehabilitation centres'.[64]

A more careful analysis of the UN Convention on the Rights of the Child and the other relevant international instruments therefore suggests that appropriate measures should encompass 'The reform of criminal laws… to ensure that children and young people who use drugs are not criminalised but offered treatment and/or harm reduction services'.[65]

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About this briefing paper

This IDPC advocacy note attempts to provide an overview of how current drug policies violate universal human rights, and what a rights-based approach to drug policy looks like in practice, based on the Banjul Charter.

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About IDPC

The International Drug Policy Consortium (IDPC) is a global network of NGOs that promotes objective and open debate on the effectiveness, direction and content of drug policies at national and international leve l, and supports evidence-based policies that are effective in reducing drug -related harms. IDPC members have a wide range of experience and expertise in the analysis of drug problems and policies, and contribute to national and international policy debates. IDPC offers specialist advice through the dissemination of written materials, presentations at conferences, meetings with key policy makers and study tours. IDPC also provides capacity building and advocacy training for civil society organisations.

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