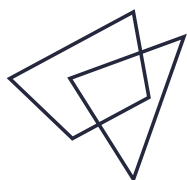


Alternatives to detention: A human rights assessment tool

Implementing the International Guidelines on
Human Rights and Drug Policy



**INTERNATIONAL GUIDELINES ON
Human Rights + Drug Policy**

About the International Centre on Human Rights and Drug Policy

Established in 2009, the International Centre on Human Rights and Drug Policy (HRDP) is an academic programme dedicated to developing and promoting innovative and high-quality human rights research and education on issues related to drug laws, policy, and enforcement. HRDP is based at the Human Rights Centre, University of Essex.

About the International Guidelines on Human Rights and Drug Policy

The International Guidelines on Human Rights and Drug Policy are the result of a partnership between HRDP and the United Nations Development Programme, in addition to a three-year international consultative process, aimed at applying contemporary human rights legal standards to drug policy. Covering the entire supply chain from supply to use, and grounded in basic human rights principles, the Guidelines address the catalogue of core internationally recognised rights, as well as drug policy themes (health, development, and criminal justice) and groups (children, women, and indigenous peoples). The Guidelines highlight the measures States should undertake or refrain from undertaking in order to comply with their human rights obligations, while taking into account their concurrent obligations under the international drug control conventions. They are intended as a normative reference for parliamentarians, diplomats, judges, policy makers, civil society organisations, and affected communities.

www.humanrights-drugpolicy.org

About this tool

It is now very common to hear that drug policy must be carried out in full conformity with human rights. But what does this mean on the ground? The United Nations (UN) Standard Minimum Rules for Non-custodial Measures (also known as the Tokyo Rules) were adopted over 30 years ago. They aim to address the overuse of detention in criminal justice. That aim, however, has been hindered by punitive approaches to drugs. Currently, approximately two million people worldwide are imprisoned for drug offences, of which hundreds of thousands are in prison for drug use or possession.¹ Further, many more people are administratively detained as a component of involuntary drug treatment.

The first step in making this commitment to human rights a reality in drug policy is to understand how human rights law applies. The International Guidelines on Human Rights and Drug Policy were developed for exactly this purpose. The Guidelines contain numerous provisions that direct States away from detention in relation both to criminal offences and to drug treatment. The point, of course, is to translate standards into action.

The Guidelines may be applied in several ways:

- **Mapping:** using the catalogue of rights (in Section II) and thematic annexes (development, criminal justice, and health) to map which rights might be affected positively or negatively in laws, policies, and practices.
- **Legal analysis:** using the Guidelines and their commentaries to investigate compliance with international human rights law.
- **Assessment:** using the Guidelines as a basis for a participatory assessment process (such as a legal environment assessment²).

This tool is aimed at facilitating the above pathways for implementation with respect to alternatives to detention. Human rights standards can sometimes be broadly written, so it is not always obvious what those standards require in terms of specific policy and practice.

This tool is based on **a model for human rights assessment of drug policies** developed by the Pompidou Group of the Council of Europe. HRDP collaborated in the development of that tool and it is adapted here with the permission of the Pompidou Group.

Rather than a general assessment of human rights compliance in drug policy, this tool focuses on alternatives to sentencing and detention as well as on pathways to detention. Alternatives to detention include measures to decrease the risk of incarceration or to avoid the criminal legal system altogether (such as decriminalisation of drug use and of possession and cultivation of controlled drugs for personal use); measures to reduce criminal prosecution; measures to limit pre-trial detention and the deprivation of liberty as punishment; and measures to decrease the time that people are deprived of liberty for drug-related crimes.

The document begins with a brief overview of alternatives to detention, adopting the broad approach noted above. It then connects existing alternatives and relevant human rights standards contained in the Guidelines. This provides users of the tool with an initial snapshot of the applicable Guidelines and how certain alternatives can facilitate human rights progress.

The tool itself is constructed around a series of exploratory questions connected to alternatives to detention. These questions help bridge the gap between a broad standard and the situation on the ground in differing contexts.

- The first question in each section is a binary yes/no question on a key human rights issue.
- This question is then followed by additional questions that invite the user of the tool to explore the issue further. Some of these questions are binary while others are more open ended.
- Each binary question is connected to a simple traffic light system to indicate what kind of action might be required depending on the answer:
 - **Green:** low risk of human rights concerns
 - **Amber:** further exploration may be needed
 - **Red:** law, policy, or practice changes may be required
- There may be questions for which there is no clear answer. The absence of answers might also indicate the need for action in fulfilling a human rights information gap.
- The tool also suggests possible sources of information where answers to these questions tend to be found.

The outcome of using this tool is a mapping of legal and practice-based alternatives to detention in a specific country (or sub-national jurisdiction), linked with human rights standards. The traffic light system will provide a snapshot of where there are positives and negatives, and where more information is needed to advance human rights progress. The table on page 6 provides an overview of the concept.

This tool is not a set of standard indicators (though the yes/no questions may be used as indicators or variables in later research). It is intended not to compare situations across countries but to serve as an entry point for advocates, affected populations, civil servants, human rights mechanisms, and others to map a particular situation and initiate a participatory process for ensuring the protection and realisation of human rights in drug policy. In this respect, the value of the assessment lies not only in its concrete outcomes but in the process itself, through which a shared understanding of the situation and opportunities to address it can be developed.

Readily available sources of information should be sufficient to conduct the assessment, which should help minimise the time needed to carry out this work. As noted, the tool is designed in a way that encourages the participation of stakeholders from different backgrounds, recognising that distinct, often overlapping expertise resides among all stakeholders, as well as the importance of building and strengthening communication and participation between and among them.

