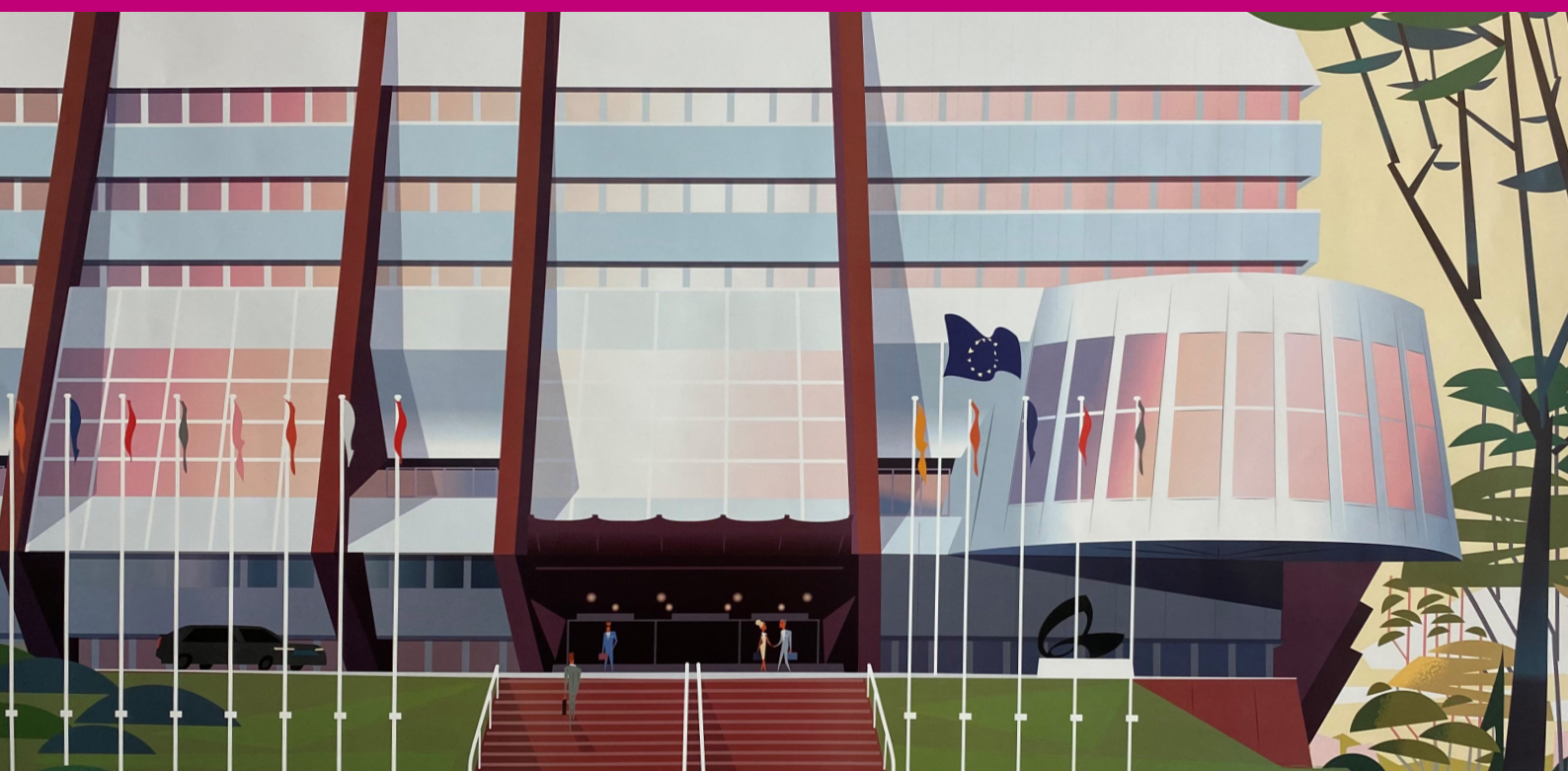


# HUMAN RIGHTS IN DRUG POLICY: A SELF-ASSESSMENT TOOL



2021 EDITION



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2021 EDITION

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# Foreword

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As far back as 2007, the INCB 2007 stated that due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions. Disrespect for them can hinder the ability of the criminal justice system to enforce the law, can lead to discriminatory and disproportionate responses to drug offenses and can undermine the conventions. A human rights-based approach means the incorporation of all applicable human rights standards into a specific policy and not merely addressing specific violations.

In addition, the UN has underlined that a further added value of the application of a human rights-based approach in tackling multi-dimensional problems lies in the fact that it allows policymakers to address these problems in a high-level manner. It helps to take into account the range of inter-related and mutually reinforcing factors, whilst avoiding stigma, discrimination, insecurity and social exclusion.

Adhering to human right standards can make a significant contribution to global efforts to re-balance drug policies towards prioritizing public health a widely-supported objective. Promoting and supporting worldwide evidence-based policies, strategies and interventions that are based on a public health and human rights can be an important way to reduce drug use and the health and social burden it causes.

Since UNGASS 2016 there has been a growing discussion about developing human rights indicators for drug policies. The Pompidou Group is in the unique position to make a landmark contribution to this development with this new tool. In 2020 the Permanent Correspondents of the Pompidou Group set up an expert group commissioned to develop a tool that allows for a self-assessment/internal evaluation of drug policies and programmes with respect to human rights standards under existing legal instruments and the work undertaken by UNODC, UNHCR, OHCH and other stakeholders. The tool presented in this document was developed by the members of the expert group on drug policies and human rights:

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The presented self-assessment tool was endorsed by the Permanent Correspondents of the Pompidou Group at their 88th meeting in June 2021.

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# I. Introduction

## From consensus to implementation

In the past decade the human rights dimensions of drug policy have risen to prominence in international and European policy debates. At European and UN levels it has been agreed upon for many years that the response to drug use and the drug trade should be implemented in full conformity with human rights. Based on this commitment, the Council of Europe's Committee on Legal Affairs and Human Rights commissioned a 'baseline' study on the status of human rights in relation to drug policy in the region, which identified good practices as well as areas of concern and knowledge gaps.<sup>1</sup> The UN Human Rights Council has now issued resolutions calling for greater attention to the human rights consequences of efforts to control drugs.<sup>2</sup> A UN Common Statement on drug policy was agreed upon in 2019 by the heads of all UN agencies.<sup>3</sup> What these and other important documents highlight is that while there is a strong consensus that human rights must be fully adhered to in drug law, policy and practice, there remains much work to put this commitment into practice.

## The role of human rights in drug policy

Human rights primarily mediate the relationship between individuals and the State. In some ways they direct States as to what must be done. In other ways they restrain States from doing certain things. Drug policy should aim towards improved health and welfare of individual and societies. However, the right to health is *interdependent* with the wider human rights framework and retains fundamental freedoms.<sup>4</sup> The protection of the public's health is certainly a legitimate aim for the purposes of limitations on certain rights,<sup>5</sup> but identifying this aim is only a first step. Limitations on rights should also be subject review and to a proportionality test.<sup>6</sup> The rationale limiting rights may not always be publicly stated, certain laws may have been adopted without analysis of the rights implications, or may not have been subject to review for many years. Moreover, human rights apply not only to proposed outcomes, but also at the means used to pursue those outcomes. Even if the aim is to achieve improved health, certain means may result in problems for human rights.

## Aim and approach of the tool

With this new self-assessment tool, the Pompidou Group aims to address the challenge of assessing human rights in drug policy. There are challenges with how to measure progress in the absence of standardized indicators across many issues, and across countries. In addition, both human right and drug policy are very broad, and bringing them together can seem daunting. The aim of this tool is to provide a straightforward entry point for human rights assessment across key issues. This assessment is envisaged as a collaborative, reflective process, recognizing the variation in approaches and differing contexts across the region. By linking key topics to human rights standards and more specific probing questions, its aim is to provide a practical framework to investigate and assess the human rights implications of drug laws, policies and practices.

*Understanding the situation on the ground:* Much work has been done in recent years to clarify what human rights law may require in the context of drug policy.<sup>7</sup> This is very helpful in better understanding State obligations, but in the abstract human rights are of limited use. A major step in translating commitments into practice is better understanding the situation on the ground. This tool is therefore intended for use by Council of Europe Member States for internal analysis, ideally collaborating with civil society, with a view to better understanding their own human rights situation in this policy context.

*Internal, voluntary and non-comparative:* The tool is not a comparative 'scorecard'. The Pompidou Group has published the tool but will not collate or publish State information and there will be no central database against which States will be checked against each other. The tool is for *self-assessment* – an internal process for States to voluntarily undertake.

*A view to progress and reform, rather than a 'violations approach':* The tool is not intended to identify violations, but for an assessment of law, policy and practice with a view to making human rights progress. It does not follow up on judgments or recommendations of any specific human rights mechanisms. The aim, in other words, is not to 'name and shame' or to adopt an overly legalistic approach.

*An invitation to explore further:* The tool is envisaged as an adaptable entry point. It is not comprehensive, and it is recognized that some issues are not included. By including a selection of key recurring issues relevant to the region, across social, health and criminal justice domains, the tool is an invitation for States to work within and across ministries to explore progress, problems, and those areas where human rights issues may have been overlooked.

## Practical application

The self-assessment concept relies on a set of (non-exhaustive) questions designed to enable concerned decision makers as well as managers and administrators to explore human rights compliance of different drug policy options and interventions.

Being conscious of existing reporting obligations and high workloads in this policy sphere, the concept is designed in a way that readily available sources of information should suffice to conduct the assessments, and standardized indicators are not required.

However, the tool envisages cross-ministerial/departmental communication. While the issue of drugs is sometimes held within one ministry, many of the issues involved cross policy spheres (e.g. education, health). This communication is seen as an important part of human rights assessment.

The tool may be used at any time. It can be used on its own, as an entry point for identifying issues needing further attention, or it can supplement other processes. For example, if an assessment of drugs interventions in schools was being undertaken, the section on schools in this tool can be added to ensure that important child rights aspects are taken into account.

The tool need not be used in its entirety, at one time. Selected topics may be focused upon, using the human rights standards and the questions posed as an entry point for a deeper assessment.

In using the tool, States can:

- Achieve a better understanding of how human rights apply to specific areas of drug policy, communicated across relevant ministries
- Identify knowledge gaps, areas for more in-depth assessment
- Supplement or facilitate existing reporting requirements (e.g. periodic reporting to UN human rights treaty bodies)
- Collate key information that can be reported at international political meetings where human rights and drug policy are increasing on the agenda (e.g. Pompidou Group and other Council of Europe meetings; UN Commission on Narcotic Drugs; UN Human Rights Council)

# II. Methodology and explanatory notes

## Process

Making a landmark contribution to the international discussion about developing human rights indicators for drug policies that has gained prominence since 2016 UNGASS, the Pompidou Group set up an Expert Group in 2019 to elaborate a concept for a self-assessment tool for drug policies and programmes with respect to human rights standards under existing legal instruments. The aim is to present clear guidance to member States and relevant stakeholders about the implications of human rights dimensions in drug policy development and implementation, as well as awareness of the observation of related obligations under international legal instruments.

The work of the Venice Commission in developing assessment tools, specifically the 'Rule of Law check list' (2016) inspired the chosen approach. The Department of Execution of Judgements of the Council of Europe, the Secretariats of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Social Charter have provided invaluable contributions and advice in developing this tool. The follows previous Pompidou Group activities relating to human rights dimensions in drug policy, in particular the reports on '*Drug Policy and Human Rights in Europe*' (2018), and on '*Costs and unintended consequences of drug control policies*' (2017). Furthermore, it constitutes a follow-up to the recommendations from the PACE report '*Drug policy and human rights in Europe: a baseline study*' and '*Involuntary addiction to prescription medicines*' (2020).<sup>8</sup>

It further builds upon the *International Guidelines on Human Rights and Drug Policy*, adopted in 2019, and endorsed by the UN Office of the High Commissioner for Human Rights, WHO, UNAIDS and the UN Development Program.<sup>9</sup> The Guidelines were the result of a three-year, international, consultative process to bring together contemporary human rights law and drug policy. They therefore provided important normative basis for the tool, having already done the analysis of applicable standards.

While building on the above work, the tool does not duplicate them or existing monitoring or data collection processes.

## Non-discrimination: a primary entry point

In early meetings of the Expert Group it was decided that non-discrimination should serve as a universal entry point for the tool, reflecting a broad aim of ensuring that drug laws, policies and practices do not contribute to, and work to alleviate, inequalities in the enjoyment of human rights.

Non-discrimination is 'fundamental' to the Council of Europe's human rights system<sup>10</sup> and common to all human rights instruments.<sup>11</sup> It is a cornerstone of 'human rights-based approaches' to health, and a 'foundational principle' of the *International Guidelines on Human Rights and Drug Policy*.<sup>12</sup> Target 10.3 of the Sustainable Development Goals further calls upon States to 'Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard under the broad theme of 'leaving no one behind'.

Non-discrimination may be understood as including prohibitions on both *direct* and *indirect* discrimination.<sup>13</sup> Direct discrimination may be understood as differential treatment in analogous or similar situations on the basis of an identifiable characteristic or status. An example, presented below, would be the removal of child custody on the basis of status as a drug user, rather than on evidence of abuse or neglect. Indirect discrimination refers to the outcomes of specific laws, policies or interventions which, though formally neutral and without discriminatory intent, have discriminatory consequences for specific groups.

Like other human rights treaties, the European Convention on Human Rights (Article 14) includes a non-exhaustive list of grounds of discrimination, including sex, race or 'other status'.<sup>14</sup> Health status has been included as such a ground in human rights law (e.g. disability, HIV status).<sup>15</sup> For the purposes of this tool, health status includes drug dependency.

