



MODEL DRUG LAW FOR WEST AFRICA

A tool for policymakers

September 2018

ABOUT THE WEST AFRICA COMMISSION ON DRUGS

Convened by Kofi Annan, the West Africa Commission on Drugs (WACD) comprises a group of distinguished West Africans from the worlds of politics, civil society, health, security and the judiciary. The Commission, chaired by Olusegun Obasanjo, former President of Nigeria, is an independent body and can therefore speak with impartiality and directness.

With the support of leading experts, the WACD delivered comprehensive policy recommendations in its authoritative report *Not Just in Transit - Drugs, the State and Society in West Africa* in June 2014. This report was the culmination of one and a half years of engagement by the Commission with national, regional and international parties including the African Union (AU), the Economic Community of West African States (ECOWAS) and the United Nations Office on Drugs and Crime (UNODC). It was informed by a series of background papers, drafted by leading experts from Africa and beyond.

To ensure that the Commission's findings and recommendations are widely discussed and acted on, its members engage in a follow-up advocacy campaign with governments, regional and international bodies, civil society and the media.



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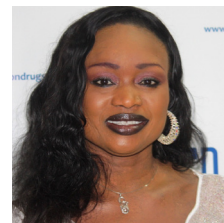
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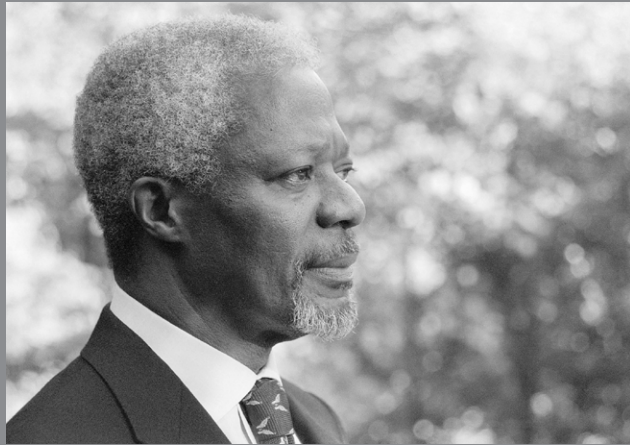
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In memoriam: Kofi Annan – A life in war and peace

The West Africa Commission on Drugs and the Model Drug Law you are now reading would not have been possible without Kofi Annan, former Secretary General of the United Nations, Nobel Peace Laureate, and Chair of the Kofi Annan Foundation. Sadly, Kofi passed away on 18 August after a short illness, lending our joint foreword to this document particular significance. I wish to take this opportunity to pay tribute to the remarkable life and career of this gracious world leader and my friend.

It was his deep concern for the impact that drug trafficking and consumption was having on our native region of West Africa that led Kofi to convene the West Africa Commission on Drugs, which he asked me to chair. When I received his phone call, the issue was not one that I had concerned myself with very much and the truth is that I only agreed to become chairman because I would not dare to deny a request from our former Secretary-General and one of the greatest Africans. But through the work on the Commission I quickly learned the urgency and importance of the problem for our countries and was once again impressed with his great foresight in acting before others were even really aware of the needs.

He was a fierce advocate for a more humane approach to drug control globally and convinced me and many others. Always a great communicator, he managed to put it quite simply for all to comprehend when he repeatedly said: "I believe that drugs have destroyed many lives, but wrong government policies have destroyed many more."

But aside from a great leader, many of us have also lost a great and gracious friend. With his deep compassion and empathy, his warmth and kindness, he reached the hearts of so many around the world. He will be greatly missed.



Olusegun Obasanjo

FOREWORD

Because of our deep concern about the growing threats drug trafficking, production and consumption pose to public health, governance, and stability in West Africa, in 2013 we convened a diverse group of West Africans from the worlds of politics, civil society, health, security and the judiciary to form the West Africa Commission on Drugs (WACD).

After a year and a half of engagement with civil society and national, regional and international institutions including the African Union (AU), the Economic Community of West African States (ECOWAS) and the United Nations Office on Drugs and Crime (UNODC), we launched the report entitled '*Not Just in Transit: Drugs, the State and Society in West Africa*', analysing the situation and setting out concrete policy recommendations.

We cautioned that West Africa must not become the next front line in the failed 'war on drugs' and appealed to governments and society in the region to regard drug use primarily as a public health problem, not one of criminal justice, and to support people dependent on drugs through treatment and recovery instead of punishing them. Drug trafficking needs to be tackled alongside other forms of organized crime, taking into account also the related serious problems of corruption and money laundering.

The work of the Commission and other initiatives inspired by it has increased public awareness around the challenges posed by drug trafficking, production and consumption as has the political commitment to address these critical issues. The awareness of the failures and harms of current drug policies is growing, together with an acknowledgement of their enormous costs and the need for more humane, balanced and cost-effective responses.