Key stakeholders include people who use drugs (including those with experience with the criminal justice system) and their representative organisations; civil society organisations working on human rights (e.g., women's rights, children's rights, and the rights of people deprived of liberty); prosecutors; legal service providers; and law enforcement authorities and representatives from relevant government ministries (e.g., human rights, justice, children, gender, and corrections).

In some cases, partnerships may already exist that could facilitate information gathering and minimise the time needed to conduct the assessment (such as Country Coordinating Mechanisms in countries that receive funds from the Global Fund to Fight AIDS, Tuberculosis and Malaria where people who use drugs are a target population).

There may be some questions that are difficult to answer with available data or for which States do not currently have an answer. Identifying such knowledge gaps can help pinpoint areas for action.

Sources of information

Laws governing detention and available alternatives may be found in statutes and case law and complemented by regulations, policies, guidelines, and strategies. These include:

- Criminal/Penal Code and Criminal/Penal Procedure Code
- Prison Act, Criminal Executive Code, and Penal Enforcement Act
- Probation Act
- Drug control laws and laws on specific drug offences
- Specific legislation relating to children (e.g., Children’s Act, Juvenile Justice Act)
- Specific legislation relating to women
- Health legislation (e.g., regarding drug treatment and rehabilitation)
- Administrative Code
- Annual reports from court systems
- Reports from parliament or parliamentary committees focusing on health, criminal law, drugs issues, correctional systems, juvenile justice, children’s rights, or women’s rights
- Reports and policy guidance from the ministries responsible for health, justice, correctional systems, women’s issues, or children’s issues
- Reports, directives, or guidelines from policing and prosecutorial authorities
- Reports, directives, or guidelines from health authorities
- Reports by national human rights institutions and national preventive mechanisms
- Reports by human rights and civil society organisations working on drug policy, criminal justice, children’s rights, or women’s rights
- National constitutions
- State reports to human rights treaty bodies

In some countries, laws, regulations, policies, guidelines, and strategies from provincial or municipal authorities may complement these sources.

Criminal court judges and donor organisations working on criminal justice issues may provide information on alternatives to detention.

Databases that provide country-specific information relevant to alternatives to incarceration include:

- Child Rights International Network database on minimum age of criminal responsibility, <https://home.crin.org/issues/deprivation-of-liberty/minimum-age-of-criminal-responsibility>
- UN Office on Drugs and Crime database of legislation on drug control, <https://sherloc.unodc.org/cld/v3/drugcontrolrepository/enl/index.html?lng=en#/country>
- Office of the United Nations High Commissioner for Human Rights database on human rights recommendations from UN human rights monitoring mechanisms, <https://uhri.ohchr.org/en/>

Additional resources on alternatives to incarceration, with some country-specific examples, include:

- UN Office on Drugs and Crime, Criminal Justice Assessment Toolkit (2006), https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf
- UN Office on Drugs and Crime, Toolkit on Gender-Responsive Non-custodial Measures (2020), https://www.unodc.org/documents/justice-and-prison-reform/20-01528_Gender_Toolkit_complete.pdf

Conceptual framework

Issue	Guideline	Assessment questions	Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Where to look
Sets out the basic theme or topic	The International Guidelines on Human Rights and Drug Policy establish the normative standards.	Selected questions are set out that aim to help measure compliance with a specific Guideline.				Sets out potential sources of information and data (see page 5)
	The relevant right and the quoted Guideline are presented.	The first question is usually a closed yes/no question. This is followed by additional questions (quantitative or qualitative) for further exploration.	Top-line questions invite 'yes', 'no', or 'not known' answers. These are linked to whether there is a risk of human rights issues arising or if there is a need for further investigation – indicated by green, amber, and red 'lights'.			
	Users of the tool can access the Guidelines and their associated legal commentary at https://www.humanrights-drugpolicy.org/					

Alternatives to detention and human rights: An overview of options

- **Decriminalisation** is the removal or non-enforcement of criminal sanctions for certain offences that divert people from the criminal justice system in the first place. ‘De jure’ decriminalisation is the elimination of criminal penalties for certain offences as a matter of law. ‘De facto’ decriminalisation is the decision in practice or as policy not to apply criminal penalties for certain offences – for example, as a matter of police discretion. Decriminalisation is not the same as legalisation, which is the process of ending prohibition across the supply chain and replacing it with legal regulation and control.
- **Diversion programmes** aim to reduce people’s exposure to the criminal justice system at arrest, pre-prosecution, prosecution, or sentencing. These include diversion to harm reduction, drug education or treatment, and housing or social services as an alternative to arrest or criminal charge, and court-mandated treatment as an alternative to prosecution.
- **Alternatives to pre-trial detention** spare individuals from detention while awaiting trial. They include bail, house arrest, and supervised release.
- **Alternative punishments** operate on the principle of using imprisonment as a last resort. They include verbal sanctions, economic penalties, house arrest and probation, sentence suspension or deferral, and community service or treatment order.
- **Sentencing guidelines** permit judges to impose sentences commensurate with the degree of responsibility and the specific circumstances of the offence, taking into account the role of the offender (leading, significant, or minor), the type of crime committed, the type and quantity of drugs at issue, and any aggravating or mitigating circumstances.
- **Early release mechanisms** restore an individual’s liberty while at the same time decreasing their exposure to the harms of incarceration. These mechanisms include amnesty, pardon, furlough (authorised absence from prison), halfway houses, work or education release, paroles or conditional releases, open prison systems, and suspended sentences.

