idpc International Drug Policy Consortium

PENAL REFORM INTERNATIONAL
Promoting fair and effective criminal justice

Advocacy note

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The UNGASS Outcome Document: Opportunities for promoting criminal justice reform

Introduction

The United Nations General Assembly Special Session (UNGASS) on drugs, held in April 2016, was the first high-level event of its kind since 1998. Held three years before it was due to take place,[1] the Special Session was meant to respond to the urgency of discussing the successes and failures of global drug policies, and identify options for the way forward. The UNGASS took place in the midst of unprecedented calls for a rethink of punitive strategies towards drugs – an approach that had prevailed for decades. This was in recognition that prohibition-led policies focusing on mass incarceration, interdiction and eradication have failed to reduce the scale of the illicit drug market, and have resulted instead in a number of severe negative consequences, including prison overcrowding, human rights abuses (such as extrajudicial killings, police abuse, torture and ill-treatment, lack of access to justice and due process), health harms and an explosion of drug market-related violence and corruption. A study of the High Commissioner for Human Rights, tabled at the 30th Human Rights Council session in September 2015, outlined the human rights impact of drug policies, addressing concerns relating to health, criminal justice, discriminatory practices, rights of the child and Indigenous peoples.[2]

Research suggests that punishment has a limited impact upon reducing illicit drug use, with countries which impose severe penalties for possession and personal consumption of drugs no more likely to deter drug use in the community compared to countries imposing less severe sanctions.[3]

Although the UNGASS fell short of expectations in many regards,[4] it achieved major milestones with regards to drug control, in particular in the area of criminal justice reform. The Outcome Document,[5] which was adopted by consensus at the opening of the UNGASS, covers seven thematic areas with commitments towards demand reduction; access to controlled substances for medical and scientific purposes; supply reduction; human rights, youth, children and women; as well as cross-cutting issues on new threats and challenges; international cooperation; and development. This seven-pillar structure provided unprecedented opportunities to put forward criminal justice reform and drug policy options grounded in the fundamental UN principles of protecting human rights, promoting public health and proportionate sentencing policies and practices, and consistent with the 2030 Agenda for Sustainable Development.[6]

In preparation for the 26th Session of the Commission on Crime Prevention and Criminal Justice, set to take place from 22 to 26 May 2017,[7] this Advocacy Note seeks to identify key aspects of the Outcome Document that are relevant to the work of the CCPCJ.

Proportionality of sentencing

For the last decades, drug policies have seen the unwavering application of punitive criminal sanctions for drug offenders, with little differentiation between use and possession, at one end of the scale, and large-scale trafficking with links to organised crime, at the other end. This has given rise to a dramatic increase in the number of people disproportionately criminalised for small-scale drug offences, and has fuelled prison overcrowding.

Disproportionate penal policies also exist with regard to pre-trial detention. In many countries, pre-trial detention is mandatory for drug offences.[8] In others,

people accused or convicted of drug offences are denied access to alternative sentences that are available to those accused of other types of offences.

In light of this, the UNGASS Outcome Document represented progress in that it calls for 'proportionate national sentencing policies, practices and guidelines for drug-related offences', with the consideration of 'both mitigating and aggravating factors' by the judge when imposing a penalty (paragraph 4.l). Recognition of this principle at such high-level political level is significant. In this context, it should be pointed out that the death penalty for drug-related offences is in violation of international human rights law (prohibition of capital punishment other than for the 'most serious crimes'[9]), but also constitutes a disproportionate punishment. Sixty-seven UN member states reiterated the need to abolish capital punishment for drug-related offences during the UNGASS.[10]

Alternatives to incarceration

The Outcome Document also encourages 'the development, adoption and implementation… of alternative or additional measures with regard to conviction or punishment' for minor drug offences, in line with the Tokyo Rules (paragraph 4.j). According to available UN data, 83% of drug offences recorded by law enforcement and criminal justice systems are possession offences[11] – clogging criminal courts with low-level offenders, and leading to significant prison overcrowding. There is also overwhelming evidence showing that a criminal record significantly exacerbates poverty and marginalisation for vulnerable groups caught in the criminal justice system.[12] People who use drugs, in particular, face considerable stigma and discrimination in accessing healthcare and social services, and their criminalisation creates additional obstacles to accessing harm reduction, welfare, education and employment for fear of arrest, incarceration and police abuse.