In 2014, we called on political leaders in West Africa to act together to change laws and policies that have not worked. Convinced by the series of recommendations outlined in the WACD report, several governments have since begun to revisit their drug laws, while asking the Commission for technical guidance on how to transform these recommendations into concrete legislative provisions. This *Model Drug Law for West Africa* provides the requested guidance on how to make the necessary changes to drug policies in our region. This will require political will but we urge you to make full use of this guide, which will move our region one more step forward to securing a healthy future for the people of West Africa.



Kofi Annan
Chair of the Kofi Annan Foundation
Convener of the West Africa Commission
on Drugs
Former Secretary-General of the United Nations



Olusegun Obasanjo
Chair of the West Africa Commission on Drugs
Former President of Nigeria

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ACRONYMS

ECOWAS Economic Community of West African States

HIV human immunodeficiency virus

INCB International Narcotics Control Board

UN United Nations

UNAIDS Joint United Nations Programme on HIV/AIDS

UNODC United Nations Office on Drugs and Crime

WACD West Africa Commission on Drugs

WHO World Health Organization

INTRODUCTION

A number of West African countries are considering, or are already in the process of, revisiting their drug laws. It is increasingly recognized that the current drug laws are not effective and are resulting in enormous costs. More humane and balanced approaches are needed. In the words of the Executive Director of the United Nations Office on Drugs and Crime: "It is important to reaffirm the original spirit of the conventions, focusing on health. The conventions are not about waging a 'war on drugs' but about protecting the 'health and welfare of mankind'".¹

The purpose of this Model Drug Law is to respond to this need for reform, by providing legislative provisions and commentary, which incorporate the obligations of the three UN drug control treaties,² and take into account the outcomes and commitments from the 2016 United Nations General Assembly Special Session on the world drug problem,³ the ECOWAS Drug Action Plan to Address Illicit Drug Trafficking, Organized Crime and Drug Abuse in West Africa (2016-2020),⁴ as well as, the existing evidence of effectiveness, the need for greater harmonisation of drug laws in the region, and the current gaps in the legislation.⁵

An important objective of this Model Drug Law is to reinforce the central purpose of the international drug conventions - protecting the health and welfare of humankind.

This is to be achieved by, on the one hand, ensuring access to, and availability of, essential medicines (notably those which are also controlled drugs) and on the other hand, controlling the non-medical use of narcotic and psychoactive substances, and reducing the harms associated with the diversion of controlled drugs to unauthorized purposes. Current barriers to accessing health services for people who use drugs need to be removed. This includes the removal of criminal penalties for people who use drugs, the provision of harm reduction measures, and drug treatment. For drug use, and possession of drugs for personal use, alternatives to conviction and punishment are needed, to allow law enforcement to focus on the most serious drug offenses and in particular organized crime and high-level corruption. Given the trans-border nature of most drug trafficking, no one country can solve problems by itself and a harmonization of drug policy across the region will be the most effective approach.

1 Yury Fedotov, United Nations Office on Drugs and Crime, *Contribution of the Executive Director of the United Nations Office on Drugs and Crime to the High-Level Review of the Implementation of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, to Be Conducted by the Commission on Narcotic Drugs in 2014*. UNODC/ED/2014/1. (2013) <https://www.unodc.org/documents/hlr/V1388514e.pdf>

2 The Single Convention on Narcotic Drugs (1961) (as amended by the 1972 Protocol Amending the Single Convention); The 1971 Convention on Psychotropic Substances; The United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances (1988). United Nations Office on Drugs and Crime, 'The International Drug Control Conventions' https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf

3 General Assembly, Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem A/RES/S-30/1 ('UNGASS Outcome Document') (2016) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/110/24/PDF/N1611024.pdf?OpenElement>

4 ECOWAS, *Drug Action Plan to Address Illicit Drug Trafficking, Organized Crime and Drug Abuse in West Africa (2016-2020)* (2016)

5 Bridge J and Loglo MG, *Drug Laws in West Africa: A Review and Summary* (International Drug Policy Consortium and West Africa Commission on Drugs 2017) http://fileservr.idpc.net/library/Drug-laws-in-West-Africa_ENGLISH.pdf

The West Africa Commission on Drugs (WACD) has worked towards drug policy reform in the region since 2013 and launched its flagship report entitled 'Not Just in Transit: Drugs, the State and Society in West Africa in 2014'.⁶ The report highlighted the serious threats posed to governance, stability, economic growth and public health. It included a series of recommendations for the reform of drug policies in the region but governments have asked the West Africa Commission on Drugs to go further and translate these recommendations into model provisions which they can use. This Model Drug Law responds to these requests.

How to use this document

The model legislative provisions represent a technical tool to assist West African countries in updating and amending their legislation.

The Model Drug Law includes provisions for the vast majority of the measures required by the international drug conventions. Where any requirement is not reflected in the provisions of the Model Drug Law, an explanation for this is provided. In some instances the Model Drug Law presents different legislative options available under the conventions which are signposted in the text. The Model Drug Law also includes sections on the exercise of police powers, which are not dealt with in the international drug conventions but are instead covered in human rights instruments. Wherever feasible, relevant articles of the drug conventions and other relevant legal instruments are provided after each provision, or after each set of provisions in a particular section. Following on from the international legal instrument references is a commentary section which explains the reason for adopting the provision(s).