Alternatives to detention: Country examples:

Decriminalisation	Country examples
<i>De jure: removal of criminal sanctions for certain offences</i>	<p>South Africa (Constitutional Court decisions)</p> <p><i>No criminal sanctions for possession or cultivation of cannabis for personal use in private</i></p> <p>There are no criminal sanctions for adult possession or cultivation of cannabis for personal use in private.³ Children cannot be arrested or prosecuted for possession or personal use of cannabis in public or private, though they may be subject to a civil process or procedure for prevention, early intervention, treatment, or rehabilitation for substance use or addiction.⁴</p>

	<p>Portugal</p> <p><i>Criminal penalties replaced by civil sanctions (e.g., fines) or referral to treatment or education for all drugs</i></p> <p>The possession of drugs is considered an administrative offence, which may be sanctioned by administrative penalties, including fines and community service, or through interventions such as non-mandatory counselling and drug treatment. Drugs are confiscated, and the decision whether to impose a sanction is decided by 'commissions for dissuasion of addiction' comprising legal, health, and social work professionals.⁵</p>
<i>De facto: non-enforcement of certain crimes</i>	<p>The Netherlands</p> <p><i>Cannabis possession, cultivation, and sales tolerated</i></p> <p>The possession, sale, and production of drugs are criminal offences in the Netherlands. However, the sale of small quantities of cannabis (no more than five grams) in coffee shops to residents over the age of 18 is not prosecuted. Nor is the possession of small quantities of cannabis or no more than five cannabis plants by people over age 18 prosecuted, though police may seize the cannabis and plants.⁶</p>
Diversion from the criminal justice system	Country examples
	<p>Thames Valley, United Kingdom</p> <p><i>Pre-arrest diversion to community-based treatment</i></p> <p>The Thames Valley Police have a number of pre-arrest street diversion programmes for people caught with a small amount of drugs for personal use. The adult drug diversion programme gives police discretion to offer a 'community resolution' in lieu of arrest (thus avoiding a criminal record) for a person in possession of a small amount of drugs for personal use or involved in crimes motivated by alcohol or drug misuse; the community resolution consists of a referral for a voluntary assessment with treatment services tailored to the individual's needs, including social, mental health, and housing support.⁷</p>
	<p>Seattle, United States</p> <p><i>Post-arrest/pre-booking diversion</i></p> <p>The Law Enforcement Assisted Diversion/Let Everyone Advance with Dignity (LEAD) programme allows law enforcement discretion at the point of contact (arrest) to redirect people arrested for low-level or sex work offences away from the criminal legal system and toward community-based services tailored to their needs, including shelter, food, clothing, housing, vocational services, medical care, psychiatric or substance-use treatment, and legal assistance.⁸ The LEAD National Support Bureau, modelled on Seattle's LEAD program, supports the development of programmes operating in the UK, New Zealand, and more than 60 jurisdictions in the United States.⁹</p>
Alternatives to pre-trial detention	Country examples
	<p>Sierra Leone</p> <p><i>Bail regulations for caretakers and pregnant or lactating mothers</i></p> <p>Courts in Sierra Leone are required to consider alternatives to pre-trial detention when making a bail decision in the case of a defendant who is a primary caregiver or a woman who is pregnant or lactating, and they may resort to detention only when required by the nature and circumstances of the offence and the risk of non-compliance with bail conditions. In cases where the court cannot release a person granted bail because no suitable surety is provided, the court must fix bail while considering conditions that are reasonable and proportionate to the offence and taking into account the individual circumstances of the defendant.¹⁰</p>

Alternative punishments	Country examples
	<p>Armenia</p> <p><i>Supervised release as a form of serving a prison sentence</i></p> <p>The Republic of Armenia's Criminal Code provides that pregnant women and women who are caretakers of children under age three may be provided a non-custodial sentence as an alternative to imprisonment; this non-custodial option includes early conditional release, substitution of the sentence with a more lenient sentence, and deferral or exemption from a custodial sentence. In cases where a person receives a non-custodial sentence, the Probation Service will monitor the individual by means that include electronic surveillance and regular visits.¹¹</p>
Sentencing guidelines	Country examples
	<p>England and Wales</p> <p><i>Sentencing guidelines for drug offences</i></p> <p>Guidance for magistrates and judges includes criteria to take into account when sentencing people for drug offences. These criteria include the harm caused (measured by type and quantity of drugs involved), the offender's role in the offence, and factors such as the degree of coercion to which the person was subjected, their level of influence on others above or below them, and their expectation of financial or other advantage. The guidelines also draw sentencers' attention to evidence of disparities in sentence outcomes for some drug offences based on ethnicity and sex that also must be considered as part of the sentencing process.¹²</p>
Early release mechanisms and sentence reductions	Country examples
	<p>India</p> <p><i>Open prisons</i></p> <p>Open prisons in India allow prisoners to serve their sentence with minimal supervision and perimeter security. They are ranked according to the level of liberty granted, and they include semi-open training institutions, which are attached to closed prisons; open training institutions and work camps, where inmates may work on various projects, including land cultivation and development, the construction of dams and government buildings, and soil cultivation and afforestation; and open colonies. Inmates and their families can live together and maintain themselves with wages earned, which are on par with those paid in the outside community.¹³</p>
	<p>Costa Rica</p> <p><i>Sentence reductions for women in situations of vulnerability</i></p> <p>Costa Rican law reduces sentences for women convicted of smuggling drugs into prison if they are living in poverty; are heads of household or older women in conditions of vulnerability; or are caretakers of minor children, older adults, or people with disabilities. If these conditions are met, judges may order the sentence to be served under house arrest, under probation, with electronic monitoring devices, or through another alternative to prison.¹⁴ Costa Rican law also permits judges to reduce sentences for women living in poverty, women with family caretaking responsibilities, women with disabilities, and women who are victims of gender-based violence, wherever such circumstances influenced the commission of the offence.¹⁵</p>

Potential human rights concerns regarding alternatives to detention

Alternatives to detention can minimise exposure to the criminal justice system. However, they rarely eliminate it, and they can affect a range of fundamental rights.