## Issue selection and exclusion

A challenge in applying human rights law to drug policies is that both are exceptionally broad. On the one hand there is the spectrum of rights from civil and political, to economic, social and cultural, to the rights of specific groups (e.g. women, children). On the other there is the complex interplay of laws, policies and practices from supply to demand reduction that make up 'drug policy'.

The Expert Group decided to focus on national drug laws and policies, excluding foreign affairs, mutual legal assistance, law enforcement co-operation and funding for anti-trafficking efforts. These are very important issues, however, that should be the subject of future work.<sup>16</sup>

Excluded also were human rights issues, that, while very important, are already known to not exist in the region or among Pompidou Group collaborating states. The most prominent of these is the death penalty for drug offences. It would not have been useful to place this issue in an inward-looking self-assessment tool when the answer is already well known. Diplomacy aimed at the abolition of the death penalty for drug offences remains vital.

Beyond exclusion, issue selection/inclusion remained a challenge. A fully comprehensive tool would not be possible and would be exceptionally lengthy. The Expert Group instead aimed to agree on a broad selection of topics relevant to the region that ask questions that might otherwise be overlooked in typical assessments of drug laws, policies and practices.

One method for this could be to only include drug-policy specific issues that have been the subject of decisions of the European Court of Human Rights, or recommendations of other international human rights mechanisms. However, the Court's case law on drug-related issues is relatively limited, and the issues that tend to come before human rights mechanisms can be selective.

A thematic approach was instead adopted, adopting the approach of the *International Guidelines on Human Rights and Drug Policy*. Three broad, interrelated themes were

agreed by the Expert Group as capable of reflecting the diversity of the issues:

1. *Social and welfare*, referring to general anti-discrimination protections, as well as social security, schools and parenting
2. *Health and treatment*, referring to risk and harm reduction and drug treatment
3. *Criminal justice*, referring to the practices and effects of enforcing criminal drug laws, including conditions of detention

Within these themes, specific issues were selected that had already been included in the previous work of Council of Europe bodies and the *International Guidelines on Human Rights and Drug Policy*. In this way the consultative processes, research and expert input into those earlier works could be built upon.

## Sources of human rights obligations used in the self-assessment tool

The issues selected must also be normatively grounded in human rights law. The tool includes a mix of positive and negative human rights obligations. Positive obligations generally refer to guaranteeing certain entitlements (which may include positive action to remedy factual inequalities), while negative obligations refer to avoiding certain actions.

The main sources used are human rights treaties and the work of human rights mechanisms, such as courts, independent committees, special rapporteurs and working groups. As the tool is developed primarily for Council of Europe Member States, key sources are the *European Convention on Human Rights*, the *European Social Charter*, and the various mechanisms charged with overseeing the implementation of these treaties.

However, some Pompidou Group Member States are outside of the Council of Europe, and an aim of the tool is that

it may have wider application outside of the region. Moreover, all Council of Europe member States are also parties to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of Discrimination*

*Against Women*, and the *Convention on the Rights of the Child*. The relevant provisions of these treaties and the recommendations of their respective monitoring mechanisms therefore also ground the tool.

As noted above the tool builds upon previous work. The *International Guidelines on Human Rights and Drug Policy* are the outcome of a lengthy consultative and expert review process applying human rights law to drug policy. For the purposes of this tool, the majority of the research required to relate specific issues to human rights law has been done through the Guidelines. The relevant sections of the Guidelines will be referenced to direct readers to the normative support for each section of the tool, supported by additional European cases and recommendations where relevant.

#### **Assessment questions: Structure, process, outcome**

In an earlier Pompidou Group Report *Drug Policies and Human Rights in Europe: Managing Tensions, Maximising Complementarities*, an approach to monitoring human rights was adopted based on the work of the UN Office of the High Commissioner for Human Rights and the UN Special Rapporteur on the Right to Health.<sup>17</sup> Broadly that approach sees human rights as applying at structural, process and outcome levels, and organises indicators accordingly. The aim with this approach is to capture the attention in human rights law not only to outcomes (e.g. in public health), but also to look at the means adopted to achieve those outcomes.

This tool, however, does not present a list of standardised indicators. There are three main reasons for this. First, and most importantly, the tool is non-comparative. It is not intended to create a database across Member States requiring standardised indicators. Second, the creation of

an extensive list of agreed indicators would be technically very difficult, and expensive. And third, the tool is exploratory, aiming to assess the current situation and invite discussion, debate and inquiry across responsible ministries. The tool therefore presents exploratory questions instead of indicators, building on the same structure, process and outcome categorisation.

- Structural questions relate to the legal and policy framework surrounding the issue at hand. If, for example, discrimination was enshrined explicitly in law by banning a specific group from certain forms of work, this would be a structural issue. Questions looking at structure therefore focus on the legal and policy frameworks surrounding a given issue.
- Process questions relate to state effort or, in other words, what is being done to achieve a given aim. Many of the core measures of success for drug policy (arrests, seizures, prosecutions etc.) are process indicators, and where a number of tensions with human rights can arise. The probing questions posed in the self-assessment tool aim to explore these tensions and how they can be resolved in favour of human rights protection.
- Outcome questions invite Member States to explore the human rights outcomes of laws, policies and interventions as a complement to typical drug policy metrics.

In some cases, it is not clear whether a certain question falls into one or other of these categories, and it may not always be necessary to highlight all three types for every specific issue. What is important is that this framework helps to highlight these three different elements, so that key aspects are not overlooked.

The approach further calls for supplementary information that captures key human rights standards:

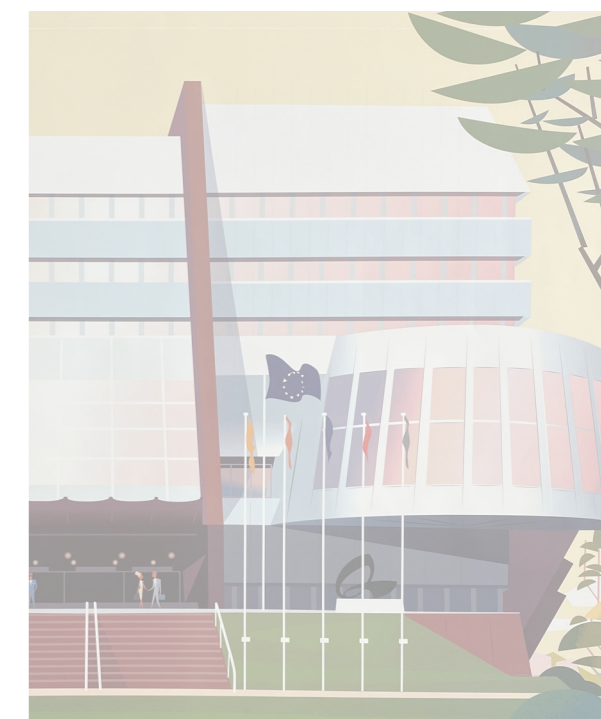
- Of special importance to non-discrimination is the identification of patterns of vulnerability or gaps in rights protections. This may be done via disaggregation of data, but States do not disaggregate in the same way. The tool therefore asks questions of the situation of specific groups, requiring further investigation.
- Qualitative information is also important from a human rights perspective, as some conditions or the content of laws or policies may not be easily represented quantitatively (i.e. as indicators). The tool therefore builds on this more qualitative aspect of assessment.

#### **Information availability, time and feasibility**

While the aim is to invite scrutiny of drug laws, policies and practices from a human rights perspective, it was agreed from the start that the tool attempt to avoid asking unanswerable or overly burdensome questions. To ask these would both be impractical and defeat the aim of the tool to promote positive change.

However, some questions are more difficult to answer than others, and this may vary from country to country. Moreover, there may be questions for which States currently do not have an answer. The absence of such answers is not to be taken as indicating fault or shortcoming. Unknowns themselves serve as markers of knowledge gaps and provide a starting point from which specific analyses or evaluations could be conducted, based on national level priorities.

As noted above, the entire tool need not be applied in one single process. Sections can be used to supplement other processes, or on their own as an entry point for a more detailed rights-based assessment.



# III. Conceptual framework

Theme	Issue and rationale	Assessment questions	Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
<p>The framework addresses three thematic areas with specific subthemes:</p> <p><b>Social and welfare</b></p> <ol style="list-style-type: none"> <li>1. Anti-discrimination protection</li> <li>2. Social welfare conditionality</li> <li>3. Data protection and privacy</li> <li>4. Child custody</li> <li>5. School-based prevention</li> </ol> <p><b>Health and treatment</b></p> <ol style="list-style-type: none"> <li>6. Access to drug treatment and risk and harm reduction services</li> <li>7. Compulsory drug treatment</li> <li>8. Detention due to addiction or intoxication</li> <li>9. Conditions of drug treatment</li> </ol> <p><b>Law enforcement and criminal justice</b></p> <ol style="list-style-type: none"> <li>10. Alternatives to criminal sanctions for drug use/possession for personal use</li> <li>11. Arrest, interrogation</li> <li>12. Crimes involving freedom of expression</li> <li>13. Imprisonment and pre-trial detention</li> <li>14. Conditions of detention (drug treatment and risk and harm reduction services)</li> </ol>	<p>The issue is described and a general rationale for its inclusion is provided.</p>	<p>Selected questions are set out that help to capture the crux of the human rights dimensions of the issue. These include structure, process and outcome questions to draw attention to the spectrum from law to practice.</p> <p>The first question is usually a yes or no question as an entry point. This is followed by proposals for further exploring and investigating information and existing data that will help to come to conclusions from the assessment.</p>	<p>Yes</p>	<p>Not known (N/K)</p>	<p>No</p>	<p>The specific European and international human rights <b>treaty provisions</b> related to the issue are listed.</p> <p>These provisions and sources provide specific information and guidance how to interpret your findings from your assessment questions further exploration and investigation.</p> <p>The <b>Sources</b> directs the reader to specific treaty text, court decisions or recommendations providing support for the relevant issue. As much of this information is already collated in the <i>International Guidelines on Human Rights and Drug Policy</i>, the relevant sections of their legal commentary are referenced. All sources are available at <a href="http://www.humanrights-drugpolicy.org">www.humanrights-drugpolicy.org</a></p>

ECHR – European Convention on Human Rights  
 ESC – European Social Charter  
 ICCPR – International Covenant on Civil and Political Rights  
 ECtHR – European Court of Human Rights

CRC – UN Convention on the Rights of the Child  
 ICESCR – International Covenant on Economic, Social and Cultural Rights  
*International Guidelines on Human Rights and Drug Policy*, with full commentary, available at [www.humanrights-drugpolicy.org](http://www.humanrights-drugpolicy.org)



# IV. Self-assessment tool

## Social and Welfare

1. Anti-discrimination protection		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>The entry point for this self-assessment tool is non-discrimination being a universal standard, central to human rights law. People who are drug dependent can face various forms of discrimination due to their health status in both the private and public spheres. Health status has been recognised as prohibited grounds for discrimination. But it is not always sufficiently clear if drug dependency is recognised in anti-discrimination legislation.</p> <p>The aim of this section is therefore to draw attention to this important legal protection that underpins the realisation of other rights.</p>	<p>Is drug dependence recognised as a health status for the purposes of anti-discrimination legislation?</p> <ul style="list-style-type: none"> <li>➤ If drug dependency is not covered by anti-discrimination legislation, clarify if the rationale or explanation given for not recognising drug dependency as grounds for discrimination is plausible and legitimate.</li> </ul> <p>Are procedures and mechanisms in place to ensure that people who are drug dependent have access to health and social services without discrimination?</p> <ul style="list-style-type: none"> <li>➤ Assess the level of protection against non-discrimination, and if/how this has been applied to relevant social and health services</li> </ul> <p>Are efforts undertaken to reduce the stigma associated with drug use or dependency?</p> <ul style="list-style-type: none"> <li>➤ Analyse how comprehensive/fragmented and effective</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>N/K</p> <p>N/K</p> <p>N/K</p>	<p>No</p> <p>No</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR, Art 14, Art 1 Protocol 12, non-discrimination</p> <p>ESC, Art E, non-discrimination</p> <p>ICCPR, Art 2(1), non-discrimination</p> <p>ICESCR, Art 2(3), non-discrimination</p> <p>CRC, Art 2, non-discrimination</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy:</i></p> <p>I.3 (non-discrimination as a foundational principle)</p> <p>II.1.ii (action on the social determinants of health, including stigma and discrimination)</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p>