⁶ West Africa Commission on Drugs, Not Just in Transit - Drugs, the State and Society in West Africa (2014) http://www.globalcommissionondrugs.org/wp-content/uploads/2017/02/WACD_En_Report_WEB_051114.pdf

PART I: GENERAL PROVISIONS

Article 1: Objectives of the Law on Controlled Drugs

(1) The purpose of this Law is to provide a legal framework for implementing the requirements of the international drug conventions that is in conformity with human rights and the overriding objective of which is the protection of public health by (a) enabling and facilitating adequate availability and accessibility to affordable controlled drugs for medical and scientific purposes, (b) minimising the diversion of controlled drugs for unauthorized purposes, (c) preventing and reducing the harms associated with the diversion of controlled drugs to unauthorized purposes.

International Legal Instruments:

This article reflects the dual obligation under the international drug control conventions to take measures to ensure both the availability of drugs for medical and scientific purposes and the provision of control measures to limit their use to these purposes. It further incorporates the recommendations on the treatment of drug dependence and on the protection of human rights in the Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem.⁷

Commentary:

An effective drug control regime that complies with the spirit of the international drug conventions should strike the right balance between ensuring the availability of controlled drugs for licit uses and preventing the diversion of controlled drugs to illicit uses.⁸ In recent years the international policy discussion on drugs has shifted much of its focus towards ensuring access to controlled substances for medical and scientific purposes, yet most of the laws and policies related to controlled drugs in West Africa only contain provisions on preventing the diversion of controlled drugs to unauthorised uses - without any acknowledgement of, or provision for, ensuring access to controlled drugs for medical and scientific purposes. In 2012, the African Union Conference of Ministers of Drug Control adopted the African Common Position on Controlled Substances and Access to Pain Management Drugs.⁹ That position was translated into the African Union Plan of Action on Drug Control (2013-2017), which lists among its key objectives capacity-building

⁷ General Assembly, Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem A/RES/S-30/1 ('UNGASS Outcome Document') (2016) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/110/24/PDF/N1611024.pdf?OpenElement>

⁸ World Health Organization, *Ensuring balance in national policies on controlled substances* (2011) http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D-7734FA350433C3F612414073A601F6?sequence=1

⁹ African Union, 'African Common Position on Controlled Substances and Access to Pain Management Drugs', *Fifth Session of the AU Conference of Ministers of Drug Control (Camdc5)*, Addis Ababa, Ethiopia (2012) http://www.un.org/en/africa/osaa/pdf/au/cap_controlledsubstances_2012.pdf

to facilitate the licit movement of narcotic drugs and psychotropic substances for medical and scientific purposes. It also describes some outputs related to this objective, such as the removal of barriers limiting availability of internationally controlled drugs for medical and scientific purposes.¹⁰ The Common African Position for the 2016 United Nations General Assembly Special Session states that a more balanced approach is needed to ensure the availability of controlled drugs for medical and scientific use while reducing their illicit use.¹¹ Constitutional recognition of the right of access to medical products is used as a country progress indicator by the World Health Organization (WHO) and an important success factor for legal enforcement of access to essential medicines is the incorporation of right-to-health principles into national constitutions.¹² The right to health is enshrined in the constitutions of all members of the Economic Community of West African States (ECOWAS).¹³

The Outcome Document of the 2016 United Nations General Assembly Special Session emphasizes the need for all drug control efforts to “fully respect all human rights and fundamental freedoms” enshrined in international human rights law.¹⁴ It states clearly that the three UN drug control conventions “and other relevant international instruments” together constitute the cornerstone of the international drug control system and that drug laws should be developed in line with recommendations by WHO, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme, UNODC, the International Narcotics Control Board (INCB) and other specialized UN agencies. WHO explains that “[d]rug control should not be approached as an objective in itself but as a tool to optimize public health”.¹⁵

The right to health is one of the many human rights implicated in drug policy. The requirement for countries to deliver, as part of the health services provided to the population, programmes aimed at reducing the adverse health and social consequences associated with unauthorised drug use, is a consequence of the right of all to the highest attainable standard of health.¹⁶ The right to health “is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body... and the right to be free from interference, such as the right to be free from torture, non-consensual

10 African Union, *AU Plan of Action on Drug Control (2013-2017)* http://www.sadrugpolicyweek.com/uploads/6/6/2/3/66238155/aupa_on_dc_2013-2017_-_english.pdf

11 African Union, ‘Common African Position (CAP) on the Post-2015 Development Agenda’ [2014] Addis Ababa https://www.unodc.org/documents/ungass2016/Contributions/IO/AU/Common_African_Position_for_UNGASS_-_English_-_final.pdf

12 Pehudoff SK, Laing RO and Hogerzeil HV, ‘Access to Essential Medicines in National Constitutions’ (2010) 88 *Bulletin of the World Health Organization* 800; Pehudoff SK, *Health, Human Rights & National Constitutions* (2008) <http://apps.who.int/medicinedocs/documents/s17421e/s17421e.pdf>

13 Mauritania, which is not part of ECOWAS but included in the work of the West Africa Commission on Drugs, however does not have this right enshrined in its constitution.