People who are diverted from the criminal justice system post-arrest may still have a permanent arrest record, which can compromise their rights to liberty and security in the case of future arrests, as well as their access to employment, housing, and education and the right to travel. In some jurisdictions, people with low-level, non-violent criminal records can be denied public housing and can face disadvantages in accessing employment, threatening their rights to an adequate standard of living and to social security.

House arrest can compromise the rights to privacy, prevent someone from earning a livelihood, and impede their access to food, health, and education. House arrest may also heighten risk of domestic violence for women confined at home, and it excludes those without an eligible residence from this option altogether. Measures to enforce house arrest, such as electronic surveillance, heighten the level of supervision and in turn the restrictions imposed, compromising the rights to privacy and human dignity.

The UN Office on Drugs and Crime cautions that 'electronic monitoring should be used sparingly and only where other less intrusive non-custodial measures have been considered' and that when such monitoring is used, gender-specific considerations – for example, with respect to income-earning responsibilities and women's caretaking responsibilities – should be taken into account. Further, the cost of such monitoring should not be passed along to the person in conflict with the law.¹⁶

In some jurisdictions, failure to complete drug treatment may result in immediate imprisonment or other sanctions harsher than those that would have been imposed had someone been convicted of the offence charged, raising concerns about excessive punishment and due process. In addition, human rights mechanisms have raised concerns that the delivery of drug treatment through the justice system – whereby judges and other non-medical personnel make health care decisions – raises concerns regarding the rights to health (including with respect to voluntary, evidence-based care, informed consent, and patient confidentiality) and to privacy.

In some countries, people identified as drug users can be detained outside the criminal justice system, without due process, and subjected to forced labour or physical, sexual, or psychological violence as 'treatment', raising concerns about arbitrary detention and torture and other cruel, inhuman, or degrading treatment or punishment.

In some countries, judges are obliged to impose pre-trial detention for those charged with drug-related offences, including for the use or possession of small amounts of drugs, even where there are strict limits on the deprivation of liberty for other alleged crimes. Some countries likewise bar people convicted of drug-related offences from sentence reduction, sentence suspension, early release or parole, pardons, and amnesties, even where these alternatives are available for crimes of a similar or less serious nature.

Discrimination based on race and ethnicity at all levels of the criminal legal system, from arrest to prosecution to sentencing to incarceration, has contributed to disproportionately high rates of incarceration and disparities in sentencing outcomes among people of African descent, indigenous peoples, and religious and ethnic minorities.

Human rights and alternatives to detention: Connecting the dots

The table below connects some basic problems regarding detention in drug policy and examples of alternatives to detention with related sections of the International Guidelines on Human Rights on Drug Policy. The aim is to provide an overview prior to looking at the more detailed tool below.

Problem	Examples of alternatives	Related rights and Guidelines
Over-criminalisation and related contacts with law enforcement	<p><i>Decriminalisation</i></p> <p>De jure – removal of certain crimes from the statute books (South Africa, Portugal)</p> <p>De facto – non-enforcement of certain crimes (The Netherlands)</p>	<p>II.1.v (right to the highest attainable standard of health)</p> <p>II.9.v (right to privacy)</p> <p>II.10.1 (freedom of thought, conscience, and religion)</p> <p>II.7.i (freedom from arbitrary arrest and detention) <i>Ensure that people are not detained solely on the basis of drug use or drug dependence.</i></p> <p>III.1.2.vi (children’s rights) <i>Refrain from criminalising children because of their drug use or possession of drugs for personal use.</i></p> <p>III.2.1.viii (women’s rights) <i>Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.</i></p>
<p>Overuse of detention for minor offences, contributing to unnecessary detention and overcrowding</p> <p>Duration of detention, contributing to overcrowding</p> <p>Poor conditions and public health concerns</p>	<p><i>Diversion</i></p> <p>Pre-arrest diversion to community-based treatment (Thames Valley Police, UK) Law Enforcement Assisted Diversion (LEAD) (Seattle, US)</p> <p><i>Alternative punishments</i></p> <p>Supervised release as a form of serving a prison sentence (Armenia)</p> <p><i>Early release</i></p> <p>Open prison system (India)</p>	<p>II.7 (freedom from arbitrary arrest and detention)</p> <p>II.7.iii <i>Guarantee that people arrested, detained, or convicted for drug-related offences can benefit from the application of non-custodial measures – such as bail or other alternatives to pre-trial detention; sentence reduction or suspension; parole; and pardon or amnesty – enjoyed by those who are arrested, detained, or convicted of other crimes.</i></p> <p>II.7.iv <i>Prioritise diversion from prosecution for persons arrested for drug offences or drug-related offences of a minor nature.</i></p> <p>II.7.v <i>Prioritise non-custodial measures at the sentencing and post-sentencing stages for persons charged with or convicted of drug offences or drug-related offences of a minor nature.</i></p> <p>III.1.2.v (children’s rights) <i>Target efforts primarily at diversion from the criminal justice system and promote rehabilitation over punishment.</i></p> <p>III.2 (women’s rights)</p> <p>III.2.2.iv <i>Make available gender-specific interventions that aim primarily at diversion from the criminal justice system.</i></p> <p>III.2.2.v <i>Legislate for and prioritise non-custodial sentences for pregnant women where possible and appropriate.</i></p> <p>III.3 (persons deprived of liberty) <i>All persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the person. This includes those held in prisons and other closed settings and places of detention for drug-related reasons. Such persons have the right to a standard of health care equivalent to that available to the general population.</i></p>