2. Social welfare conditionality		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Social security is an important aspect of holistic responses to drug dependence and drug-related harm. Social security is, in turn, a human right, requiring non-discriminatory provision for all.</p> <p>However, evidence of abstinence from drugs can sometimes be required to qualify for social security or specific benefits. While this is intended to incentivise behaviour change, it has implications both for the rights of the claimant and any dependent children.</p> <p>This section is intended to capture both the positive obligation to realise the right, as well as the human rights implications of restrictions on social welfare payments.</p>	<p>Are any social welfare payments/benefits and social services conditional upon abstinence from drugs or participation in drug treatment?</p> <ul style="list-style-type: none"> <li>➤ If yes, check if the conditions for denial of benefits and social services are in compliance with internationally adopted standards for social rights.</li> </ul> <p>Can existing benefits be removed due to ongoing drug use or not taking part in drug treatment?</p> <ul style="list-style-type: none"> <li>➤ If yes, check if reasons for removal of benefits and eligibility for social services are in compliance with internationally adopted standards on social rights.</li> </ul> <p>Is the right to social security of the client and any dependent children considered in these decisions (i.e. required in instructions or regulations)?</p> <ul style="list-style-type: none"> <li>➤ If yes, verify if the legal requirements are in coherence with the adopted standards on social rights.</li> </ul> <p>Are records kept of how many people are have been denied social welfare benefits or and social services removed due to drug use?</p> <ul style="list-style-type: none"> <li>➤ If so, analyse how many people have been denied social welfare or had benefits removed due to drug use in the past year. Consider how this may have affected other social rights (Housing, employment, parental authority, etc.)</li> </ul> <p><b>!</b> <i>Note: This question may be difficult to answer with available data – the aim is to understand the numbers of people affected and the consequences a denial/removal of benefits may entail.</i></p>	<p>No</p> <p>No</p> <p>Yes</p>	<p>N/K</p> <p>N/K</p> <p>N/K</p> <p>Yes</p>	<p>Yes</p> <p>Yes</p> <p>Not recognised or ad hoc application</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 8, right to family life</p> <p>ESC Arts 13 and 14, right to social assistance and right to social welfare services</p> <p>CRC Art 26, right of the child to social security</p> <p>Non-discrimination provisions from 1 above.</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy:</i></p> <p>II.4.i &amp; ii (drug use and the right to social security)</p>

3. Data protection and privacy		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Accurate data are a vital and challenging part of policy responses to drug related harms, and the collection of appropriate data is itself a part of the right to health and human rights accountability.</p> <p>There are well known risks with the collection of personal health information. In some countries it is permitted to share health data relating to drug use/dependency with law enforcement, unlike other medical conditions. In other countries registries are in place to record people who are or have been drug dependent, which can have consequences for jobs, travel and parental care.</p> <p>This section aims to draw attention to the right to privacy issues raised by certain forms of data collection, retention and sharing.</p>	<p>Does legislation explicitly address the storage and sharing of health information?</p> <p>Does this explicitly include data relating to drug use or dependence?</p> <ul style="list-style-type: none"> <li>➤ Clarify the circumstances and conditions under which health data of people who use drugs can be shared for the purposes of law enforcement, and verify if these comply with the right to privacy</li> </ul> <p>Is a registry kept recording people who are drug dependent or have been through drug treatment?</p> <p>If yes, can placement on the registry be used to preclude access to employment, to challenge child custody?</p> <p>Is there a process to seek the removal of one's name from the registry?</p> <ul style="list-style-type: none"> <li>➤ Assess the process with regard to accessibility, how long it takes to receive a decision, and likelihood of success.</li> </ul>	<p>Yes</p> <p>No</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>No</p> <p>Yes</p> <p>N/K</p> <p>Yes</p>	<p>No</p> <p>Yes</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 8, right to privacy</p> <p>ICCPR Art 17, right to privacy</p> <p>CRC Art 16, right to privacy</p> <p>ESC Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.9 (right to privacy)</p> <p>IV.1 (data collection)</p> <p>V.2 (standards for limitations on rights)</p>

4. Child custody		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Parental drug dependence is an important child protection issue, engaging the child's right to protection from neglect or abuse.</p> <p>Intervening in the family environment, however, raises human rights and child rights issues. For example, in some countries, parental rights may be removed due to drug use/dependency as the sole criterion, without the need for evidence of abuse or neglect. This can be linked to the person being on a drug user registry (see above). As women are more often the primary caregivers, such measures can disproportionately affect mothers. Drug use can be associated with being a 'bad parent'.</p> <p>At all times, the best interests of the child should guide decision making, which should include their ability to express their view in line with the right to be heard.</p> <p>This section aims to highlight the human and child rights issues raised when drug use is the justification for removal of custody.</p>	<p>Can drug use or dependence be the sole grounds for removal from custody (i.e. <u>without</u> evidence of abuse or neglect)?</p> <ul style="list-style-type: none"> <li>➤ Check if the best interests of the child are appropriately taken into account in line with international commitments in custody decisions relating to parental drug use/dependency.</li> <li>➤ Check if there is a practice by authorities and courts to remove children from parental custody when drug use or dependency was the sole criterion (i.e. <u>without</u> evidence of abuse or neglect).</li> </ul> <p>Is the child afforded the opportunity to express their views and preference in custody proceedings relating to parental drug dependence, with due regard to their age and maturity?</p> <ul style="list-style-type: none"> <li>➤ Find out if the process satisfies the requirements under the right of the child to have his/her views taken into account.</li> </ul>	<p>No, evidence of abuse or neglect is required</p> <p>Yes</p>	<p>N/K</p> <p>N/K</p>	<p>Yes</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 8, right to family life</p> <p>CRC Art 3, best interests of the child</p> <p>CRC Art 12, the right to be heard</p> <p>CRC Art 9(1) &amp; (2), separation from parents</p> <p>CRC Art 19, protection from neglect</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>III.1.3.ii (custody and parental drug use or dependence)</p> <p>III.2.1.iii (custody and women's drug use or dependence)</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p>

5. School-based prevention		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Schools have a legitimate aim to prevent drug use, and extensive efforts are employed to educate, inform and build resilience. However, some methods raise important human rights concerns, including strip searches, drug testing and the use of sniffer dogs.</p> <p>In addition to the right to privacy and consent issues raised, there may be disproportionate effects of such interventions upon at risk young people, and those from disadvantaged backgrounds. Depending on the country or school authority, positive drugs tests or detection of drugs through other means can result in exclusion from school.</p> <p>Some of these measures, such as strip searches, are recognised as rights violations. Others are more complicated, including drug testing, or when searches are undertaken to address drug sales on school premises.</p> <p>The aim of this section therefore is to draw attention to the human rights/child rights aspects of drug prevention efforts</p>	<p>Are the following interventions employed as part of school-based drug prevention efforts?</p> <ul style="list-style-type: none"> <li>– Strip searches</li> <li>– Drug testing (urine, hair, saliva)</li> <li>– Sniffer dogs</li> <li>– Searches of bags, clothing, lockers etc.</li> </ul> <p>If yes, do national guidelines require attention to the child's rights to privacy and to education in school prevention policies?</p> <p>Are there any disciplinary consequences for refusal to undergo a drug test?</p> <ul style="list-style-type: none"> <li>➤ Check if these consequences are compliant with children's rights, including the right to education</li> </ul> <p>Are there any disciplinary consequences for a positive drug test (e.g. exclusion from school, referral to police)?</p> <ul style="list-style-type: none"> <li>➤ Check if these consequences are compliant with children's rights, including the right to education</li> <li>➤ Try to find out how many children were excluded from school due to drug use in the past year</li> </ul> <p><b>!</b> <i>Note: These questions may be difficult to answer with available data – the aim is to understand the numbers of children affected as an indicator of scale.</i></p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes</p> <p>No</p> <p>No</p>	<p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>Yes or N/K</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p> <p>Yes</p> <p>No</p> <p>No or no guidelines in place</p> <p>Yes</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 8, right to privacy</p> <p>ICCPR Art 17, right to privacy</p> <p>CRC Art 16, right to privacy</p> <p>ECHR Art 2 Protocol 1, right to education</p> <p>CRC Art 28, right to education</p> <p>CRC Art 33, protection from drugs</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>III.1.1 (Prevention and the rights of the child)</p> <p>V.2 (standards for limitations on rights)</p>

## Health and treatment

6. Access to drug treatment and risk and harm reduction		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Access to drug dependence treatment and harm reduction services are well recognised as priorities in drug policy. A great deal of data is already collected on coverage, however, including through European and UN processes.</p> <p>Avoiding duplication with these existing processes, this section focuses on specific issues raised by human rights considerations, in particular the right to health and budgeting to secure economic and social rights. It aims to raise specific questions rooted in human rights norms that might otherwise be overlooked in wider data collection.</p> <p>Conditions of drug treatment are addressed below.</p>	<p>Has the annual budget for the following increased or decreased in the past 3-5 years?</p> <ul style="list-style-type: none"> <li>- Drug dependency treatment</li> <li>- Opioid agonist and antagonist treatments</li> <li>- Needle and syringe programmes</li> <li>- Overdose prevention and response</li> </ul> <p>Are drug treatment and risk and harm reduction services provided free of charge for the client or covered by health insurance?</p> <p>➤ Check if this inhibits or prohibits people from accessing and benefiting from these services</p> <p>Are drug treatment and risk and harm reduction services equally accessible in all parts of the country (geographic accessibility)?</p> <p>➤ Find out the reasons why these services are not available and how the right to health is affected</p> <p>Are there dedicated treatment and risk and harm reduction services for women and young people?</p>	<p>Increased</p> <p>Increased</p> <p>Increased</p> <p>Increased</p> <p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p> <p>N/K</p>	<p>Decreased</p> <p>Decreased</p> <p>Decreased</p> <p>Decreased</p> <p>No</p> <p>No</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ESC Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p>ICESCR, Art 4, obligation to use the 'maximum of available resources' for the progressive realisation of rights</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.1.1 (harm reduction, the right to health)</p> <p>II.1.2 (drug treatment, the right to health)</p>

7. Compulsory drug treatment		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>In many countries compulsory (or involuntary) treatment measures are in place for people who are drug dependent. This is often justified as being required for the protection of the person or others. However, such measures serve to deny people who use drugs the right to refuse treatment that is typically granted to other health conditions, in all but exceptional circumstances. The right to health, in turn, retains health autonomy and informed consent. Compulsory treatment therefore requires very close human rights attention.</p> <p>This section aims to highlight safeguards and standards relating to compulsory drug treatment</p> <p>Conditions of drug treatment are addressed below.</p>	<p>Is compulsory drug treatment permissible in law?</p> <ul style="list-style-type: none"> <li>➤ Under what conditions is compulsory drug treatment possible in law?</li> <li>➤ Verify if sufficient safeguards are in place. These include e.g. review of the decision, second opinions, guarantee of no less restrictive means being available.</li> </ul> <p>If drug treatment is court ordered instead of criminal conviction, is there a punishment for relapse?</p> <ul style="list-style-type: none"> <li>➤ Check if the number of people in compulsory drug treatment increased or decreased in recent years</li> <li>➤ Check if patterns are identifiable relating to race, sex, ethnicity, socio-economic status in those subject to compulsory treatment</li> </ul> <p><b>!</b> <i>Note: These questions may be difficult to answer with available data – the aim is to understand if there are disparities the numbers of people affected)</i></p>	<p>No</p> <p>No</p> <p>Decreased</p> <p>No</p>	<p>Yes</p> <p>N/K</p> <p>N/K</p> <p>N/K</p>	<p>Yes</p> <p>Increased</p> <p>Yes</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ESC Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p>ECHR, Art 5(1)(e), limitation on liberty and security of the person</p> <p>ICCPR, Art 9, liberty and security of the person</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>I.1.2.ii (voluntariness, informed consent)</p> <p>II.1.2.vi (protection against arbitrary detention)</p> <p>II.7.i (no detention solely for the purposes of drug treatment)</p> <p>V.2 (standards for limitations on rights)</p>

8. Detention due to addiction or intoxication		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Article 5(1)(e) of the ECHR allows for detention of 'drug addicts' as a limitation on liberty and security of the person. The ICCPR does not contain an equivalent provision.</p> <p>This form of detention need not include drug treatment but can relate to time in a cell to sober up. Deprivation of liberty is a very serious limitation on human rights. Safeguards are required, including that the person was a danger to themselves or others, and that no less restrictive means were available. Adequate monitoring of a detainee's health is required.</p> <p>This section focused on detention on grounds of addiction or intoxication, as a distinct issue from involuntary drug treatment..</p>	<p><b>Assessment Questions</b></p> <p>Is drug dependency or intoxication seen as permissible grounds for detention in law?</p> <p>If yes</p> <ul style="list-style-type: none"> <li>➤ Consider the specific conditions under which someone may be detained for drug dependency or intoxication and check the against the relevant case law of the ECtHR.</li> <li>➤ Find out if there are adequate measures in place that make detention the option of last resort. Consider if they are subject to appropriate re-view.</li> <li>➤ Check that people in detention receive adequate treatment in terms of quality and equivalence to the community and that their health status is regularly assessed.</li> </ul>	No	Yes		<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR, Art 3, prohibition of cruel inhuman or degrading treatment</p> <p>ICCPR, Art 7, prohibition of cruel inhuman or degrading treatment</p> <p>ECHR, Art 5(1)(e), limitation on liberty and security of the person</p> <p>ICCPR, Art 9, liberty and security of the person</p> <p>ESC Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p><b>Guidance documents</b> ► <a href="#">click here</a> _</p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.1.2.vi (Protection against arbitrary detention of people who use drugs)</p> <p>III.3 (Persons deprived of their liberty)</p> <p>V.2 (standards for limitations on rights)</p>