14 General Assembly, *Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem A/RES/S-30/1* (‘UNGASS Outcome Document’) (2016) p 2

15 World Health Organization, *Ensuring balance in national policies on controlled substances* (2011) p 12; http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D-7734FA350433C3F612414073A601F6?sequence=1

16 General Assembly, *Declaration on the Guiding Principles of Drug Demand Reduction (A/RES/S-20/3)* (1998) <http://www.un.org/documents/ga/res/20sp/a20spr03.htm> paragraph 8(b)(i)

medical treatment and experimentation.”¹⁷ Included amongst the core obligations of signatories to the International Covenant on Economic, Social and Cultural Rights are the obligations to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for the vulnerable or marginalised, and the obligation to provide essential drugs, as defined under the WHO Action Programme on Essential Drugs.¹⁸

Article 2: Classifications of Substances

(1) For the purposes of this Law a “controlled drug” means –

(a) any of the narcotics listed in Schedule I, II, III and IV of the UN Single Convention on Narcotic Drugs (1961) (as amended by the 1972 Protocol Amending the Single Convention), or

(b) any of the psychotropic substances listed in Schedules I, II, III and IV of the 1971 Convention on Psychotropic Substances and their annexes.¹⁹

(2) For the purposes of this Law a “precursor” means any of the substances classified in Tables I or II of the United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances (1988).²⁰

Commentary:

There is a wide divergence amongst West African countries’ classification of controlled drugs with some not including any categorization or specific articulation of the drugs controlled. The adoption of the scheduling system provided in the international drug conventions could aid harmonization of drug laws in the region and enhance legal certainty. The scheduling system provided in the international drug conventions also provides greater flexibility than the drug classification system contained in some West African countries, for example, by permitting the production of any controlled substances for medical purposes, regardless of classification class. The significance of the classification in the schedules in the international drug conventions relates only to the control measures to be applied to authorized activities concerning controlled drugs.

17 UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’ http://data.unaids.org/publications/external-documents/ecosoc_cescr-gc14_en.pdf, Paragraph 8

18 UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’ http://data.unaids.org/publications/external-documents/ecosoc_cescr-gc14_en.pdf, Paragraph 43

19 See Commission on Narcotic Drugs, ‘The International Drug Control Conventions Schedules of the Single Convention on Narcotic Drugs of 1961 as Amended by the 1972 Protocol, as at 16 May 2018 (ST/CND/1/Add.1/Rev.4 - E)’ <http://undocs.org/ST/CND/1/Add.1/Rev.4>; and Commission on Narcotic Drugs, ‘The International Drug Control Conventions Schedules of the Convention on Psychotropic Substances of 1971, as at 18 October 2017 (ST/CND/1/Add.2/Rev.3 - E)’ <http://undocs.org/ST/CND/1/Add.2/Rev.3>

20 United Nations, *The International Drug Control Conventions - Tables of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as at 18 October 2017 (ST/CND/1/Add.3/Rev.2)* (2017) https://www.incb.org/documents/PRECURSORS/TABLES/revise_1988_Conv_Schedules_18Oct2017_corr.pdf

Article 3: Coordination Mechanism

- (1) There is to be an Inter-Ministerial Coordination Mechanism to monitor drug control from a health and human rights perspective.
- (2) The Coordination Mechanism must prescribe mechanisms to ensure –
 - a) the creation of an over-arching national drug strategy for controlling drugs from a health and human rights perspective;
 - b) the convening of regular inter-ministerial meetings chaired by the Presidency or the Office of the Prime Minister to review the implementation of the national drug strategy;
 - c) the inclusion of civil society organisations active in the field of drug policy in deliberations concerning national drug policy;
 - d) a co-ordinated approach between public health and law enforcement agencies and other relevant government bodies and non-governmental bodies;
 - e) oversight of the creation of working groups as required by this Law (Articles 31, 32 and 34) and the adoption of measures to implement their recommendations;
 - f) facilitation of the collection and availability of reliable and comparable national data on drug use and drug offending for the development of evidence-based drug policies and programmes;
 - g) participation of government bodies relevant to drug policy in international processes such as the United Nations Commission on Narcotic Drugs.

International Legal Instruments:

Included in the recommendations of the Outcome Document of the 2016 United Nations General Assembly Special Session is the recommendation to state parties to develop and strengthen, as appropriate, the capacity of health, social and law enforcement and other criminal justice authorities to cooperate, within their mandates, in the implementation of comprehensive, integrated and balanced responses to drug abuse and drug use disorders, at all levels of government.