<p>Pre-trial detention conditions and public health concerns</p> <p>Pre-trial duration and the right to a speedy hearing</p>	<p><i>Alternatives to pre-trial detention</i></p> <p>Bail regulations for caretakers and pregnant or lactating mothers (Sierra Leone)</p>	<p>11.7.ii (freedom from arbitrary arrest and detention) <i>Ensure that pre-trial detention is never mandatory for drug-related charges and is imposed only in exceptional circumstances where such detention is deemed reasonable, necessary, and proportional.</i></p> <p>11.8.1 (right to a fair trial) <i>Guarantee to all persons accused of drug-related offences the right to a fair and public hearing, without undue delay ...</i></p>
<p>Impact of incarceration on women with caretaking responsibilities, women who are pregnant or nursing, or women in situations of vulnerability</p>	<p><i>Alternatives to pre-trial detention and sentence reductions</i></p> <p>Suspension of pre-trial detention or sentence for pregnant or nursing women, women with young children, and those who care for children with disabilities (Argentina)</p> <p>Sentence reductions for women in situations of vulnerability as a result of poverty, responsibilities, disability, or gender-based violence, where such vulnerability influenced the commission of the punishable act (Costa Rica)</p>	<p>11.7.i (freedom from arbitrary arrest and detention) <i>Ensure that people are not detained solely on the basis of drug use or drug dependence.</i></p> <p>111.2 (women's rights) 111.2.2.v <i>Legislate for and prioritise non-custodial sentences for pregnant women where possible and appropriate.</i> 111.2.2.vi <i>Ensure that courts have the power to consider mitigating factors in light of women's caretaking responsibilities, such as lack of criminal history and relative non-severity and nature of the criminal conduct.</i></p>

Problems regarding eligibility and mandatory or court-ordered treatment	Related rights and Guidelines
<p>Exclusion of drug offences from alternatives</p> <p>For example, in the early months of the COVID-19 pandemic, more than 100 countries and territories adopted measures to reduce prison populations, including early release, pardons, diversion to home arrest, and release on bail or parole. At least 28 countries specifically excluded individuals detained for certain drug offences from such measures.¹⁷</p>	<p>1.3.i (equality and non-discrimination) <i>Take all appropriate measures to prevent, identify, and remedy unjust discrimination in drug laws, policies, and practices on any prohibited grounds, including drug dependence.</i></p> <p>11.7.iii (freedom from arbitrary arrest and detention) <i>Guarantee that people arrested, detained, or convicted for drug-related offences can benefit from the application of noncustodial measures – such as bail or other alternatives to pre-trial detention; sentence reduction or suspension; parole; and pardon or amnesty – enjoyed by those who are arrested, detained, or convicted of other crimes.</i></p>
<p>Compulsory detention, ostensibly for treatment, can be imposed outside of the criminal justice system in many countries. In such cases, torture and cruel, inhuman, degrading treatment – not evidence-based treatment – is often imposed.</p>	<p>11.1 (right to the highest attainable standard of health) 11.1.2 Where compulsory drug detention centres exist, States: 11.1.2.v Should take immediate measures to close such centres, release people detained in such centres, and replace such facilities with voluntary, evidence-based care and support in the community. 11.1.2.vi Shall in all circumstances guard against the arbitrary detention of people who use drugs.</p> <p>11.6 (freedom from torture and other cruel, inhuman, or degrading treatment or punishment) 11.6.vii Establish a national system to effectively monitor drug dependence treatment practices and to inspect drug dependence treatment centres, as well as places of detention, including migrant detention centres, police stations and prisons.</p>

	<p>II.7 (freedom from arbitrary arrest and detention) II.7.i Ensure that people are not detained solely on the basis of drug use or drug dependence. II.7.viii Take immediate measures to close compulsory drug detention centres where they exist, release people detained in such centres, and replace such facilities with voluntary, evidence-based care and support in the community.</p>
<p>Drug treatment can be mandated as an alternative to punishment.</p> <p>Where treatment is court ordered, failure to complete the treatment can result in incarceration or other punishment, sometimes with additional sanctions that would not otherwise have been received.</p>	<p>II.1 (right to the highest attainable standard of health) II.1.2.ii <i>Ensure that voluntary, informed consent is a precondition for any medical treatment or preventive or diagnostic intervention and that drug use or dependence alone are not grounds to deprive someone of the right to withhold consent.</i></p> <p>II.6 (freedom from torture and other cruel, inhuman, or degrading treatment or punishment) II.6.vi <i>Ensure that access to health care for people who use or are dependent on drugs and are in places of detention is equivalent to that available in the community.</i></p> <p>II.7 (freedom from arbitrary arrest and detention) II.7.vi <i>Ensure that, where treatment is court mandated, no penalties attach to a failure to complete such treatment.</i> II.7.vii <i>Ensure that treatment for drug dependence as an alternative to incarceration is undertaken only with informed consent and where medically indicated, and under no circumstances extends beyond the period of the applicable criminal sentence.</i></p>