9. Conditions of drug treatment		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Strengthened drug treatment is a Sustainable Development Goal (3.5), and access to drug treatment is a component of the right to health, and a requirement of the UN drugs conventions.</p> <p>However, while drug treatment might be in place, conditions and practices may not live up to human rights standards. In some cases, treatment is not evidence based and fails to live up the acceptability and quality criteria of the right to health. In others, questions of human dignity are raised by requirement to urinate in front of staff, or invasive searches. In the most serious cases, drug treatment has amounted to arbitrary detention, or cruel, inhuman or degrading treatment. This has occurred both in publicly and privately run institutions.</p> <p>The aim of this section is to focus on specific human rights issues relating to conditions of drug treatment, rather than access to treatment.</p>	<p>Is an official monitoring system in place for public and private drug treatment facilities?</p> <ul style="list-style-type: none"> <li>➤ Check if these include human rights related criteria.</li> </ul> <p>Are clients at drug treatment facilities required to take urine tests or undergo bodily searches to continue receiving treatment?</p> <p>Can people who use drugs be involuntarily discharged from drug treatment?</p> <ul style="list-style-type: none"> <li>➤ Verify if the criteria and means (e.g. failed urine test, behavioural issues) comply with the right to health, the right physical integrity, etc., as well as the possibility to re-instate treatment.</li> </ul>	<p>No</p> <p>No</p> <p>No</p>	<p>Yes</p> <p>N/K</p> <p>Yes</p>	<p>No</p> <p>Yes</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR, Art 3, prohibition of cruel inhuman or degrading treatment</p> <p>ICCPR, Art 7, prohibition of cruel inhuman or degrading treatment</p> <p>ESC, Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p>CRC Art 24, right to health</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>I.1 (dignity as a foundational principle)</p> <p>II.1.2 (drug treatment and the right to health)</p> <p><b>Relevant case law</b> ► <a href="#">click here</a></p>

## Law enforcement and criminal justice

10. Alternatives to criminal sanctions for drug use/possession for personal use		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>It is difficult to discuss human rights and drug policy without addressing criminalisation. Laws criminalising use or possession for personal use are a long-standing part of State responses to drugs. While such laws are intended to improve population health, they are seen by many as a driver of health and human rights problems, including increased stigma and marginalisation. For example, criminal records can have long term effects on welfare and opportunities. Laws may also criminalise the carrying of equipment necessary for risk and harm reduction services, such as sterile needles.</p> <p>An increasing number of countries have applied alternatives to criminalisation and/or punishment to address these health and human rights concerns, and which can be recorded as examples of positive human rights practice. These alternatives are permissible under the UN drugs conventions.</p> <p>This section aims to highlight alternatives to criminalisation or punishment, while promoting reflection on the proportionality of laws criminalising drug use or possession for personal use.</p>	<p>Are alternatives to criminalisation for drug use/possession for personal use available?</p> <ul style="list-style-type: none"> <li>➤ In the absence of alternatives in law (de jure), check if there are efforts and practices (de facto) in place to reduce entry into the criminal justice system.</li> </ul> <p>Are laws in place that criminalise the carrying of paraphernalia for drug use?</p> <ul style="list-style-type: none"> <li>➤ Check if essential health commodities such as sterile needles are exempted.</li> </ul> <p>Have laws criminalising personal use, or possession for personal use been evaluated, taking into account standards for limitations on rights?</p> <ul style="list-style-type: none"> <li>➤ If yes, check if the outcome led to change of regulations and/or practices Check if patterns are identifiable relating to race, sex, ethnicity, socio-economic status in criminal records issued for possession for personal use</li> </ul> <p><b>!</b> <i>Note: This question may be difficult to answer with available data – the aim is to understand if there are disparities the numbers of people affected.</i></p>	<p>Yes</p> <p>No</p>	<p>No or N/K</p> <p>Yes or N/K</p> <p>Yes</p>	<p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 8, right to privacy</p> <p>ICCPR Art 17, right to privacy</p> <p>CRC Art 16, right to privacy</p> <p>ECHR Art 9, freedom of thought, conscience and religion</p> <p>ICCPR Art 18, freedom of thought, conscience and religion</p> <p>ESC Arts 11 and 13, right to health and medical services</p> <p>ICESCR, Art 12, right to health</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.1. v, II.9. v, II.10. i, III.2.1.viii (permissibility of criminal law reforms under the UN drugs conventions V.2 (standards for limitations on rights))</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p> <p>-</p>

11. Arrest, interrogation		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Police are at the front lines of responses to drugs, frequently in contact with people who use drugs, and often first responders to health crises. There are examples in various countries of innovative policing practices, aiming to connect people who use drugs with risk and harm reduction and treatment services.</p> <p>However, there are also frequent reports of ill-treatment of drug users and others during arrest and interrogation, from the use of emetics to force vomiting, to beatings to extract information. Moreover, people may hesitate to call emergency services to overdose incidents for fear of arrest.</p> <p>Stop and search is a routine practice in many countries, whereby police may initiate a search on their discretion, or based on pre-defined trigger behaviours or situations. In some countries this has been shown to be biased against racial and ethnic minorities, and people from disadvantaged areas.</p> <p>This section aims to draw attention to these important issues, as well as possibilities for alternative approaches.</p>	<p>Can police attend overdose incidents without the need to arrest the patient, those calling emergency services or others on site due to the presence of drugs or paraphernalia?</p> <p>Is a complaints procedure in place for police abuse in the context of drug enforcement?</p> <ul style="list-style-type: none"> <li>➤ Check the extent of violations by finding out how many investigations of police abuse in the context of drug enforcement have been undertaken and what the outcomes were.</li> <li>➤ Check if patterns relating to race, sex, ethnicity, socio-economic status identifiable in search and arrest statistics</li> </ul> <p><b>!</b> <i>Note: This question may be difficult to answer with available data – the aim is to understand if there are disparities the numbers of people affected.</i></p>	<p>Yes</p> <p>Yes</p>	<p>N/K or unclear</p> <p>N/K</p>	<p>No</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 3 prohibition of cruel inhuman or degrading treatment</p> <p>ICCPR, Art 7, prohibition of cruel inhuman or degrading treatment</p> <p>CRC Art 37(a), prohibition of cruel inhuman or degrading treatment</p> <p>ECHR Art 8, right to privacy</p> <p>ICCPR Art 17, right to privacy</p> <p>CRC Art 16, right to privacy</p> <p>ECHR Art 5, liberty and security of the person</p> <p>ICCPR, Art 9, liberty and security of the person</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>I.1.1.vi (protection of victims of, or witnesses to overdose from arrest or punishment when they have sought medical assistance)</p> <p>II.6.i &amp; ii (prevention and investigation of cruel, inhuman or degrading treatment)</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p>

12. Crimes involving freedom of expression		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Incitement to use drugs, sometimes referred to as drugs propaganda, is criminalised in various countries. This is usually with the intention of protecting children and young people. Subject to constitutional limitations, criminalising this form of speech is a requirement of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art Article 3(1)(c)(iii). These laws and actions can raise issues of freedom of expression, and the right to receive and impart information. The reference to constitutional limitations in the drug trafficking convention recognises this challenge, as the provision was drafted in an intentionally broad manner to capture incitement to use drug 'by any means', thereby capturing film, books, websites etc.</p> <p>There are challenges where there is a lack of clarity about what forms of speech are protected, and what counts as incitement or encouragement. For example, advice around safer drug use intended for improved health can be seen as incitement. The intent behind expression is therefore important.</p> <p>This section is aimed at investigating the extent to which freedom of expression is taken into account in how incitement laws and drafted and enforced.</p> <p>It does not address sales or promotion of illicit substances (for example, online), recognising that this is not a form of protected expression.</p>	<p>Is incitement to use drugs a crime under law?</p> <p>If so, is the provision of health and risk and harm reduction services in person, in print or online explicitly exempted (e.g. safer injecting practices)?</p> <ul style="list-style-type: none"> <li>➤ Check if there were cases of website closures, banning of information material or books on grounds of incitement to use drugs. Verify if the circumstances show that the right of freedom of expression was adequately taken into account?</li> <li>➤ Analyse the standards for <i>mens rea</i> (mental capacities) and <i>actus reus</i> (purposeful intent) for the crime of incitement to use drugs in view of the relevant decisions of the ECtHR.</li> </ul>	<p>No</p> <p>Yes</p>	<p>Yes or N/K</p> <p>N/K</p>	<p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 10, freedom of expression</p> <p>ICCPR Art 19, freedom of expression</p> <p>ESC Arts 13 and 14, right to social assistance and right to social welfare services</p> <p>ICESCR Art 12, right to health</p> <p>CRC Art 17, children's access to information and protection from misinformation</p> <p>CRC Art 33, protection from illicit drugs</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.1.1.v (exemptions for harm reduction services in incitement laws)</p> <p>II.12 (freedom of expression)</p> <p>V.2 (standards for limitations on rights)</p>

13. Imprisonment and pre-trial detention		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>Across the European region drug offences make up a large proportion of the prison population. The majority of convictions are for non-violent offences. It is important to be able to understand if there are discriminatory effects from incarceration for drug offences, and if certain groups are over-represented.</p> <p>Alternatives to imprisonment are in place in an increasing number of countries and encouraged by the UN drugs conventions. This is distinct from alternatives to criminalisation discussed at 10 above and focuses instead on alternatives to imprisonment as a form of punishment.</p> <p>Pre-trial detention is commonly used for drug offences, raising distinct human rights issues, especially if it is prolonged. Judges in some situations must impose pre-trial detention, including for use or possession of small amounts of drugs, even where such deprivation of liberty is strictly limited for other crimes.</p> <p>This section therefore focuses on alternatives to imprisonment, the potential for discriminatory effects of imprisonment, and the duration and process of pre-trial detention.</p>	<p>Are alternatives to imprisonment available for drug offences of a minor nature?</p> <ul style="list-style-type: none"> <li>➤ Analyse if this leads or has led to a notable reduction of incarceration (factors to be considered: definition of a 'minor offence', acceptable mitigating factors, sentencing guidelines, etc.)</li> </ul> <p>Do judges/magistrates have a discretion as to whether to impose pre-trial detention for drug offences?</p> <ul style="list-style-type: none"> <li>➤ Check if any existing guidelines provide adequate guidance for exercising due discretion.</li> <li>➤ Check the statistics on how many people are in pretrial detention for drug offences.</li> <li>➤ Check if there are patterns identifiable in these data relating to race, sex, ethnicity, socio-economic status</li> </ul> <p>! <i>Note: These questions may be difficult to answer with available data – the aim is to understand if there are disparities in the numbers of people affected.</i></p>	Yes	N/K	No	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 5, liberty and security of the person</p> <p>ICCPR Art 9, liberty and security of the person</p> <p>ECHR Art 6, right speedy and fair trial</p> <p>ICCPR Art 14, right to speedy and fair trial</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.7.ii (limiting pre-trial detention)</p> <p>II.7.iii, iv, v (prioritising non-custodial measures for minor cases)</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p>

14. Conditions of detention (drug treatment, risk and harm reduction)		Low risk of human rights concerns	Need for further investigation	Potential need for remedial action	Human rights treaty provisions and sources for guidance and enhancing policies
Issue and rationale	Assessment questions				
<p>A large proportion of people in prison use drugs. Many continue to use drugs while in prison. In many countries, however, drug treatment and risk and harm reduction services that are available in the community are not available in prison settings, contrary to the principle of equivalence in human rights law. In some cases, treatments are discontinued upon entry into prison.</p> <p>Prison conditions are monitored by human rights entities such as the European Committee for the Prevention of Torture. This section focuses specifically on drug treatment and risk and harm reduction.</p>	<p>Are the following services available in prisons and pre-trial detention to an equivalent standard as in the community?</p> <ul style="list-style-type: none"> <li>➤ Drug dependence treatment, including opioid agonist and antagonist</li> <li>➤ Needle and syringe exchange</li> <li>➤ Overdose prevention (including through-care)</li> <li>➤ Check if the official reasons for not providing these services to an equivalent standard as available in the community stand in compliance with the right to equivalence of care.</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>N/K</p> <p>N/K</p> <p>N/K</p>	<p>No</p> <p>No</p> <p>No</p>	<p><b>Treaty provisions</b> ► <a href="#">click here</a></p> <p>ECHR Art 3 prohibition of cruel inhuman or degrading treatment (principle of equivalence)</p> <p>ICCPR, Art 7, prohibition of cruel inhuman or degrading treatment</p> <p>ICCPR Art 10, inherent dignity of persons deprivation of liberty</p> <p>ESC, Arts 11 and 13, right to health and medical assistance</p> <p>ICESCR, Art 12, right to health</p> <p><b>Guidance documents</b> ► <a href="#">click here</a></p> <p><i>International Guidelines on Human Rights and Drug Policy</i></p> <p>II.6.vi (principle of equivalence in relation to prevention of cruel inhuman and degrading treatment)</p> <p>III.3 (people deprived of their liberty)</p> <p><b>Relevant ECtHR case law</b> ► <a href="#">click here</a></p>

# Appendix - Human rights treaty provisions and sources for guidance and enhancing policies

## Social and Welfare

### 1. Anti-discrimination protection

#### Treaty Provisions

##### European Convention on Human Rights

###### ARTICLE 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

###### PROTOCOL 12, ARTICLE 1

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

##### European Social Charter

###### ARTICLE E

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

##### International Covenant on Civil and Political Rights

###### ARTICLE 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

##### International Covenant on Economic, Social and Cultural Rights

###### ARTICLE 2

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals.

##### UN Convention on the Rights of the Child

###### ARTICLE 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

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#### Relevant Case Law of the ECtHR

##### ARTICLE 14 ECHR – Prohibition of discrimination

###### *Shelley v. UK, 23800/06*

The applicant complained under Article 14 that he was discriminated against since those in prison were treated less favourably than those in the community. This difference in treatment between persons outside and inside detention was found to not breach Article 14 as **the Court found that not providing needle exchange services in prison was proportionate and supported by objective and reasonable justification**. This indicates that the Court grants a wide margin of appreciation to States surrounding decisions around treatment in prison compared to outside prison.