In 2016 the INCB recommended that countries improve inter-agency and inter-ministerial cooperation and coordination at the national level, particularly between health and drug control agencies.²¹

21 International Narcotics Control Board, *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes. Indispensable, Adequately Available and Not Unduly Restricted (E/INCB/2015/1/Supp.1)* (2016) https://www.incb.org/documents/Publications/AnnualReports/AR2015/English/Supplement-AR15_availability_English.pdf

According to WHO “ensuring that controlled medicines reach those patients who need them most is a multifaceted challenge. As such, it demands a response that is applied on many fronts and that requires the involvement of and cooperation among many sectors of Government and society. This response should be rooted in the recognition that controlled substances are indispensable for medical and scientific purposes. This recognition means that ensuring access to controlled substances should be given due importance on the public health agenda of countries. This recognition should also be at the source of the strong and sustained support that all Governments must provide to the complex task of removing impediments to the availability of controlled medicines and promoting their rational use.”²²

Commentary:

*Governments are encouraged to articulate in their national drug policy a set of objectives and outcome indicators to include:*²³

- Health – A reduction in the number of deaths, including deaths from overdose; a reduction in drug-related HIV or hepatitis infections; an increase in the number of citizens receiving voluntary treatment for drug dependence; better management of pain relief and palliative care through improved access to essential medicines; and increased training for healthcare workers on the use of controlled medicines.
- Development – Relief of poverty in areas of concentrated drug production, trafficking or retail sale via rural and urban development strategies that encompass access to education, employment, land, social support, improved infrastructure and better access to licit markets, etc.
- Security – A reduction in drug market-related violence; a reduction in the power and reach of organised crime; a reduction in corruption and money laundering; a reduction in internal displacements related to supply reduction measures; a reduction in the numbers and proportion of people imprisoned for minor, non-violent drug offences; a reduction in property and violent crimes associated with drug dependence – with a focus of law enforcement efforts on the most harmful aspects of the illicit drug market, rather than on low-level and non-violent dealers, people who use drugs, or vulnerable farming communities.

22 World Health Organization, *Ensuring Balance in National Policies on Controlled Substances: Guidance for Availability and Accessibility of Controlled Medicines* (2011) http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D7734FA350433C3F612414073A601F6?sequence=1

23 Some of the wording for this section has been taken from International Drug Policy Consortium, *IDPC Drug Policy Guide* (3rd edn, 2016) <https://idpc.net/publications/2016/03/idpc-drug-policy-guide-3rd-edition>

Article 4: Control of Activities

- (1) For the purposes of this Law the cultivation, production, manufacture, wholesale and retail trade, distribution, transport, possession, offering, brokerage, purchase, use, import and export of controlled drugs is “unauthorised” wherever it is for purposes other than medical or scientific ones.
- (2) [OPTION] For the purposes of this Law the cultivation, production, manufacture, wholesale and retail trade, distribution, transport, possession, offering, brokerage, purchase, use, import and export of controlled drugs is “unauthorised” wherever it is for purposes other than medical or scientific ones, with the exception of hemp-producing varieties of cannabis [characterized by low tetrahydrocannabinol content and high cannabidiol content], which is authorised for industrial purposes in accordance with the measures of control established pursuant to the provisions of this Law or regulations made under it.
- (3) The cultivation, production, manufacture, wholesale and retail trade, distribution, transport, possession, offering, brokerage, purchase, use, import and export of drugs is permitted for medical and scientific purposes subject to the measures of control established pursuant to the provisions of this Law or regulations made under it.

International Legal Instruments:

Paragraphs 1 and 3 of this article reflect the general obligation under the international drug conventions to ensure the availability of drugs for medical and scientific purposes, while implementing the applicable measures of control to limit their use exclusively to these purposes.

Paragraph 2 is an alternative option to paragraph 1, there being no requirement, within the international drug conventions, for the cultivation of cannabis which is exclusively for industrial purposes, to be controlled. Article 28 of the 1961 Convention provides that the international drug conventions do “not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes”. This Model Law has provided the optional article for countries interested in facilitating a domestic industry in industrial cannabis cultivation but concerned to ensure that in doing so they do not hamper attempts to control unauthorised activities. The optional article would require cannabis cultivation for industrial purposes to be authorised and in accordance with regulations promulgated pursuant to this Law. The United Nations Office on Drugs and Crime provides guidance for state authorities for distinguishing industrial cannabis from cannabis grown for purposes that must be controlled pursuant to the drug conventions.²⁴

²⁴ United Nations Office on Drugs and Crime, *Recommended Methods for the Identification and Analysis of Cannabis and Cannabis Products* (2009) https://www.unodc.org/documents/scientific/ST-NAR-40-Ebook_1.pdf at paragraphs 3.7 and 3.15