Human rights and detention in drug policy: Assessment tool

Issue	Guideline	Assessment questions	Low risk of human rights concerns	Need for further investigation	Potential need for remedial action
Decriminalisation	<p>II.1.v (right to the highest attainable standard of health)</p> <p>II.9.v (right to privacy)</p> <p>II.10.i (freedom of thought, conscience, and religion)</p> <p>III.2.1.viii (women's rights)</p> <p>Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.</p>	<p>Are alternatives to criminalisation for drug use or for possession for personal use available in law or practice?</p> <p>If so, provide details – e.g. ‘de jure’ (in law) or ‘de facto’ (in practice).</p>	Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
Diversion from the criminal justice system	<p>II.7 (freedom from arbitrary arrest and detention)</p> <p>II.7.iv <i>Prioritise diversion from prosecution for persons arrested for drug offences or drug-related offences of a minor nature.</i></p>	<p>Are there options available as a matter of law or policy to divert people suspected of, arrested for, or charged with drug offences from the criminal justice system?</p> <p>If so, at which point in the process?</p> <ul style="list-style-type: none"> • Pre-arrest • Post-arrest or pre-booking • During trial • Pre-prosecution <p>Are any drug offences explicitly excluded from diversion options?</p> <p>If so, document which offences.</p> <p>Check if official guidelines exist for the use of alternatives as a matter of law or via police, prosecutorial, or judicial discretion.</p>	Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
			Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
			Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
			Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
			Yes <input type="checkbox"/>	Not known <input type="checkbox"/>	No <input type="checkbox"/>
			No <input type="checkbox"/>	Not known <input type="checkbox"/>	Yes <input type="checkbox"/>

	<p>measures – such as bail or other alternatives to pre-trial detention; sentence reduction or suspension; parole; and pardon or amnesty – enjoyed by those who are arrested, detained, or convicted of other crimes.</p> <p>11.7.iv Prioritise diversion from prosecution for persons arrested for drug offences or drug-related offences of a minor nature.</p> <p>11.8 (right to a fair trial)</p> <p>11.8.i Guarantee to all persons accused of drug-related offences the right to a fair and public hearing, without undue delay ...</p>	<p>Are drug offences excluded from alternatives to pre-trial detention that are available for other comparable crimes?</p> <ul style="list-style-type: none"> • Check if official guidelines exist regarding the use of pre-trial detention for drug offences. 	<p>No <input type="checkbox"/></p>	<p>Not known <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p>
<p>Alternative punishments</p>	<p>11.7 (freedom from arbitrary arrest and detention)</p> <p>11.7.iii Guarantee that people arrested, detained, or convicted for drug-related offences can benefit from the application of non-custodial measures – such as bail or other alternatives to pre-trial detention; sentence reduction or suspension; parole; and pardon or amnesty – enjoyed by those who are arrested, detained, or convicted of other crimes.</p> <p>11.7.v Prioritise non-custodial measures at the sentencing and post-sentencing stages for persons charged with or convicted of drug offences or drug-related offences of a minor nature.</p>	<p>Are alternatives to custodial punishment available for drug offences of a minor nature?</p> <p>Are certain drug offences excluded from alternatives that are available for comparable crimes?</p>	<p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>	<p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p>	<p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p>
	<p>111.2 (women's rights)</p> <p>111.2.v Legislate for and prioritise non-custodial sentences for pregnant women where possible and appropriate.</p> <p>111.2.vi Ensure that courts have the power to consider mitigating factors in light of women's caretaking responsibilities, such as lack of criminal history and relative non-severity and nature of the criminal conduct.</p>	<p>Where alternatives are available, are gender-specific considerations taken into account?</p> <p>If so, are any of these factors taken into account with respect to providing gender-specific alternatives?</p> <ul style="list-style-type: none"> • Pregnancy • Nursing • Caretaking responsibilities <p>Check if official guidelines exist regarding women and the use alternative punishments for drug offences.</p>	<p>Yes <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p>	<p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p>	<p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>

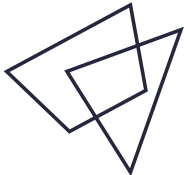
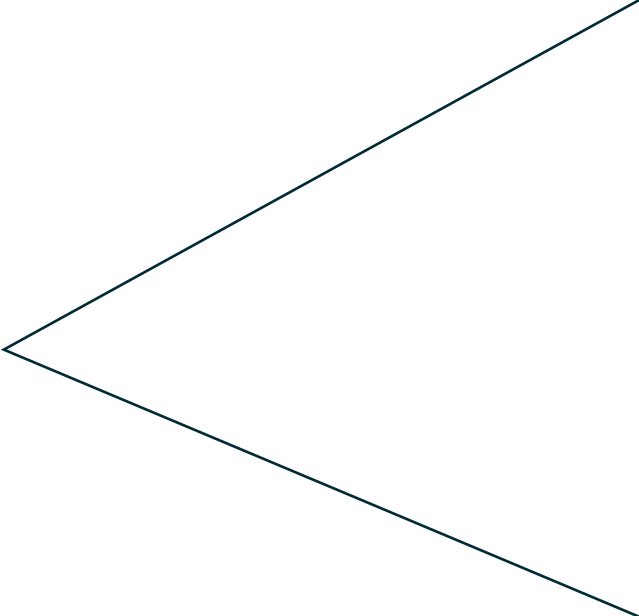
<p>Drug treatment (alternative to conviction or punishment)</p>	<p>11.1 (right to the highest attainable standard of health)</p> <p>11.1.2.i <i>Ensure the availability and accessibility of drug treatment services that are acceptable, delivered in a scientifically sound and medically appropriate manner, and of good quality (that is, with a strong evidence base and independent oversight) ...</i></p> <p>11.1.2.ii <i>Ensure that voluntary, informed consent is a precondition for any medical treatment or preventive or diagnostic intervention and that drug use or dependence alone are not grounds to deprive someone of the right to withhold consent.</i></p> <p>11.7 (freedom from arbitrary arrest and detention)</p> <p>11.7.vi <i>Ensure that, where treatment is court mandated, no penalties attach to a failure to complete such treatment.</i></p> <p>11.7.vii <i>Ensure that treatment for drug dependence as an alternative to incarceration is undertaken only with informed consent and where medically indicated, and under no circumstances extends beyond the period of the applicable criminal sentence.</i></p>	<p>Can courts mandate treatment as an alternative to conviction or punishment?</p> <p>If so:</p> <ul style="list-style-type: none"> • Are sanctions imposed for failure to complete such treatment? • Can drug treatment extend beyond the period of the applicable criminal sentences? • Are measures taken to ensure that treatment is medically indicated? • Can people be ordered to undergo treatment without their voluntary, informed consent? <p>Check if official guidelines exist regarding standards for mandating treatment as an alternative to punishment, conditions of treatment (e.g. eligibility, consent, health care oversight), and type(s) of treatment provided.</p>	<p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>	<p>Yes or Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p>	<p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p>
<p>Drug treatment (administrative detention)</p>	<p>11.1 (right to the highest attainable standard of health)</p> <p>11.1.2.i <i>Ensure the availability and accessibility of drug treatment services that are acceptable, delivered in a scientifically sound and medically appropriate manner, and of good quality (that is, with a strong evidence base and independent oversight) ...</i></p> <p>11.1.2.ii <i>Ensure that voluntary, informed consent is a precondition for any medical treatment or preventive or diagnostic intervention and that drug use or dependence alone are not grounds to deprive someone of the right to withhold consent.</i></p> <p>11.1.2 Where compulsory drug detention centres exist, States:</p> <p>11.1.2.v <i>Should take immediate measures to close such centres, release people detained in such centres, and replace such facilities with voluntary, evidence-based care and support in the community.</i></p>	<p>Are drug use or dependence permissible grounds for administrative detention for treatment, rehabilitation, or re-education?</p> <p>If so:</p> <ul style="list-style-type: none"> • Are there closed centres where people are held for compulsory treatment (also called drug detention or compulsory drug detention centres)? • Are measures taken to ensure that treatment is medically indicated? • Do health care professionals supervise the treatment? <p>Check if official guidelines exist regarding the provision of treatment and rehabilitation services.</p> <p>Is there a legal process to determine whether and for how long someone could be detained for treatment?</p>	<p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>	<p>Not known <input type="checkbox"/></p> <p>Not known <input type="checkbox"/></p> <p>Yes or Not known <input type="checkbox"/></p> <p>Yes or Not known <input type="checkbox"/></p> <p>Yes or Not known <input type="checkbox"/></p>	<p>Yes <input type="checkbox"/></p> <p>Yes <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>No <input type="checkbox"/></p> <p>Yes or Not known <input type="checkbox"/></p> <p>No <input type="checkbox"/></p>