The European Prison Rules, the Committee for the prevention of Torture and domestic prison regulations themselves provide that the health care in prisons should be the same as that in the community. According to the Court's case law, prisoners can claim to be on the same footing as the community as regards the provision of health care (*Mathew v the Netherlands*, no. 24919/03, paras. 186, 193). While the Court concedes that **medical assistance in prison may not be at the same level as in the best medical institutions for the general public, States have to ensure that the health and well-being of detainees were adequately secured by providing them with the requisite medical assistance** (*Khudobin v. Russia*).

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#### International Guidelines on Human Rights and Drug Policy

##### I.3: Equality and non-discrimination

All persons have the right to equality and freedom from discrimination. This means that all are equal before the law and are entitled to equal protection and benefit of the law, including the enjoyment of all human rights without discrimination on a range of grounds (such as health status, which includes drug dependence).

In accordance with this right, States shall:

- 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.
- ii. Provide equal and effective protection against such discrimination, ensuring that particularly marginalised or vulnerable groups can effectively exercise and realise their human rights.

To facilitate the above, States should:

- iii. Monitor the impact of drug laws, policies, and practices on various communities – including on the basis of race, ethnicity, sexual orientation, gender identity, economic status, and involvement in sex work – and collect disaggregated data for this purpose.

##### II.1: Right to the highest attainable standard of health

Everyone has the right to enjoy the highest attainable standard of physical and mental health. This right applies equally in the context of drug laws, policies, and practices.

In accordance with this right, States should:

- i. Address the social and economic determinants that support or hinder positive health outcomes related to drug use, including stigma and discrimination of various kinds, such as against people who use drugs.

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## 2. Social welfare conditionality

#### Treaty Provisions

##### European Convention on Human Rights

###### ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

##### European Social Charter

###### ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

## ARTICLE 14

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:

1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

## UN Convention on the Rights of the Child

### ARTICLE 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

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## International Guidelines on Human Rights and Drug Policy

### II.4: Right to social security

Everyone has the right to social security, including social insurance. This right applies equally to all without discrimination, including people who use drugs, people dependent on illicit drug economies, people in prisons and other places of detention or closed settings, and people who have been arrested for, charged with, or convicted of drug-related offences.

In accordance with this right, States should:

- i. Take steps, to the maximum of available resources, to establish and progressively expand comprehensive social security systems that equally guarantee legal entitlements – including universal access to health care, housing, education, and basic income security – to the aforementioned individuals and groups, while also ensuring that particularly marginalised or vulnerable groups can effectively exercise and realise these human rights on an equal basis with others.
- ii. Prevent and remedy the denial of social assistance to persons on the basis of drug dependence, which is impermissible discrimination

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## 3. Data protection and privacy

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### International Covenant on Civil and Political Rights

##### ARTICLE 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### UN Convention on the Rights of the Child

##### ARTICLE 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

#### European Social Charter

##### ARTICLE 11

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

## ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

#### International Covenant on Economic, Social and Cultural Rights

##### ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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## International Guidelines on Human Rights and Drug Policy

### II.9: Right to privacy

Everyone has the right to privacy, including people who use drugs. In accordance with this right, States should:

- i. Adopt legislative, administrative, and other measures to prevent arbitrary and unlawful interference with the privacy, family life, home, and correspondence of people who use drugs.
- ii. Ensure the protection of the right to privacy in relation to criminal investigations for drug-related offences.
- iii. Adopt legislative and other measures to prevent the disclosure of individuals' personal health data, including drug test results and drug dependence treatment histories, without their free and informed consent.
- iv. Ensure that welfare conditionalities and administrative requirements to access rights and benefits do not unlawfully, unnecessarily, or disproportionately infringe the privacy of those who use drugs.

In addition, States may:

- v. Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.

### IV.1: Data collection

States should:

- 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).
- ii. Ensure that data collection for the purpose of drug law and policy formulation, implementation, or other analysis complies with relevant international standards for data protection.

### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
- ii. Public health, safety, and order may be invoked as grounds for limiting certain rights, such as the freedom to manifest one's religion or beliefs, the freedom of expression, the right to peaceful assembly, or the freedom of association, in order to deal with a serious threat to the health or safety of the population or its individual members.
- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles



relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. [These principles include the following:](#)

- a. Certain human rights protections cannot be limited at any time, for any reason. These include the right to life; the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; the right not to be convicted of a criminal offence for acts that were not criminalised at the time they were carried out; and the right to freedom of thought, conscience, and religion.
- b. Any limitation must be provided for by a national law of general application. Any such law must be clear and accessible to everyone. A limitation cannot be provided for retroactively.
- c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
- d. No limitation shall be applied in an arbitrary or unreasonable manner.
- e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
- f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.
- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights.

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## 4. Child custody

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder

or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### UN Convention on the Rights of the Child

##### ARTICLE 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

##### ARTICLE 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

##### ARTICLE 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

##### ARTICLE 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

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### Relevant Case Law of the ECtHR

#### Article 8 ECHR – Right to family life

##### *Amrollahi v. Denmark, 56811/00*

The applicant, an Iranian national with residency in Denmark, was found guilty for drug trafficking and sentenced to three years imprisonment and expelled from Denmark. The applicant complained that if deported he would lose contact with his wife, children and stepdaughter as they cannot be expected to follow him to Iran.

**The removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life** as guaranteed in Article 8.1 (*Moustaquim v. Belgium*, para. 16). Due to the applicant's ties with Denmark, being married to a Danish woman with a Danish child together who have no ties to Iran, the Court is of the opinion that it is impossible for the applicant and his family to relocate to Iran. Therefore, the expulsion was disproportionate to the aims pursued.

##### *Dalia v. France, 26102/95*

The applicant was arrested for the heroin trafficking. The applicant is an Algerian national who moved to France at 18 where she lived for 19-years. After her exclusion order she gave birth. The Court ruled that the exclusion order violated Article 8 paragraph 1. The Court states that the interference is not so drastic as that which may result from the expulsion of applicants who were born in the host country of went there as a young child (*C. v. Belgium*, para. 34). **Decisions to expel someone from a country must be necessary in a democratic society that is justified by a pressing social need and by proportionate to the legitimate aim pursued** (*Mehemi v. France*, para. 34).

##### *Eriksson v. Sweden, no. 11373/85*

Measures interfering in the right to respect for their family life must:

1. Be in accordance with the law
2. Have a legitimate aim
3. Be necessary in a democratic society

'In accordance with the law' meaning:

- a) Laws must be formulated with sufficient precision to enable the citizen to **foresee**, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law is ever evolving, however, and so vague terms may be necessary (*Sunday Times v. UK*, para. 49).
- b) 'In accordance with the law' must relate to the domestic law but also relate to the **quality** of the law, requiring it to be compatible with the rule of law and be **accessible**. There must be a measure of protection in domestic law against arbitrary interferences by public authorities which is enshrined in Article 8.1
- c) Laws which confer discretion are not in themselves inconsistent with the condition of foreseeability, provided that the **scope of discretion** is indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual protection against arbitrary interference.

The Court noted that the mother's right to Article 8 includes a right to the taking of measures with a view to her being reunited with her child, which she was prevented from doing despite the applicant's suitability to take care of children and the conditions of her home. The applicant was denied the opportunity to meet with her daughter to an extent and in circumstances likely to promote the aim of reuniting them. The Court concludes that **the severe and lasting restrictions on access combined with the long duration of the prohibition on removal are not proportionate to the legitimate aims pursued**. Accordingly, there has been a violation of Article 8.

##### *Mehemi v. France, 25017/94*

The applicant was born in France and lived there for thirty-years and his parent lived in France for forty-years. He has a wife whom he no longer lives with and three children. The applicant was caught in possession of 7kg of hashish and conspired to import 142kg. The applicant emphasised that his permanent exclusion from France had separated him from his wife and children.

The Court reiterated that States have the **right to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences**. However, the Court must measure **a fair balance between the applicant's right to respect for his private and family life, and the prevention of disorder or crime**. In view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion

from French territory separated him from his minor children and his wife, the Court considers that the measure in question was disproportionate to the aims pursued and there had been a breach of Article 8.

#### **Sezen v. the Netherlands, 50252/99**

The applicant entered the Netherlands at the age of 23 and has a residence permit and formed a relationship with the second applicant who moved to Netherlands at the age of seven, holds a residence permit, is married and has a child. The applicant was sentenced to four years' imprisonment for being a co-perpetrator of possession 52 kg of heroin.

The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 and that to split up a family is an interference of a very serious order (*Mehemi v. France*, para. 45). The Court had to determine if the applicants' **right to respect for family life was balanced with the interests of public safety and the prevention of disorder and crime**. For this the following guiding principles apply:

1. the nature and seriousness of the offence committed;
2. the length of the applicant's state in the country;
3. the time elapsed since the offence was committed and the applicant's conduct during this period;
4. the nationalities of the persons involved;
5. the applicant's family situation, such as length of marriage;
6. whether the spouse knew about the offence at the time when he or she entered into a family relationship;
7. whether there are children of the marriage and their age;

the seriousness of the difficulties which the spouse is likely to encounter in the applicant's country of origin.

The Court understands – in view of the devastating effects drugs have on people's lives – why the authorities show great firmness to those who actively contribute to the spread of this scourge (*Baghli v. France*, para. 48). The crime had not been committed at the time of marriage. The children speak Dutch and Kurdish and not Turkish. The Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and the children. Consequently, the State failed to strike a fair balance and there had been a violation of Article 8.

#### **Y.I. v. Russia, 68868/14**

The case concerned the applicant's complaint about being deprived of her parental authority in respect of her three children because she had addiction problems. Drug addiction is a ground for removing parental authority under the Russian Family Code, and its application entailed her losing all contact rights. The applicant was found guilty of drug trafficking and sentenced to six years' imprisonment and the domestic courts had deprived her of parental authority, deciding that it would be dangerous to leave the children in her care. The courts referred

to her drug addiction and the fact that she was unemployed. In her defence, the applicant argued, providing evidence, that she had started rehabilitation treatment and found a job.

The Court found that the national courts had not sufficiently justified taking such a drastic measure while there were less radical solutions available under domestic law. Nor had they taken into consideration that she had no history of neglecting her children, had started rehabilitation and had not apparently been given any support for her drug problems. The Court reiterated **that splitting up a family was a very serious interference. Deprivation of parental authority can only be justified in exceptional circumstances, the overriding requirement being a child's best interests. While drug addiction and unemployment are of relevance for considerations, these do not suffice alone to remove parental authority.**

Firstly, it must be considered if **the parent intends to and has taken steps to resolve the drug addiction**. Secondly, **unemployment and financial difficulties cannot in themselves be enough grounds for severing a parent-child bond**. The court decisions had not explained how her being unemployed had affected her ability to take care of her children. Furthermore, **real defects in the family's living conditions must be demonstrated and established**. Due consideration must also be given to the **parent's expressed attachment to the children**, where evidence shows that the parent has taken care of the children prior to their removal and had made efforts to maintain contact afterwards. At the same time **the attachment of the children to the parent and the consequences of a separation** must be considered.

The Court considers the removal of parental authority a last resort and requires national courts to consider firstly any less drastic measure legally available. In cases where these principles are not observed, the measure to remove parental authority would have been disproportionate and in violation of Article 8 of the Convention.

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### **International Guidelines on Human Rights and Drug Policy**

#### **III.1.3: Protection in the context of parental drug dependence**

Every child has the right to such care and protection as is necessary for their well-being, including where the child's parents use drugs or are drug dependent.

States should:

- ii. Ensure that a parent's drug use or dependency is never the sole justification for removing a child from parental care or for preventing reunification. Efforts should be directed primarily towards enabling the child to remain in or return to the care of their parents, including by assisting drug-dependent parents in carrying out their childcare responsibilities.

#### **III.2.1: Interventions for women who use drugs**

Women who use drugs have the right to access health care, including sexual and reproductive care, on a non-discriminatory basis

In accordance with this right, States should:

- iii. Ensure that a woman's drug use or dependency is never the sole justification for removing a child from her care or preventing reunification with her child, as this may deter access to necessary drug-related health care services and prejudice the woman's right to family life and the child's right to remain in the care and custody of their parents.

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## **5. School-based prevention**

### **Treaty Provisions**

#### **European Convention on Human Rights**

##### **ARTICLE 2, PROTOCOL 1**

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

##### **ARTICLE 8**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **International Covenant on Civil and Political Rights**

##### **ARTICLE 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### **UN Convention on the Rights of the Child**

##### **ARTICLE 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

##### **ARTICLE 28**

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - a) Make primary education compulsory and available free to all;
  - b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
  - c) Make higher education accessible to all on the basis of capacity by every appropriate means;
  - d) Make educational and vocational information and guidance available and accessible to all children;
  - e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

1. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
2. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

##### **ARTICLE 33**

States Parties shall take all appropriate measures, including legislative, administrative, social and educational 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.

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## International Guidelines on Human Rights and Drug Policy

### III.1.1: Prevention

Children have the right to receive accurate and objective information about drugs and drug-related harm, the right to protection from harmful misinformation, and the right to privacy. In accordance with this right, States should:

- i. Undertake evidence-based and human rights-compliant prevention measures, including in schools.
- ii. Avoid excluding children from school due to risk-taking behaviours and take measures to ensure their access to education.
- iii. Avoid random drug testing, sniffer dogs, and strip searches in schools.

### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
- ii. Public health, safety, and order may be invoked as grounds for limiting certain rights, such as the freedom to manifest one's religion or beliefs, the freedom of expression, the right to peaceful assembly, or the freedom of association, in order to deal with a serious threat to the health or safety of the population or its individual members.
- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. These principles include the following:
  - a. Certain human rights protections cannot be limited at any time, for any reason. These include the right to life; the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; the right not to be convicted of a criminal offence for acts that were not criminalised at the time they were carried out; and the right to freedom of thought, conscience, and religion.
  - b. Any limitation must be provided for by a national law of general application. Any such law must be clear and accessible to everyone. A limitation cannot be provided for retroactively.