PART II: PENAL PROVISIONS

Article 5: Drug Trafficking

- (1) A person who, in the absence of any authorisation for medical or scientific purposes, intentionally carries out any activity in paragraph (2) commits an offence.
- (2) The activities are -
 - a) the manufacture of a controlled drug
 - b) the sale, or offer for sale, of a controlled drug;
 - c) brokerage, or trade in, a controlled drug;
 - d) the delivery, dispatch, export, import or transportation of a controlled drug for the purpose of any activity mentioned in sub-paragraph (b) or (c).
- (3) The burden of proof is on the prosecution to prove all elements of the offence.
- (4) A person who is authorised to conduct any of the activities in paragraph (2) for medical purposes and who acts in breach of their authorisation, or otherwise outside the scope of their authorisation, will not commit an offence pursuant to this article (see instead Article 8 and Article 9).
- (5) A person who commits an offence under this Article is liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

Article 6: Possession of a Controlled Drug for the Purpose of Drug Trafficking

- (1) Where a person is in unauthorised possession of a controlled drug with the intention of conducting an activity which constitutes an offence under Article 5 they commit an offence.
- (2) For the purpose of this Article whether the drug is possessed with the requisite intention is a matter to be proved by the prosecution and is to be determined in accordance with all the evidence available, including the extent to which the amount of controlled drug exceeds the thresholds provided in Schedule I of this Law.
- (3) No one will be convicted of an offence under this Article solely on the basis of an inference drawn from the amount of drug possessed.
- (4) Notwithstanding any other provision of law, the unauthorised possession, purchase, and transportation, of controlled drugs for personal use do not amount to an offence in law.

- (5) For the purpose of this Law "personal use" means -
- a) for the sole use of the person in possession of the controlled drug, or
 - b) for the collective and voluntary consumption of the controlled drug by a group of adult persons, all known personally to the person in possession of the controlled drug, where the person in possession of the controlled drug does not stand to gain financially from the collective consumption.
- (6) The controlled drugs in unauthorised possession are subject to the seizure and destruction provisions in Article 18 of this Law, regardless of whether the drugs are for the purpose of drug trafficking or for personal use.
- (7) A person who commits an offence under this Article is liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

Article 7: Unauthorised Cultivation or Production of a Controlled Drug for the Purpose of Drug Trafficking

- (1) A person who cultivates or produces the opium poppy, coca bush or cannabis plant in the absence of authorisation for medical or scientific [OPTION or, in the case of hemp-producing varieties of cannabis, industrial] purposes, with the intention of conducting an activity which constitutes an offence under Article 5, commits an offence.
- (2) For the purpose of this Article whether the drug is possessed with the requisite intention is a matter to be proved by the prosecution and is to be determined in accordance with all the evidence available, including the extent to which the amount of controlled drug exceeds the thresholds provided in Schedule I of this Law.
- (3) No one will be convicted of an offence under this Article solely on the basis of an inference drawn from the amount of drug cultivated or produced.
- (4) Notwithstanding any other provision of law, the unauthorised cultivation or production of controlled drugs for personal use does not amount to an offence in law.
- (5) A person who commits an offence under this Article shall be liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

Breaches of Terms of Authorisation

Article 8: Criminal Breach of Authorisation

- (1) A person who, for the purpose of financial gain or advantage, intentionally does any act in breach of the conditions of, or outside the scope of, their authorisation commits an offence.
- (2) A person may be arrested for an offence under this Article only if the police have secured a court order for the person's arrest.
- (3) A person may be prosecuted for an offence under this Article only with the consent of the Attorney General, who shall consult the Minister for Health in their decision-making.
- (4) The burden of proof is on the prosecution to prove all elements of the offence.
- (5) A person who commits an offence under this Article shall be liable upon conviction to sentence of the court in accordance with the sentencing provisions of this law (Schedule II).

Article 9: Administrative Breach

- (1) A person who inadvertently or recklessly does any act in breach of the conditions of, or outside the scope of, their authorisation, is to be dealt with in accordance with regulations made under this Law.

International Legal Instruments:

The provisions of the Model Drug Law enumerate the acts set forth in paragraph 1(a) of article 36 of the 1961 Convention, in paragraph 1(a) of article 22 of the 1971 Convention and in paragraphs 1 (a) (i) (ii) and (iii) of article 3 of the 1988 convention. Article 36(1) of the 1961 Single Convention, article 22(1) (a) and article 3(3) of the 1988 Convention provide that each of the proscribed acts must be 'committed intentionally' which implies that the criminal conduct must be performed consciously, wilfully or knowingly.

'Production' according to article 1(1)(t) of the 1961 Convention 'means the separation' of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained,' an agricultural operation that goes hand in hand with cultivation and which is distinct from the industrial process involved in the manufacture of other drugs.²⁵ 'Manufacture' according to article 1 (1)(n) 'means all processes, other than production by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs'.

²⁵ See United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961* (1973) https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_single_convention_1961.pdf at pages 26 and 27.

'Use' of drugs was consciously omitted from the articles that list the drug-related acts for which penal measures are required. The UN conventions do not oblige any penalty (criminal or administrative) to be imposed for drug use. The Commentary to the 1988 Convention in relation to its article 3 is quite clear on the issue: "It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence."²⁶

The international drug conventions do not require countries to punish either the possession or the supply of equipment for drug use/consumption.