	<p>11.1.2.vi <i>Shall in all circumstances guard against the arbitrary detention of people who use drugs.</i></p> <p>11.6 (freedom from torture and other cruel, inhuman, or degrading treatment or punishment)</p> <p>11.6.vii <i>Establish a national system to effectively monitor drug dependence treatment practices and to inspect drug dependence treatment centres..</i></p> <p>11.7 (freedom from arbitrary arrest and detention)</p> <p>11.7.i <i>Ensure that people are not detained solely on the basis of drug use or drug dependence.</i></p> <p>11.7.viii <i>Take immediate measures to close compulsory drug detention centres where they exist, release people detained in such centres, and replace such facilities with voluntary, evidence-based care and support in the community.</i></p>	<p>If so:</p> <ul style="list-style-type: none"> • Check the relevant standards governing administrative detention, including any that are specific to administrative detention for treatment. <p>Is there a national inspection mechanism for drug treatment centres or other forms of administrative detention for drug treatment?</p> <p>If so:</p> <ul style="list-style-type: none"> • Check if the inspection mechanism has raised human rights concerns. 		Yes or Not known <input type="checkbox"/>	No <input type="checkbox"/>
<p>Early release mechanisms</p>	<p>11.7 (freedom from arbitrary arrest and detention)</p> <p>11.7.iii <i>Guarantee that people arrested, detained, or convicted for drug-related offences can benefit from the application of non-custodial measures – such as bail or other alternatives to pre-trial detention; sentence reduction or suspension; parole; and pardon or amnesty – enjoyed by those who are arrested, detained, or convicted of other crimes.</i></p> <p>11.7.v <i>Prioritise non-custodial measures at the sentencing and post-sentencing stages for persons charged with or convicted of drug offences or drug-related offences of a minor nature.</i></p>	<p>Are early release mechanisms available for drug offences of a minor nature?</p> <p>Are certain drug offences excluded from early release options that are available for comparable crimes?</p> <ul style="list-style-type: none"> • Check if there is guidance for judges and magistrates regarding the implementation of early release mechanisms for drug-related crimes. 	Yes <input type="checkbox"/> No <input type="checkbox"/>	Not known <input type="checkbox"/> Not known <input type="checkbox"/>	No <input type="checkbox"/> Yes <input type="checkbox"/>
	<p>111.2 (women's rights)</p> <p>111.2.vii <i>Ensure the earliest possible transfer of non-resident foreign-national women prisoners following the request or informed consent of the woman concerned.</i></p>	<p>Are opportunities to transfer foreign-national women prisoners to their home country available as a matter of law?</p> <p>If so:</p> <ul style="list-style-type: none"> • Are foreign-national women imprisoned for drug offences excluded from such opportunities? 	Yes <input type="checkbox"/> No <input type="checkbox"/>	Not known <input type="checkbox"/> Not known <input type="checkbox"/>	No <input type="checkbox"/> Yes <input type="checkbox"/>