- c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
- d. No limitation shall be applied in an arbitrary or unreasonable manner.
- e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
- f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.
- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights

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## Health and treatment

### 6. Access to drug treatment and risk and harm reduction

#### Treaty Provisions

##### European Social Charter

###### ARTICLE 11

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

###### ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

##### International Covenant on Economic, Social and Cultural Rights

###### ARTICLE 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

###### ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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## International Guidelines on Human Rights and Drug Policy

### II.1.1: Harm reduction

The right to health as applied to drug policy includes access, on a voluntary basis, to harm reduction services, goods, facilities, and information. In accordance with their right to health obligations, States should:

- i. Ensure the availability and accessibility of harm reduction services as recommended by UN technical agencies such as the World Health Organization, UNAIDS, and the UN Office on Drugs and Crime, meaning that such services should be adequately funded, appropriate for the needs of particular vulnerable or marginalised groups, compliant with fundamental rights (such as privacy, bodily integrity, due process, and freedom from arbitrary detention), and respectful of human dignity.
- ii. Consider the development of other evidence-based interventions aimed at minimising the adverse health risks and harms associated with drug use.
- iii. Remove age restrictions on access to harm reduction services where they exist, and instead ensure that in every instance in which a young person seeks access to services, access is determined based on the best interests and evolving capacity of the individual in question.
- iv. Exclude from the scope of criminal offences, or other punitive laws, policies, or practices, the carrying and distribution of equipment, goods, and information intended for preventing or reducing the harms associated with drug use, ensuring also that criminal conspiracy laws do not capture people using drugs together for this purpose.
- v. Ensure that any law prohibiting the 'incitement' or 'encouragement' of drug use contains safeguards protecting harm reduction services, excluding from liability those who provide information, facilities, goods, or services aimed at reducing harms associated with drug use.
- vi. Ensure that victims of, or witnesses to, an overdose or other injury occurring as a result of drug use are legally protected against criminal prosecution and other punishment in situations in which they have sought medical assistance for the overdose or injury.

### II.1.2: Drug dependence treatment

The right to health as applied to drug policy includes access to evidence-based drug dependence treatment on a voluntary basis. In accordance with their right to health obligations, States should:

- 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). This means that such services should also be adequately funded; appropriate for particular vulnera-

- ble or marginalised groups; compliant with fundamental rights (such as to privacy, bodily integrity, due process, and freedom from arbitrary detention), and respectful of human dignity.
- ii. 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.
- iii. Ensure that non-compliance with programme rules, such as failed drug tests, do not lead to automatic involuntary discharge or temporary expulsion as a disciplinary measure.
- iv. Safeguard the confidentiality of all identifying information regarding an individual's involvement in drug-related health care to ensure that it is used solely for the purpose of advancing the health of that person.

Where compulsory drug detention centres exist, States:

- 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
- vi. Shall in all circumstances guard against the arbitrary detention of people who use drugs

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## 7. Compulsory drug treatment

### Treaty Provisions

#### European Social Charter

##### ARTICLE 11

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

##### ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

#### International Covenant on Economic, Social and Cultural Rights

##### ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

#### European Convention on Human Rights

##### ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

#### International Covenant on Civil and Political Rights

##### ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

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### International Guidelines on Human Rights and Drug Policy

#### II.1.2: Drug dependence treatment

The right to health as applied to drug policy includes access to evidence-based drug dependence treatment on a voluntary basis. In accordance with their right to health obligations, States should:

- 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.

Where compulsory drug detention centres exist, States:

- ii. Shall in all circumstances guard against the arbitrary detention of people who use drugs.

#### II.7: Freedom from arbitrary arrest and detention

Everyone has the right to liberty and security of the person and therefore to freedom from arbitrary arrest and detention. No one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Such rights apply equally to any person known to have used drugs or suspected of drug use, as well as to anyone suspected of a drug-related offence.

In accordance with this right, States shall:

- i. Ensure that people are not detained solely on the basis of drug use or drug dependence.

#### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
- ii. Public health, safety, and order may be invoked as grounds for limiting certain rights, such as the freedom to manifest one's religion or beliefs, the freedom of expression, the right to peaceful assembly, or the freedom of association, in order to deal with a serious threat to the health or safety of the population or its individual members.
- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. These principles include the following:
  - a. Certain human rights protections cannot be limited at any time, for any reason. These include the right to life; the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; the right not to be convicted of a criminal offence for acts that were not criminalised at the time they were carried out; and the right to freedom of thought, conscience, and religion.
  - b. Any limitation must be provided for by a national law of general application. Any such law must be clear and accessible to everyone. A limitation cannot be provided for retroactively.
  - c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
  - d. No limitation shall be applied in an arbitrary or unreasonable manner.
  - e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
  - f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.

- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights.

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## 8. Detention due to addiction or intoxication

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

##### ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

#### International Covenant on Civil and Political Rights

##### ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

##### ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to gua-

rantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### European Social Charter

##### ARTICLE 11

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

##### ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

#### International Covenant on Economic, Social and Cultural Rights

##### ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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### International Guidelines on Human Rights and Drug Policy

#### II.1.2: Drug dependence treatment

The right to health as applied to drug policy includes access to evidence-based drug dependence treatment on a voluntary basis. Where compulsory drug detention centres exist, States:

- vi. Shall in all circumstances guard against the arbitrary detention of people who use drugs.

#### III.3: Persons deprived of liberty

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. In accordance with these rights, States should:

- i. Adhere at all times to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).
- ii. Adhere at all times to international standards relating to specific groups deprived of their liberty, including women (the Bangkok Rules) and children (the Beijing Rules).
- iii. Ensure that all persons deprived of their liberty have access to voluntary and evidence-based health services, including harm reduction and drug treatment services, as well as essential medicines, including HIV and hepatitis C services, at a standard that is equivalent to that in the community.

- iv. Organise such drug-related and other health care services in close parallel with general public health administration, taking into account the specific nature of individuals' detention, and design services to ensure the continuity of harm reduction, drug treatment, and access to essential medicines through transitions of entering and exiting the detention facility, as well as transfer between institutions.
- v. Ensure that drug-related and other health care services for these populations are provided by qualified medical personnel able to make independent, evidence-based decisions for their patients.
- vi. vi. Ensure the provision of training for health care professionals and other staff working in prisons and other closed settings and places of detention on drug treatment, harm reduction, and palliative care and pain management, as well as other medical conditions that require the use of controlled substances for medical purposes.

#### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
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- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. These principles include the following:
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- c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
- d. No limitation shall be applied in an arbitrary or unreasonable manner.
- e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
- f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.
- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights.

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## 9. Conditions of drug treatment

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### International Covenant on Civil and Political Rights

##### ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### European Social Charter

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2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

#### International Covenant on Economic, Social and Cultural Rights

##### ARTICLE 12

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  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

#### UN Convention on the Rights of the Child

##### ARTICLE 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
  - a) To diminish infant and child mortality;
  - b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
  - c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
  - d) To ensure appropriate pre-natal and post-natal health care for mothers;
  - e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
  - f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

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### Relevant Case Law of the ECtHR

#### ARTICLE 3 ECHR – Prohibition of inhuman or degrading treatment

##### *Jalloh v. Germany, 54810/00*

The applicant was arrested following a drug deal, after which he swallowed a bag containing 0.2g of cocaine which the police forced him to regurgitate through forcibly administering emet-

ics. The applicant complained that he had been subjected to inhuman and degrading treatment.

Treatment has been held by the Court to be 'inhuman' when it was premeditated, applied for hours and caused actual bodily injury or intense physical and mental suffering (*Labita v. Italy*, para. 120). Treatment has been considered 'degrading' when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (*Hurado v. Switzerland*, para. 67), or when it was such as to drive the victim to act against his will or conscience (*Denmark, Norway, Sweden and the Netherlands v. Greece*, para. 186; *Keenan v. UK*, para.10). Furthermore, in considering whether treatment is 'degrading', one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (*Raninen v. Finland*, para. 55).

With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.

Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 do not prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. However, any forcible medical intervention to obtain evidence must be convincingly justified on the facts of a case. This is especially true where the procedure is intended to retrieve from inside the individual's body evidence. Due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. The procedure must not entail any risk of lasting detriment to a suspect's health (*Nevmerzchitsky V. Ukraine*, para. 94 and 97).

As with interventions carried out for therapeutic purposes, the way a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case law. In particular, account must be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention. Another consideration is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (*Ilijkov v. Bulgaria*). A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (*Krastanov v. Bulgaria*, para. 53).

In the present case, the Court noted that the removal of drugs from the applicant's stomach by administration of emetics could be required on medical grounds, as he risked death

through poisoning. However, the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Court concludes that the decision to administer emetics was aimed at securing evidence and not on medical grounds. The Court was not satisfied that this was a serious offence, evidenced by the fact that the street dealer was storing drugs in his mouth and could not have been selling drugs on a large scale. The Court accepts that it was vital to be able to determine the exact amount and quality of the drugs however it is not satisfied that the forcible administration of emetics was indispensable in the instance case to obtain the evidence. The authorities could simply have waited for the drugs to pass through his system naturally, which is common practice among Council of Europe member States. The Court finds that the practice of administering emetics poses considerable health risks, granted that it has led to deaths.

The Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate in order to retrieve evidence they could equally have obtained by less intrusive methods. The way the measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering and therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

#### **Lorse and Others v. The Netherlands, 52950/99**

The applicant was convicted with drug and weapon offences and placed in a maximum-security prison with fears that he would attempt to escape and pose a risk to society, as he had previously evaded arrest in the past and harmed a person. The applicant was subject to strip searches following every visit with the medical staff and personal visits, in addition to weekly routine strip searches in his dorm even if he had no contact with the outside world. The Court considers that in the absence of convincing security needs, the practice of weekly strip searches for a period of more than six years diminished the applicant's human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him. Accordingly, the Court concludes that the combination of routine strip searching with the other stringent security measures amounted to inhuman or degrading treatment in violation of Article 3.

#### **McGlinchey and Others v. UK, 50390/99**

The applicant was convicted for theft and sentenced to four months' imprisonment on 7 December 1998. She had a long history of intravenous heroin dependency and was asthmatic. Prison records showed that she was complaining of withdrawal symptoms and vomited frequently. She was prescribed medication to help with the withdrawal symptoms which were not given on one day, which the applicants allege was a punishment and the Government defend was on the doctor's advice. She

had to clean her own vomit and when seen by her mother had vomit in her hair and told her she felt she was going to die in prison. On 12 December her weight was recorded at 40kg. On 14 December she suffered from a cardiac arrest and died on 3<sup>rd</sup> January 1999. The parties submitted that the prison authorities failed to administer her medication for her asthma and heroin withdrawal, permitted her to dehydrate and vomit unnecessarily and delayed transferring her to a civilian hospital where she could be expertly treated.

Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons the Court finds that there was a failure to meet the standards imposed by Article 3. It notes the failure to provide accurate means to establish the applicant's weight loss, the gap in monitoring her condition by a doctor over the weekend when there was a further drop in weight and a failure of the prison to take more effective steps to treat her condition such as hospital admission or to obtain expert assistance in controlling the vomiting.

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## **International Guidelines on Human Rights and Drug Policy**

### **I.1: Human dignity**

Universal human dignity is a fundamental principle of human rights. It is from the inherent dignity of the human person that our rights derive. No drug law, policy, or practice should have the effect of undermining or violating the dignity of any person or group of persons.

### **II.1.2: Drug dependence treatment**

The right to health as applied to drug policy includes access to evidence-based drug dependence treatment on a voluntary basis.

In accordance with their right to health obligations, States should:

- 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). This means that such services should also be adequately funded; appropriate for particular vulnerable or marginalised groups; compliant with fundamental rights (such as to privacy, bodily integrity, due process, and freedom from arbitrary detention), and respectful of human dignity.
- ii. 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.
- iii. Ensure that non-compliance with programme rules, such as failed drug tests, do not lead to automatic involuntary discharge or temporary expulsion as a disciplinary measure.

- iv. Safeguard the confidentiality of all identifying information regarding an individual's involvement in drug-related health care to ensure that it is used solely for the purpose of advancing the health of that person.

Where compulsory drug detention centres exist, States:

- 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.
- vi. Shall in all circumstances guard against the arbitrary detention of people who use drugs

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# **Law enforcement and criminal justice**

## **10. Alternatives to criminal sanctions for drug use/ possession for personal use**

### **Treaty Provisions**

#### **European Convention on Human Rights**

##### **ARTICLE 8**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

##### **ARTICLE 9**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### **International Covenant on Civil and Political Rights**

##### **ARTICLE 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

##### **ARTICLE 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **UN Convention on the Rights of the Child**

##### **ARTICLE 16**

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

#### **European Social Charter**

##### **ARTICLE 11**

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

## ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

## International Covenant on Economic, Social and Cultural Rights

### ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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## Relevant Case Law of the ECtHR

### Article 8 ECHR – Right to family life

#### *Y.I. v. Russia, 68868/14*

The case concerned the applicant's complaint about being deprived of her parental authority in respect of her three children because she had addiction problems. Drug addiction is a ground for removing parental authority under the Russian Family Code, and its application entailed her losing all contact rights. The applicant was found guilty of drug trafficking and sentenced to six years' imprisonment and the domestic courts had deprived her of parental authority, deciding that it would be dangerous to leave the children in her care. The courts referred to her drug addiction and the fact that she was unemployed. In her defence, the applicant argued, providing evidence, that she had started rehabilitation treatment and found a job.