The three international drug conventions distinguish between conduct that is for personal drug use and conduct that is for trafficking. This important distinction is not reflected in the written laws of all West African countries. The term 'personal use' is nowhere defined in the international drug conventions and the model provision reflects the broader and most normatively coherent of the conceptualisations found amongst signatories to the drug conventions.²⁷

Article 3(1) (a) (iii) of the 1988 Convention requires countries to criminalise possession where it is coupled with an intention to carry out a drug trafficking offence. To be found guilty of this offence the defendant must be found to have 'known' that the drugs were to be used for drug trafficking.²⁸

A clear distinction is drawn between conduct committed with the intent of drug trafficking (which must be criminalised) and conduct which is for personal use. Article 3(2) of the 1988 Convention subjects the requirement to criminalise conduct (including possession and cultivation) which is solely for personal use to the constitutional limitations and basic concepts of the legal system of each country. No obligation to criminalise conduct which is for personal use arises wherever the creation of such an offence would be inconsistent with a country's constitutional principles or basic legal concepts. Constitutional limitations which are relevant in this context include the right to health (enshrined in the constitutions of all members of ECOWAS) and the right to privacy (enshrined in the constitutions of the majority of members of ECOWAS).

For countries in which no constitutional or other legally enshrined inconsistencies arise in relation to the criminalisation of personal use, the conventions provide that measures for the treatment, education, aftercare, rehabilitation or social reintegration can be provided as alternatives to conviction or punishment.

The requirement articulated in Article 22 of the 1971 Convention to criminalise possession of the controlled drugs listed in Schedule I of the 1971 Convention is intended to criminalise such possession only where its purpose is for drug trafficking.²⁹

26 United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (E/CN.7/590)* (1988) https://www.incb.org/documents/PRECURSORS/COMMENTARY_1988CONVENTION/Commentary_to_the_1988_UN_Convention_E.pdf

27 Marks A, 'Treating the 'personal' as private: a normative definition of 'personal consumption' in legal instruments on drug control' (2019) 68 *International and Comparative Law Quarterly* Issue 1 (forthcoming).

28 UN ECOSOC, *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November–20 December 1988 : Official Records. Volume 1, Preparatory Work, Conference Documents on Organizational Matters, Main Conference Documents, Final Act and Resolutions, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. (E/CONF.82/16)* (1994), p12

29 Boister N, *Penal Aspects of the UN Drug Conventions*, vol 22 (Kluwer Law International The Hague, London and Boston 2001) pages 93-95

Commentary:

An overly punitive approach towards people who use drugs directly undermines public health: the criminalisation, incarceration and stigmatisation of people who use drugs fuels the HIV epidemic,³⁰ hepatitis C transmission,³¹ tuberculosis, overdose deaths and a range of other harms.³² The illegality of drug use can prevent people from accessing health services. Decriminalisation on the other hand enables people who use drugs to access health services without fear of arrest, stigma or discrimination. Decriminalisation frees up criminal justice resources. Some West African countries make provision for the swearing of an oath or declaration to abstain or refrain from drug use.³³ Such provisions are problematic when applied to persons who are dependent on drugs on account of drug dependence constituting 'a chronic, relapsing, medical condition'.³⁴ Research has shown that substance dependence, including injecting drug use, is not a failure of will or of strength of character but a chronic, relapsing medical condition.

Whilst the conventions stipulate that drug use should only be 'authorised' on medical or scientific grounds, there is no suggestion in the treaties that unauthorized drug use should be criminalized or otherwise punished. In criminalizing drug use states undermine the central purpose of the treaties which is the protection of public health.

A large number of UN Agencies have supported calls for ending criminal sanctions for personal possession and use on account of the proven negative health outcomes and human rights infringements attributable to such criminalisation.³⁵ The evidence from countries which have ended criminal sanctions for drug possession for personal use is that prevalence of drug use does not significantly increase and positive health and social benefits are achieved, including a reduction in offending.³⁶ West Africa would remove a huge weight from an already overburdened criminal justice system if it were to decriminalise drug use and possession for personal use and instead focus on expanding health and social services for the prevention and treatment of problematic drug use.³⁷ Decriminalisation of drug use and possession for personal use would enable law enforcement to focus on drug trafficking offences that the international conventions on drug control categorically require to be sanctioned in the criminal law. The West Africa

30 Global Commission on Drug Policy, 'The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic' (2012) http://www.globalcommissionondrugs.org/wp-content/uploads/2012/03/GCDP_HIV-AIDS_2012_EN.pdf

31 Global Commission on Drug Policy, 'The Negative Impact Of The War On Drugs On Public Health: The Hidden Hepatitis C Epidemic' (2013) http://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP_HepatitisC_2013_EN.pdf

32 International Drug Policy Consortium, *Drug Policy in Africa: Towards a Human Rights-Based Approach* (2017) http://filesserver.idpc.net/library/IDPC-advocacy-note_Human-rights-in-Africa.pdf

33 Bridge J and Loglo MG, *Drug Laws in West Africa: A Review and Summary* (International Drug Policy Consortium and West Africa Commission on Drugs 2017) http://filesserver.idpc.net/library/Drug-laws-in-West-Africa_ENGLISH.pdf

34 World Health Organization, *Neuroscience of Psychoactive Substance Use and Dependence* (2004), pp. 7, 32-34.

35 World Health Organization, 'Joint United Nations Statement on Ending Discrimination in Health Care Settings' (2017) http://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf and World Health Organisation *A Technical Brief: HIV and Young People who inject drugs* (2015)

36 European Monitoring Centre for Drugs and Drug Addiction, *Illicit Drug Use in the EU: Legislative Approaches* (2005); and Eastwood N, Fox E and Rosmarin A, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (2016)

37 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014), p 35.