At the UNGASS, an unprecedented number of UN agencies[13] and governments[14] have called for the removal of criminal sanctions for people who use drugs, while the UN Office on Drugs and Crime has consistently reiterated the need to treat drug use as a health rather than a criminal justice issue,[15] and to better promote and implement alternatives to imprisonment for low-level, non-violent drug offenders.[16] Alternatives to incarceration constitute a critical element of an effective criminal justice system – as recognised by the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and various resolutions adopted by the Crime Congress.[17]

Access to justice and due process

Paragraph 4.o of the UNGASS Outcome Document promotes criminal justice responses to drugs that 'ensure legal guarantees and due process safeguards', including 'the right to a fair trial' and 'timely access to legal aid'. These are essential components of an effective and humane criminal justice system, but have not been incorporated in the drug control strategies of many countries. In some states, people accused of drug offences remain in pre-trial detention for months, sometimes years – contributing to prison overcrowding.[18] As defendants typically come from poor and marginalised communities, they cannot afford legal representation, and legal aid is also often unavailable. As a result, they are unable to know their rights, and defend themselves during their trial. Foreign nationals and Indigenous groups are usually even more affected if they are denied access to translation during the proceedings.[19]

Paragraph 4.o of the UNGASS Outcome Document also calls on governments 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'. Abusive practices are widespread across the world in an effort to curb the illicit drug market. These include extra-judicial killings, compulsory detention centres for drug users, withholding opioid substitution therapy for coercive purposes, the arbitrary use of stop and search powers, among many other human rights violations. In line with the UNGASS Outcome Document, such practices should come to an end and any human rights abuses against people suspected of drug-related offences should be duly investigated and redressed.[20]

Access to health services in prison settings

The prevalence of drug use in prison varies from country to country. However, estimates show that around one in three people detained have used drugs at least once while incarcerated.[21] The prevalence of HIV, hepatitis B and C and tuberculosis is also significantly greater in prison compared to the general population. And while prisons are not the best setting for harm reduction and treatment interventions, evidence shows that such services can substantially improve health outcomes for prisoners.[22]

The UNGASS Outcome Document recognises the need to 'enhance access' to a wide range of drug dependence treatment services 'in prisons and after imprisonment', specifically referring to the Nelson Mandela Rules (paragraphs 1.k and 4.m). Paragraph 1.o also

promotes the availability of harm reduction services in prisons settings to 'prevent the transmission of HIV, viral hepatitis and other blood-borne diseases associated with drug use'.

A gender perspective in criminal justice matters

The consideration of a gender perspective in the drug response is a relatively new approach and the UNGASS has been instrumental in highlighting the specific vulnerabilities faced by women. The Outcome Document includes several paragraphs[23] that seek to promote gender-sensitive policies. Paragraph 4.d in particular recognises 'the conditions that continue to make women and girls vulnerable to exploitation and participation in drug trafficking, including as couriers', while paragraph 4.n encourages UN member states to take into account 'the specific needs and possible multiple vulnerabilities of women drug offenders when imprisoned, in line with the… Bangkok Rules'.

These are welcome statements as women continue to be disproportionately affected by the criminal justice responses to drugs. Women constitute the fastest growing prison population worldwide, with punitive drug laws having been identified as a factor. In several Asian and Latin American countries, for example, female drug offenders make up more than half of the total number of women incarcerated.[24] Female drug offenders generally engage in the lowest levels of the drug trafficking chain and originate from poor, vulnerable backgrounds. Their incarceration does little to reduce the scale of the illicit drug market as they are easily replaced by other vulnerable groups, but a prison sentence can have devastating consequences on their lives and that of their families. A humane and effective criminal justice system should recognise these vulnerabilities and ensure that the response is proportionate and only uses incarceration as a last resort.

Improving UN system-wide coherence

The UNGASS was marked by the heightened engagement from across a wide variety of UN agencies, rather than just from Vienna-based drug control entities. This is a welcome development as it better reflected the cross-cutting nature of drug policy and the need to embed drug control in an approach grounded in human rights, health, development and security.

The Outcome Document also reiterates the need for more coherence within the UN family around drug control issues in the preamble by welcoming the 'continued efforts to enhance coherence within the United Nations system at all levels'. Paragraph 6.a also calls on relevant UN agencies 'to assist Member States to effectively address the health, socioeconomic, human rights, justice and law enforcement aspects of the world drug problem'. In this respect, it is critical that the CCPCJ engages in the post-UNGASS process to ensure that its particular expertise, its criminal justice mandate and international criminal justice standards are better incorporated in global drug control debates.

System-wide coherence has also been emphasised in resolution E/CN.7/2017/L.9/Rev. 1, adopted in March 2017 by the CND, in which OP8 encourages 'the relevant United Nations entities to strengthening international and inter-agency cooperation and to make available relevant information to the Commission in order to facilitate its work and to enhance coherence within the United Nations system at all levels'.[25]

The Sustainable Development Goals (SDGs), adopted in September 2015, also offer a key opportunity for relevant UN agencies – including ECOSOC subsidiary bodies such as the CND and the CCPCJ – to work together to address development-related challenges between now and 2030. Since March 2017, for instance, the CND has included an agenda item to discuss how its work can contribute to the achievement of the SDGs.