The Court found that the national courts had not sufficiently justified taking such a drastic measure while there were less radical solutions available under domestic law. Nor had they taken into consideration that she had no history of neglecting her children, had started rehabilitation and had not apparently been given any support for her drug problems. The Court reiterated that splitting up a family was a very serious interference. Deprivation of parental authority can only be justified in exceptional circumstances, the overriding requirement being a child's best interests. While drug addiction and unemployment are of relevance for considerations, these do not suffice alone to remove parental authority.

Firstly, it must be considered if the parent intends to and has taken steps to resolve the drug addiction. Secondly, unemployment and financial difficulties cannot in themselves be enough grounds for severing a parent-child bond. The court decisions had not explained how her being unemployed had affected her ability to take care of her children. Furthermore, real defects in the family's living conditions must be demonstrated and established. Due consideration must also be given to the parent's expressed attachment to the children, where evidence shows that the parent has taken care of the children prior to their removal and had made efforts to maintain contact afterwards. At the same time the attachment of the children to the parent and the consequences of a separation must be considered.

The Court considers the removal of parental authority a last resort and requires national courts to consider firstly any less drastic measure legally available. In cases where these principles are not observed, the measure to remove parental authority would have been disproportionate and in violation of Article 8 of the Convention.

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## International Guidelines on Human Rights and Drug Policy

### II.1: Right to the highest attainable standard of health

Everyone has the right to enjoy the highest attainable standard of physical and mental health. This right applies equally in the context of drug laws, policies, and practices. In accordance with this right, States should:

- v. Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.

### II.9: Right to privacy

Everyone has the right to privacy, including people who use drugs. In accordance with this right, States should:

- vii. Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.

### II.10: Freedom of thought, conscience, and religion

Everyone has the right to freedom of thought, conscience, and religion, which includes the freedom to manifest one's religion or belief, either individually or in community with others, in public or private. This right applies to those for whom such manifestations may involve the use of drugs for religious or spiritual purposes. In accordance with this right, States may:

- i. Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption.

### III.2.1: Interventions for women who use drugs

Women who use drugs have the right to access health care, including sexual and reproductive care, on a non-discriminatory basis. In accordance with this right, States should:

- viii. Utilise the available flexibilities in the UN drug control conventions to decriminalise the possession, purchase, or cultivation of controlled substances for personal consumption as an important step towards fulfilling women's right to health.

### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
- ii. Public health, safety, and order may be invoked as grounds for limiting certain rights, such as the freedom to manifest

one's religion or beliefs, the freedom of expression, the right to peaceful assembly, or the freedom of association, in order to deal with a serious threat to the health or safety of the population or its individual members.

- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. These principles include the following:

- a. Certain human rights protections cannot be limited at any time, for any reason. These include the right to life; the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; the right not to be convicted of a criminal offence for acts that were not criminalised at the time they were carried out; and the right to freedom of thought, conscience, and religion.
- b. Any limitation must be provided for by a national law of general application. Any such law must be clear and accessible to everyone. A limitation cannot be provided for retroactively.
- c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
- d. No limitation shall be applied in an arbitrary or unreasonable manner.
- e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
- f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.
- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights.

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# 11. Arrest, interrogation

## Treaty Provisions

### European Convention on Human Rights

#### ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment

#### ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a) the lawful detention of a person after conviction by a competent court;
  - b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
1. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
2. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

3. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
4. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

#### ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

### International Covenant on Civil and Political Rights

#### ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### ARTICLE 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

### UN Convention on the Rights of the Child

#### ARTICLE 16

1. child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

#### ARTICLE 37

States Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

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## Relevant Case Law of the ECtHR

### ARTICLE 3 ECHR – Prohibition of inhuman or degrading treatment

#### *Egmez v. Cyprus, 30873/96*

The applicant was beaten during the arrest of a drug deal at the buffer zone of Cyprus and complained that he was later tortured by the police investigators. The Court recalls that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment (*Selmouni v. France*, para. 95). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (*Ireland v. UK judgment 18 January 1978*, para.162). In order to determine whether a form of ill treatment should be qualified as torture, the Court must have regard to the distinction, embodied in the provision, between this notion and that of inhuman or degrading treatment. The Court has previously found that the Convention should by means of this distinction attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (*Selmouni v. France*, para. 96).

#### *Jalloh v. Germany, 54810/00*

The applicant was arrested following a drug deal, after which he swallowed a bag containing 0.2g of cocaine which the police forced him to regurgitate through forcibly administering emetics. The applicant complained that he had been subjected to inhuman and degrading treatment.

Treatment has been held by the Court to be 'inhuman' when it was premeditated, applied for hours and caused actual bodily injury or intense physical and mental suffering (*Labita v. Italy*, para. 120). Treatment has been considered 'degrading' when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (*Hurado v. Switzerland*, para. 67), or when it was such as to drive the victim to act against his will or conscience (*Denmark, Norway, Sweden and the Netherlands v. Greece*, para. 186; *Keenan v. UK*, para.10). Furthermore, in considering whether treatment is 'degrading', one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (*Raninen v. Finland*, para. 55).

With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.

Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 do not prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. However, any forcible medical intervention to obtain evidence must be convincingly justified on the facts of a case. This is especially true where the procedure is intended to retrieve from inside the individual's body evidence. Due regard must be had to the seriousness of the offence in issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. The procedure must not entail any risk of lasting detriment to a suspect's health (*Nevmerzchitsky V. Ukraine*, para. 94 and 97).

As with interventions carried out for therapeutic purposes, the way a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case law. In particular, account must be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention. Another consideration is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (*Ilijkov v. Bulgaria*). A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (*Krastanov v. Bulgaria*, para. 53).

In the present case, the Court noted that the removal of drugs from the applicant's stomach by administration of emetics could be required on medical grounds, as he risked death through poisoning. However, the emetics were administered in the absence of any prior assessment of the dangers involved in leaving the drug bubble in the applicant's body. The Court concludes that the decision to administer emetics was aimed at securing evidence and not on medical grounds. The Court was not satisfied that this was a serious offence, evidenced by the fact that the street dealer was storing drugs in his mouth and could not have been selling drugs on a large scale. The Court accepts that it was vital to be able to determine the exact amount and quality of the drugs however it is not satisfied that the forcible administration of emetics was indispensable in the instance case to obtain the evidence. The authorities could simply have waited for the drugs to pass through his system naturally, which is common practice among Council of Europe member States. The Court finds that the practice of administering emetics poses considerable health risks, granted that it has led to deaths.

The Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate in order to retrieve evidence they could equally have obtained by less intrusive methods. The way the measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering and therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

#### **Rehbock v. Slovenia, 29462/95**

In the course of an arrest following a drug trade, the police injured the applicant. The Court notes that the applicant was not arrested in the course of a random operation which might have given rise to unexpected developments to which the police might have been called upon to react without prior preparation. They have sufficient time to evaluate the possible risks and take all necessary measures for carrying out the arrest. The applicant did not carry a weapon or threaten to attack the police during the arrest. The burden therefore rests on the government to demonstrate that the use of force was not excessive.

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## **International Guidelines on Human Rights and Drug Policy**

### **I.1.1: Harm Reduction**

The right to health as applied to drug policy includes access, on a voluntary basis, to harm reduction services, goods, facilities, and information. In accordance with their right to health obligations, States should:

- vi. Ensure that victims of, or witnesses to, an overdose or other injury occurring as a result of drug use are legally pro

tected against criminal prosecution and other punishment in situations in which they have sought medical assistance for the overdose or injury

### **II.6: Freedom from torture and other cruel, inhuman, or degrading treatment or punishment**

Torture and other cruel, inhuman, or degrading treatment or punishment are absolutely prohibited, in all circumstances. This includes during the arrest, questioning, and detention of persons alleged to have committed drug-related crimes or otherwise implicated during an investigation. The withholding of drugs from those who need them for medical purposes, including for drug dependence treatment and pain relief, is considered a form of torture. In accordance with this right, States shall:

- i. Take effective legislative, administrative, judicial, and other measures to prohibit, prevent, and redress all acts of torture and ill-treatment in their jurisdiction and in all settings under their custody or control, including in the context of drug dependence treatment, whether administered in public or private facilities.
- ii. Promptly investigate allegations of torture and cruel, inhuman, or degrading treatment or punishment by State agents, as well as acts that occur in their territory or under their jurisdiction (whether carried out by State or non-State actors), and prosecute and punish those responsible, including when victims are persons alleged to have committed drug-related offences or who are dependent on drugs

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## **12. Crimes involving freedom of expression**

### **Treaty Provisions**

#### **European Convention on Human Rights**

##### **ARTICLE 10**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure

of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **International Covenant on Civil and Political Rights**

##### **ARTICLE 19**

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a) For respect of the rights or reputations of others;
  - b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **European Social Charter**

##### **ARTICLE 13**

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

#### **ARTICLE 14**

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Parties undertake:

1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;
2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

#### **International Covenant on Economic, Social and Cultural Rights**

##### **ARTICLE 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - b) The improvement of all aspects of environmental and industrial hygiene;
  - c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

#### **UN Convention on the Rights of the Child**

##### **ARTICLE 17**

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

- c) Encourage the production and dissemination of children's books;
- d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

#### ARTICLE 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational 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.

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### International Guidelines on Human Rights and Drug Policy

#### II.1.1: Harm reduction

The right to health as applied to drug policy includes access, on a voluntary basis, to harm reduction services, goods, facilities, and information.

In accordance with their right to health obligations, States should:

- v. Ensure that any law prohibiting the 'incitement' or 'encouragement' of drug use contains safeguards protecting harm reduction services, excluding from liability those who provide information, facilities, goods, or services aimed at reducing harms associated with drug use

#### II.12: Freedom of opinion, expression, and information

Everyone has the right to freedom of opinion and expression, which includes the right to seek, receive, and impart information and ideas of all kinds through any media of choice. It also includes the right to hold opinions, express ideas, and seek, receive, and impart information about drugs and drug policy. In accordance with this right, States should:

- i. Take all necessary legislative, administrative, and other measures to ensure full enjoyment of the rights to freedom of opinion, expression, and information about matters related to drug laws, policies, and practices, including information and opinions regarding health services for people who use drugs (such as harm reduction interventions); the composition of controlled drugs; the value, meaning, and benefits of traditional, cultural, and religious uses of substances; the human rights of people who use drugs or are otherwise involved in drug-related activities; and reforms to such laws, policies, and practices.

- ii. Provide accurate and objective information about drug laws, policies, and regulations; drug-related harms; and drug-related health goods, services, and facilities.
- iii. Refrain from censoring or restricting access, including through the application of criminal or other sanctions, to scientific and health-related information about drugs, drug use, drug-related harms, and goods, services, and facilities aimed at preventing or reducing such harms, and refrain from otherwise withholding or intentionally misrepresenting such information

#### V.2: Standards for limitations on rights

- i. Nothing in the international drug control treaties may be interpreted as implying for any State, group, or person a right to engage in any activity or to perform any act aimed at or having the effect of violating any of the rights and freedoms guaranteed in international human rights instruments or limiting these rights to a greater extent than is specifically provided for in those instruments.
- ii. Public health, safety, and order may be invoked as grounds for limiting certain rights, such as the freedom to manifest one's religion or beliefs, the freedom of expression, the right to peaceful assembly, or the freedom of association, in order to deal with a serious threat to the health or safety of the population or its individual members.
- iii. National security may be invoked to justify measures limiting certain rights only when such measures are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
- iv. Where a State seeks to limit a specific right in the pursuit of fulfilling a drug control obligation, such limitation must be consistent with established general interpretive principles relating to the requirements for lawful limitations on rights, which apply to only some human rights norms. These principles include the following:
  - a. Certain human rights protections cannot be limited at any time, for any reason. These include the right to life; the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment; freedom from slavery; the right not to be convicted of a criminal offence for acts that were not criminalised at the time they were carried out; and the right to freedom of thought, conscience, and religion.
  - b. Any limitation must be provided for by a national law of general application. Any such law must be clear and accessible to everyone. A limitation cannot be provided for retroactively.
  - c. The scope of the limitation shall not be interpreted so as to jeopardise the essence of the right concerned, and any limitation shall be interpreted strictly and in favour of the right at issue.
  - d. No limitation shall be applied in an arbitrary or unreasonable manner.

- e. No limitation shall be discriminatory or applied in a manner that constitutes legally prohibited discrimination.
- f. The limitation must meet the 'necessity' test established in international human rights law, which means that the measure responds to a pressing social need, pursues a legitimate aim, and is proportionate to that aim. This includes the requirement that the state use no more restrictive means than are required for achieving the purpose of the limitation.
- g. The State always bears the burden of justifying a limitation on a human right that it is legally bound to respect.
- h. Adequate safeguards and effective remedies shall be provided by law against the illegal or abusive imposition or application of limitations on human rights.

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## 13. Imprisonment and pre-trial detention

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a) the lawful detention of a person after conviction by a competent court;
  - b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

##### ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b) to have adequate time and facilities for the preparation of his defence;
  - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## International Covenant on Civil and Political Rights

### ARTICLE 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

### ARTICLE 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c) To be tried without undue delay;
  - d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - g) Not to be compelled to testify against himself or to confess guilt.
1. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  2. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  3. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  4. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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### Relevant Case Law of the ECtHR

#### ARTICLE 5 ECHR - Right to liberty and personal freedom

##### *Aerts v. Belgium, 25357/94*

The applicant was institutionalised due to suffering from mental problems due to being addicted to drugs and other personality disorders. Belgian law provides for the detention of mentally ill people in a prison as a provisional measure pending designation to a relevant institution. He claims that this continued detention on remand has no legal basis. As a result of not having been transferred, the applicant complained of being prevented the enjoyments of benefits of the detention regime his condition required. Above all, the treatment he had received had done him harm.