<p>Data collection and dissemination</p>	<p>IV.1.i Collect and disseminate appropriate information to enable the formulation and implementation of human rights-compliant drug control laws and policies. These data should be disaggregated by relevant factors, including health status (such as drug dependence), age, sex, race and ethnicity, sexual orientation and gender identity, and economic status (including involvement in sex work).</p>	<p>Are there statistics on how many people have been provided alternatives to detention for drug offences? if so:</p> <ul style="list-style-type: none"> Who is benefitting from alternatives? Check if these statistics are available for the various alternatives described above and whether the data are disaggregated by relevant factors, including drug dependence status, age, sex, sexual orientation, gender identity, race, ethnicity, nationality, and economic status. 		<p>Yes or Not known <input type="checkbox"/></p>	<p>No <input type="checkbox"/></p>
<p>Legislative and policy review</p>	<p>IV.2.i Consider undertaking a transparent review of drug laws and policies to assess human rights compliance.</p>	<p>Have any of the following been evaluated or reviewed in the past ten years?</p> <ul style="list-style-type: none"> Criminal drug laws Penalties for drug offences Sentencing guidelines for drug offences <p>If so:</p> <ul style="list-style-type: none"> Check the process and outcomes of the evaluation or review, including whether human rights and alternatives to detention were included. 		<p>Yes or Not known <input type="checkbox"/></p>	<p>No <input type="checkbox"/></p>

ENDNOTES

- ¹ United Nations Office on Drugs and Crime, *World drug report 2020* (2020), https://wdr.unodc.org/uploads/wdr2020/documents/WDR20_BOOKLET_6.pdf, p. 56.
- ² L. Ferguson, M. Lambert-Peck and D. Barrett, *Pathway for creating a human rights-based legal and policy environment relating to drugs*, International Guidelines on Human Rights and Drug Policy, Implementation Series No. 1. International Centre on Human Rights and Drug Policy (University of Essex and Program on Global Health and Human Rights, University of Southern California, 2021).
- ³ *Minister of Justice and Constitutional Development and Others v. Prince; National Director of Public Prosecutions and Others v. Rubin; National Director of Public Prosecutions and Others v. Acton and Others* [2018] ZACC 30.
- ⁴ *Centre for Child Law v. Director of Public Prosecutions, Johannesburg and Others* (CCT210/21) [2022] ZACC 35.
- ⁵ General-Directorate for Intervention on Addictive Behaviours and Dependencies, *Guidelines for the intervention in dissuasion* (2013), http://www.sicad.pt/BK/Publicacoes/Lists/SICAD_PUBLICACOES/Attachments/160/LOID_EN.pdf.
- ⁶ Government of the Netherlands, *Topics: Drugs*, <https://www.government.nl/topics/drugs>.
- ⁷ W. Spyt, L. Barnham and J. Kew, 'Diversion – Going soft on drugs?', *Thames Valley Police Journal*, vol. 4 (2019), pp. 44–58; Thames Valley Police and Crime Commissioner, *New drug diversion programme in place across Thames Valley to help break the cycle of substance misuse and crime* (December 2021), <https://www.thamesvalley-pcc.gov.uk/news-and-events/thamesvalley-pcc-news/2021/12/new-drug-diversion-programme-in-place-across-thames-valley-to-help-break-the-cycle-of-substance-misuse-and-crime>.
- ⁸ King County, Washington (United States), *Law Enforcement Assisted Diversion (LEAD): Diversion and reentry services*, <https://kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/lead.aspx>.
- ⁹ LEAD National Support Bureau, <https://www.leadbureau.org/>.
- ¹⁰ Sierra Leone, *The Bail Regulations* (2018), https://www.parliament.gov.sl/uploads/statutory_instruments/Statutory%20Instrument%20Bail%20Regulation,%202018.pdf, arts. 7, 10(3).
- ¹¹ Organization for Security and Co-operation in Europe – Office in Yerevan, *Creating a probation service in the Republic of Armenia: Issues and peculiarities; A baseline study (summary version)* (2012), <https://www.osce.org/files/f/documents/1/6/97035.pdf>.
- ¹² See, e.g., Sentencing Council for England and Wales, *Sentencing guidelines for use in Magistrates Court: Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply to another* (2021); Sentencing Council for England and Wales, *Sentencing guidelines for use in Crown Court: Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply to another* (2021); Judicial College (England and Wales), *Equal treatment bench book* (July 2022 revision).
- ¹³ P. Goyal and K. Vedula, 'Understanding open prisons in India', *Economic and Political Weekly*, vol. 56, no. 4 (2021), <https://www.epw.in/engage/article/understanding-open-prisons-india>; see also C. Bahri, 'Here's why open prisons are the solution to India's overcrowded prisons', *Business Standard* (7 October 2018), https://www.business-standard.com/article/current-affairs/here-s-why-open-prisons-are-the-solution-to-india-s-overcrowded-prisons-118092100186_1.html.
- ¹⁴ Costa Rica, *Reforma Ley No. 8204, 'Reforma integral Ley sobre estupefacientes, sustancias psicotrópicas, drogas de uso no autorizado, actividades conexas, legitimación capitales y financiamiento terrorismo'* (2013), https://www.icd.go.cr/portalicad/images/docs/uif/doc_interes/acerca_uif/LEY8204.PDF, art. 77bis.
- ¹⁵ Costa Rica, *Reforma Código Penal No. 9628, 'Modificación de los artículos 71 y 72 de la Ley No. 4573, Código Penal, de 4 de mayo de 1970'* (2019), http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=88050#ddown.
- ¹⁶ United Nations Office on Drugs and Crime, *Toolkit on gender-responsive non-custodial measures* (2020), https://www.unodc.org/documents/justice-and-prison-reform/20-01528_Gender_Toolkit_complete.pdf.
- ¹⁷ Harm Reduction International, *COVID-19, prisons and drug policy: Global scan March–June 2020* (2020), https://www.hri.global/files/2020/07/10/HRI_-_Prison_and_Covid_briefing_final.pdf.



**INTERNATIONAL GUIDELINES ON
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