Conclusion and recommendations

Many aspects of drug control continue to be dealt with through a criminal justice response. In this regard, the CCPCJ has a critical role to play in ensuring that national-level criminal justice systems operate in full conformity with human rights principles and UN guidelines (including the Nelson Mandela and the Bangkok Rules), and in line with the experience of the Commission. As member states are embarked in the post-UNGASS implementation process and in preparations for the 2019 high-level meeting (when they will discuss their global drug strategy for the next decade), the expertise of the CCPCJ – and that of all relevant UN agencies working on health, human rights, justice, development and security – will be invaluable and should be adequately reflected in the debates. In light of the above-mentioned considerations IDPC and PRI would like to put forward the following recommendations:

To the CCPCJ and UNODC:

- Include an agenda item at the CCPCJ to discuss how criminal justice issues impact on the Sustainable Development Agenda.

To member states:

- Review drug policies with a view to ensure more differentiated and proportional sanctions for drug-related offences
- Repeal mandatory pre-trial detention for drug offences in line with the requirements of an individual assessment of necessity and proportionality enshrined in Article 9 of the International Covenant on Civil and Political Rights
- Review criminal laws relating to drug use and possession in light of the growing recognition that drug use should be treated as a health and social issue rather than a criminal justice problem and in order to focus the limited resources of law enforcement on perpetrators of organised crime
- Rebalance control policies through alternative development, prevention, treatment, harm reduction and human rights – and ensure that budget for drug control reflects these different priorities, shifting resource allocation towards health and human rights responses[26]
- Address the gender disparities in sentencing policies, and provide for gender-sensitive non-custodial alternatives in the community in line with Rule 62 of the Bangkok Rules'
- Abolish the death penalty for drug-related offences, in line with Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR), according to which states that have not yet abolished the death penalty may only impose this sentence for the 'most serious crimes'
- Repeal criminal laws that ban syringe/needle provision (and possession), as these laws violate the right to health and drive people who inject drugs away from life-saving HIV prevention and other health services and encourages risky behaviour, such as sharing needles and syringes
- Provide adequate healthcare and harm reduction programmes for people who use drugs in prisons, in order to fulfil their right to health and prevent ill-treatment, and ensure gender equality in access to such programmes as well as gender-responsiveness in line with Rules 14 and 15 of the Bangkok Rules
- Close compulsory drug detention and rehabilitation centres and implement voluntary, evidence-informed and rights-based health and social services in the community.

In order to support and inform reforms to this end, IDPC and PRI have made available a ***Ten-point plan on reforming criminal justice responses to drugs***, available at: https://www.penalreform.org/resource/ten-point-plan-reforming-criminal-justice-responses-drugs/.

Endnotes

1. The next high-level event was meant to take place in 2019, as the 10-year objectives set out in the 2009 Political Declaration and Plan of Action on the world drug problem were set to expire
2. Office of the High Commissioner on Human Rights (September 2015), *Study on the impact of the world drug problem on the enjoyment of human rights*, A/HRC/30/65, https://dl.dropboxusercontent.com/u/566349360/library/A_HRC_30_65_E%281%29.pdf
3. United Nations Office on Drugs and Crime (2010), *From coercion to cohesion: Treating drug dependence through health care, not punishment*, Discussion Paper, https://www.unodc.org/docs/treatment/Coercion_Ebook.pdf
4. For a detailed analysis, see: International Drug Policy Consortium (September 2016), *The United Nations General Assembly Special Session (UNGASS) on the world drug problem: Report of proceedings*, http://idpc.net/publications/2016/09/the-ungass-on-the-worlddrug-problem-report-of-proceedings
5. United Nations Office on Drugs and Crime, Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem: Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem, Thirtieth Special Session General Assembly, 19-21 April 2016, http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/S-30/1 (accessed 16 February 2017).
6. Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, entered into force on 1 January 2016, http://www.un.org/sustainabledevelopment/sustainable-development-goals/
7. http://www.unodc.org/unodc/en/commissions/CCPCJ/session/26_Session_2017/session-26-of-the-ccpcj.html
8. Washington Office on Latin America (2011), *Systems overload: Drug laws and prisons in Latin America*, supra at n. 11, p. 6. (Bolivia, Brazil, Ecuador, Mexico and Peru), https://www.wola.org/analysis/systems-overload-drug-laws-and-prisons-in-latin-america/
9. See, for example: CCPR/C/IDN/CO/1, para. 10, CCPR/CO/84/THA, para. 14, and CCPR/C/SDN/CO/3, para. 19; Office of the High Commissioner on Human Rights (September 2015), *Study on the impact of the world drug problem on the enjoyment of human rights*, A/HRC/30/65, https://dl.dropboxusercontent.com/u/566349360/library/A_HRC_30_65_E%281%29.pdf
10. For a list of all member states calling for the end of the death penalty at the UNGASS, see: http://cndblog.org/maps/death-penalty/
11. Commission on Crime Prevention and Criminal Justice (2013), *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice,* E/CN.15/2013/9, http://www.unodc.org/documents/data-and-analysis/statistics/crime/World_Crime_Trends_2013.pdf
12. SSDP, CSSDP, SSDP UK, YODA & Youth RISE (2016), *Global youth coalition consultation*, https://ssdp.org/assets/Alternate-Youth-UNGASS-Consultation.pdf
13. Hallam, C. (March 2016), *IDPC briefing paper – Striving for system-wide coherence: An analysis of the official contributions of United Nations entities for the UNGASS on drugs* (London: International Drug Policy Consortium), http://idpc.net/publications/2016/03/striving-for-system-wide-coherence-an-analysis-of-the-official-contributions-of-united-nations-entities-for-the-ungass-on-drugs
14. For a list of all member states calling for the decriminalisation of drug use at the UNGASS, see: http://cndblog.org/maps/decriminalisation/
15. In its World Drug Report 2012, UNODC suggested rebalancing drug control policy through alternative development, prevention, treatment and fundamental human rights. The Executive Director told the 2014 Commission on Narcotic Drugs that 'a public health response to the drug use problem should consider alternatives to penalization and