As the applicant was not criminally responsible there could be no conviction within the meaning of Article 5.1 (X v. UK, para. 39). Any deprivation of liberty must be done in keeping with Article 5, namely, to protect the individual from arbitrariness (Winterwerp v. the Netherlands, paras. 35 and 45; Bizzotto v. Greece, para. 31). There must be a logic and justifiable relationship between the ground of permitted deprivation of liberty and the conditions of detention. The detention of a mental health patient is only be lawful if effected in a hospital, clinic or other appropriate institution (Ashingdane v. UK, para. 44).

#### ARTICLE 6 – Right to a fair trial

##### *Mansur v. Turkey, 16026/90*

The case concerns the length of detention in remand and the length of criminal proceedings. The ECHR guarantees to everyone against whom criminal proceedings are brought the right to a final decision within a reasonable time on the charge against him (Adiletta and Others v. Italy, para. 17). It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement (Vocaturò v. Italy, para. 17). The Court rejects the argument in that the endeavour to eliminate drug trafficking, justifies detaining the applicant while all matters which might have a bearing on the judgment are investigated.

##### *Messina v. Italy, 13803/93*

Man imprisoned over allegations of mafia involvement and drug offences claims that his pretrial detention exceeded a period of 'Reasonable time' as required under Article 6 para 1 which is determined with reference to the criteria laid down in the Court's case law and in the light of the circumstances of the case. While the Court accepts that the judicial authorities must have encountered difficulties linked to the number of persons to be questioned and the number of witnesses to be heard, as well as the need for evidence to be taken on commission; the Court cannot regard seven years as reasonable.

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### International Guidelines on Human Rights and Drug Policy

#### II.7: Freedom from arbitrary arrest and detention

Everyone has the right to liberty and security of the person and therefore to freedom from arbitrary arrest and detention. No one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Such rights apply equally to any person known to have used drugs or suspected of drug use, as well as to anyone suspected of a drug-related offence.

In accordance with this right, States shall:

- ii. 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.

In addition, States should:

- iii. 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.
- iv. Prioritise diversion from prosecution for persons arrested for drug offences or drug-related offences of a minor nature.
- 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.

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## 14. Conditions of detention (drug treatment and harm reduction)

### Treaty Provisions

#### European Convention on Human Rights

##### ARTICLE 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### International Covenant on Civil and Political Rights

##### ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

##### ARTICLE 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
  - a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
  - b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

- The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

## European Social Charter

### ARTICLE 11

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

- to remove as far as possible the causes of ill-health;
- to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
- to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

### ARTICLE 13

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

- to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
- to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
- to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

## International Covenant on Economic, Social and Cultural Rights

### ARTICLE 12

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- The improvement of all aspects of environmental and industrial hygiene;
- The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

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## Relevant Case Law of the ECtHR

### ARTICLE 3 ECHR – Prohibition of inhuman or degrading treatment

#### *Kotsaftis v. Greece, 39780/06*

The applicant was placed in pre-trial detention for possessing drugs. The Court ruled that the authorities had not fulfilled their negative obligation under Article 3 to safeguard the applicant's physical integrity due to the lack of medical care for his Hepatitis-B. The same negative obligation applies in cases of HIV and other blood borne diseases which is relevant because there is a higher prevalence of these diseases among people who use drugs. Contrary to the findings of an expert report submitted to the prison authorities, the applicant had been kept in detention without being given a special diet or treatment with the appropriate drugs, and had not performed a scheduled operation with a delay of one year. The applicant had also been detained with 2.4 sq. m of personal space which contravened medical advice to have the applicant moved to a larger cell.

The Court recognises the vulnerability of HIV-positive persons in prison and like other diseases place a positive obligation to provide adequate medical treatment. A lack of appropriate treatment was found in *Kats and Others v. Ukraine*, where the authorities refused to transfer the applicant, who suffered from schizophrenia and was drug dependent, to a medical facility or medical wing of the prison to treat numerous serious diseases exacerbated by her HIV infection.

#### *McGlinchey and Others v. UK, 50390/99*

The applicant was convicted for theft and sentenced to four months' imprisonment on 7 December 1998. She had a long history of intravenous heroin dependency and was asthmatic. Prison records showed that she was complaining of withdrawal symptoms and vomited frequently. She was prescribed medication to help with the withdrawal symptoms which were not given on one day, which the applicants allege was a punishment and the Government defend was on the doctor's advice. She had to clean her own vomit and when seen by her mother had vomit in her hair and told her she felt she was going to die in prison. On 12 December her weight was recorded at 40kg. On

14 December she suffered from a cardiac arrest and died on 3<sup>rd</sup> January 1999. The parties submitted that the prison authorities failed to administer her medication for her asthma and heroin withdrawal, permitted her to dehydrate and vomit unnecessarily and delayed transferring her to a civilian hospital where she could be expertly treated.

Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons the Court finds that there was a failure to meet the standards imposed by Article 3. It notes the failure to provide accurate means to establish the applicant's weight loss, the gap in monitoring her condition by a doctor over the weekend when there was a further drop in weight and a failure of the prison to take more effective steps to treat her condition such as hospital admission or to obtain expert assistance in controlling the vomiting.

#### *Melnik v. Ukraine, 72286/01*

The applicant was arrested on drug charges. The applicant complained a breach of Article 3 due to not receiving the necessary medical treatment for tuberculosis while serving his sentence. He also complained of the conditions of his detention. He further alleged that he was not provided with the required prescription drugs, medicines and the necessary medical care for his tuberculosis. The Court finds the medical care to be inadequate since the applicant was diagnosed with tuberculosis two and a half months after the applicant first complained of shortness of breath and phlegm. The applicant's conditions of hygiene and sanitation were unsatisfactory and contributed to the deterioration of his poor health, due to weekly access to a shower and ability to wash his clothes. The Court concluded that there was no indication that there was a positive intention of humiliating or debasing the applicant, however the absence of any such purpose cannot exclude a finding of a violation of Article 3 (*Peers v. Greece*, para. 74).

#### *Shelley v. UK, 23800/06*

The applicant claimed that the failure for prisons to facilitate needle exchange programmes due to the high risks of HIV and HCV violated Articles 2 and 3 within the UK prison population. In determining whether the minimum level of severity of suffering has been established to constitute a breach of Article 3, the Court has held that 'the assessment of this minimum is, in the nature of things relative; it depends on all circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim' (*Ireland v. the United Kingdom*, para. 162). The Court was not satisfied that this risk of HIV was sufficiently severe as to raise issues under Articles 2 and 3. Instead the Court considered a potential claim to be affected by health policy due to the higher risk of infection of HIV and HCV. The Court's case-law has held omissions of the authorities in the field of health care policy which may engage their positive obligations under Article 2. This has previously included regulations around hospitals in adopting measures to protect lives (*Calvelli and Ciglio v. Italy*, para. 49). It is therefore possible that a positive obligation might arise to prevent the spread of a particular disease or infection;

however the Court was not persuaded here that any potential threat to health that fell short of the standards of Article 2 or 3 would impose a duty on the State to take preventive steps. The Court decided that the margin of appreciation is wide for matters of general preventive measures (*mutatis mutandis*, *Osman v. UK*, para. 116).

#### *Wenner v. Germany, 62303/13*

The applicant has been addicted to heroin for almost 40 years, and whilst incarcerated he was seen as having little to no chance to lead a drug free life. The applicant was denied Opioid agonist treatment (OAT) when he started his sentence. An expert was called in on behalf of the applicant and recommended that the applicant receive OAT as he had been able to live a relatively normal life whilst undergoing drug substitution therapy previously outside detention. The prison subsequently denied the applicant access to OAT, even though the applicant expressed a clear wish to continue with the therapy he had started before he was sentenced to prison.

The Court relied on Article 3 of the European Convention on Human Rights, which prohibits torture as well as inhuman or degrading treatment. It concluded that member states of the Council of Europe that refuse access to OAT have the burden of proving that an alternative medical approach would, in the case of an individual patient, be as effective as OAT. Such proof needs to be based on an independent medical opinion.

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## International Guidelines on Human Rights and Drug Policy

### II.6: Freedom from torture and other cruel, inhuman, or degrading treatment or punishment

Torture and other cruel, inhuman, or degrading treatment or punishment are absolutely prohibited, in all circumstances. This includes during the arrest, questioning, and detention of persons alleged to have committed drug-related crimes or otherwise implicated during an investigation. The withholding of drugs from those who need them for medical purposes, including for drug dependence treatment and pain relief, is considered a form of torture. In accordance with this right, States shall:

- 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.

### III.3: Persons deprived of liberty

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.

In accordance with these rights, States should:

- i. Adhere at all times to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).
- ii. Adhere at all times to international standards relating to specific groups deprived of their liberty, including women (the Bangkok Rules) and children (the Beijing Rules).
- iii. Ensure that all persons deprived of their liberty have access to voluntary and evidence-based health services, including harm reduction and drug treatment services, as well as essential medicines, including HIV and hepatitis C services, at a standard that is equivalent to that in the community.
- iv. Organise such drug-related and other health care services in close parallel with general public health administration, taking into account the specific nature of individuals' detention, and design services to ensure the continuity of harm reduction, drug treatment, and access to essential medicines through transitions of entering and exiting the detention facility, as well as transfer between institutions.
- v. Ensure that drug-related and other health care services for these populations are provided by qualified medical personnel able to make independent, evidence-based decisions for their patients.
- vi. Ensure the provision of training for health care professionals and other staff working in prisons and other closed settings and places of detention on drug treatment, harm reduction, and palliative care and pain management, as well as other medical conditions that require the use of controlled substances for medical purposes.

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## Endnotes

1. *Drug policy and Human Rights in Europe: A Baseline Study AS/JUR (2019) 44* (CoE, Committee on Legal Affairs and Human Rights 2019)
2. For example, Human Rights Council Resolution 37/42, 'Contribution to the implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights' UN Doc No, A/HRC/RES/37/42, 4 April 2018.
3. UN Chief Executives Board for Co-ordination *Summary of Deliberations*, UN Doc No CEB/2018/2, 18 January 2019
4. UN Committee on Economic, Social and Cultural Rights, *General Comment No 14 on the Right to the Highest Attainable Standard of Physical and Mental Health*, UN Doc No E/C.12/2000/4, 11 August 2000, paras 3 & 8.
5. See, for example, Arts 8-11 and Art 2 Protocol 4 of the European Convention on Human Rights.
6. See *International Guidelines on Human Rights and Drug Policy (2019)*, Guidelines V.2, 'Standards for limitations on rights' available at [www.humanrights-drugpolicy.org](http://www.humanrights-drugpolicy.org)
7. *International Guidelines on Human Rights and Drug Policy (2019)*; Office of the High Commissioner for Human Rights, *Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights*, UN Doc No A/HRC/30/65, 2015; *Drug policy and Human Rights in Europe: A Baseline Study AS/JUR (2019) 44* (CoE, Committee on Legal Affairs and Human Rights 2019)
8. *Costs and Unintended Consequences of Drug Control Policies* (CoE, Pompidou Group 2017); *Drug Policy and Human Rights in Europe: Managing Tensions, Maximising Complementarities* (CoE, Pompidou Group 2018); *Human Rights and People Who Use Drugs in the Mediterranean Region: Current Situation in 17 MedNET Countries* (CoE, Pompidou Group 2019); *Drug policy and Human Rights in Europe: A Baseline Study AS/JUR (2019) 44* (CoE, Committee on Legal Affairs and Human Rights 2019)
9. *International Guidelines on Human Rights and Drug Policy (2019)* available at [www.humanrights-drugpolicy.org](http://www.humanrights-drugpolicy.org)
10. *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Non-discrimination*. Council of Europe 2020, para 1.
11. Article 2(2), International Covenant on Economic, Social and Cultural Rights; Article 2(1), International Covenant on Civil and Political Rights.
12. [www.humanrights-drugpolicy.org](http://www.humanrights-drugpolicy.org). According to Guideline I.3, States shall 'Take all appropriate measures to prevent, identify, and remedy unjust discrimination in drug laws, policies, and practices on any prohibited grounds, including drug dependence', and should 'Monitor the impact of drug laws, policies, and practices on various communities ...and collect disaggregated data for this purpose.'
13. *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Non-discrimination*. Council of Europe 2020, paras 27-35.
14. *Ibid* paras 44, 87, 140.
15. On European Court cases applying 'other status' to health issues see *ibid* paras 158-165. See also, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20 (2009), paras. 28, 339.
16. See *Drug Policy and Human Rights in Europe: Managing Tensions, Maximising Complementarities* (CoE, Pompidou Group 2018)
17. Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, 2012

**The Council of Europe** is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

**The Pompidou Group** promotes a human rights-based approach to drug policy encompassing all areas, from drug policy development through implementation and monitoring to evaluation. It provides assistance to national authorities in identifying and embracing timely responses to contentions about human rights in drug policy, as well as in assessing the intended and unintended effects of envisaged drug policy measures, taking into account potential impact on the enjoyment of human rights. Recognising the paramount role of civil society in upholding human rights, the Pompidou Group offers guidance and tools to decision makers, in order to develop practical and meaningful ways for government and civil society to co-operate in the field of drug policy.