incarceration of people with use disorders'. The UN High Commissioner for Human Rights has also stated that it is 'possible, and consistent with current international drug control treaties, to re-frame some drug-related conduct as administrative offences, followed with a social and medical response'. (Quoted in Penal Reform International, Global Prison Trends 2015, Special Focus, p. 5).

16. For instance, see: Lebaux, V. (January 2017), *Second Round of Thematic Discussions on the Implementation of UNGASS: Operational recommendations on cross-cutting issues: Drugs and human rights, youth, children, women and communities* (United Nations Office on Drugs and Crime), http://www.unodc.org/documents/postungass2016//contributions/UN/UNODC_Ch._4_Criminal_Justice_23Jan2017.pdf
17. See: http://www.un.org/documents/ga/res/45/a45r110.htm
18. This is the case, for instance, in Latin America. See: Chaparro, S., Pérez Correa, C. & Youngers, C. (2017), *Irrational punishment: Drug laws and punishment in Latin America* (Colectivo de Estudos Drogas y Derechos), http://www.drogasyderecho.org/files/Irrational_Punishments_ok.pdf
19. Penal Reform International, International Drug Policy Consortium & UK AID (2016), *10 point plan: Reforming criminal justice responses to drugs*, https://dl.dropboxusercontent.com/u/566349360/library/10-point-plan-Drug-policies-WEB_final.pdf
20. Fernandez, J. & Nougier, M. (2017), *IDPC Briefing Paper – How to capitalise on progress made in the UNGASS Outcome Document: A guide for advocacy* (London: International Drug Policy Consortium), http://idpc.net/publications/2017/03/how-to-capitalise-on-progress-made-in-the-ungass-outcome-document
21. United Nations Office on Drugs and Crime (2015), *UNODC World Drug Report 2015*, Chapter 1, p. 4, referencing several studies, http://www.unodc.org/wdr2015/
22. For more information, see: International Drug Policy Consortium (March 2016), 'Chapter 3.6: Health-based policies in prison and closed settings', *IDPC Drug Policy Guide, 3rd edition*, http://files.idpc.net/library/IDPC-guide-3-EN/IDPC-drug-policy-guide_3-edition_Chapter-3.6.pdf
23. See paragraphs 4.b, 4.d, 4.g and 4.n
24. Washington Office on Latin America, International Drug Policy Consortium, DeJusticia, Inter-American Commission on Women (2016), *Women, drug policy and incarceration: A policymaker's guide for adopting, reviewing and implementing reforms related to women incarcerated for drug offenses*, http://idpc.net/publications/2016/02/women-drug-policies-and-incarceration-a-guide-for-policy-reform-in-latin-america-and-the-caribbean
25. United Nations Commission on Narcotic Drugs, Report on the sixtieth session (2 December 2016 and 13-17 March 2017), para. 95. and annex Commission on Narcotic Drugs resolution 60/1, Preparations for the sixty-second session of the Commission on Narcotic Drugs in 2019, http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_60/Report/Advance_Copy_E_2017_28.pdf
26. Harm Reduction International/ International Drug Policy Consortium/ International HIV/ AIDS Alliance, The funding crisis for harm reduction, 2014, http://idpc.net/publications/2014/07/the-funding-crisis-for-harm-reduction

About this advocacy note

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About IDPC

The International Drug Policy Consortium is a global network of non-government organisations that speciali se in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

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