Commission on Drugs calls on governments and other stakeholders in the region to treat drug use as a public health issue with socio-economic causes and consequences rather than a criminal justice matter. It also calls on governments not to treat possession, or acquisition of amounts of a drug that are associated with personal use and not intended for sale, as punishable conduct.³⁸

Specific reference is made in the penal provisions of the Model Drug Law to the burden of proof being on the prosecution for all elements of the offence, as this appears to have been reversed in the drug laws of some countries in West Africa. The presumption of innocence is an international human right under the UN's Declaration of Human Rights (Article 11) and under the African Charter on Human and Peoples (Article 7). This means that it is for the prosecution to prove that the substance is a controlled drug. It means that it is for the prosecution to prove that the person has committed an activity prohibited in Article 5. Under Articles 6 and 7, it means that it is for the prosecution to prove that the defendant possessed the controlled drug with the intention of committing an offence. Evidence of criminal intention to commit an offence for the purpose of Articles 6 and 7 may take many forms. Some examples include evidence of unexplained wealth, unusual amounts of cash, division of the drugs into multiple packages or wholesale amounts (e.g. amounts that exceed a year's average individual use) and the amount of drugs possessed (further detail regarding thresholds is provided in Schedule I). It is important that a person not be convicted for drug trafficking offences where the sole evidence of their intention to use the drugs for this purpose is the amount of drugs in their possession as this may violate the presumption of innocence.³⁹

Article 5 is deliberately worded so as not to apply to persons authorised for medical and scientific purposes. Articles 8 and 9 contain the relevant provisions for such conduct. Article 8 requires the consent of the Attorney General in consultation with the Minister for Health for a prosecution of this offence. This reflects the fact that the vast majority of health professionals act within the law and should be free to carry out their professional duties without fear of reprisals. The provision seeks to ensure that a decision to prosecute a health professional is a particularly carefully considered one. According to the INCB access to medicines can be 'unduly restricted' out of 'fear of prosecution or sanction'.⁴⁰ Accordingly the INCB has recommended that governments should identify and rectify any undue restrictions in national narcotics law, regulations or administrative policies that impede prescribing, dispensing or access to essential medicines. It has recommended that countries ensure that no legal sanctions are attached to unintentional mistakes in the handling of opioids.⁴¹ One of the key points to emerge from discussion of an Expert Meeting convened in Accra (September 2017) by the West Africa Commission on Drugs was that: "Penalties for suspected diversion are very harsh and there is no leniency for an administrative framework in which to deal with infractions by doctors, pharmacists etc. that are

38 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014)

39 For example, see the Canadian decision of *R v Oakes* (1986) 50 CR (3d) 1, 24 CCC (3d) 321 (SCC) and the South African decision in *S v Bhulwana* 1995 (2) SACR 748 (CC)

40 International Narcotics Control Board, *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes. Indispensable, Adequately Available and Not Unduly Restricted (E/INCB/2015/1/Supp.1)* (2016) https://www.incb.org/documents/Publications/AnnualReports/AR2015/English/Supplement-AR15_availability_English.pdf

41 International Narcotics Control Board, *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes. Indispensable, Adequately Available and Not Unduly Restricted (E/INCB/2015/1/Supp.1)* (2016) https://www.incb.org/documents/Publications/AnnualReports/AR2015/English/Supplement-AR15_availability_English.pdf

due to error (honest mistake) and not with criminal intent."⁴² Paragraph 43 of the INCB special report of 1989, states: "While sanctions are necessary to deal with persons who transgress the law, they should not, as such, constitute an impediment to the prescription or dispensation of opiates in accordance with existing regulations. The vast majority of health professionals exercise their activity within the law and should be able to do so without unnecessary fear of sanctions for unintended violations. Occasions may still arise when a health professional could nevertheless be exposed to legal action for technical violations of the law. This possibility may tend to inhibit the prescribing or dispensing of opiates."⁴³ In some West African countries, provisions exist to enhance the sentence if a person is a physician or pharmacist. In light of the dire need to improve access to controlled drugs it is recommended that such provisions be repealed and that public health professionals are released from the fear of facing prosecution for drug trafficking on account of their professional activities.

The Model Drug Law does not include an offence of permitting premises to be used for unauthorised drug consumption because the UN conventions do not oblige countries to criminalise this conduct. The criminalisation of such conduct facilitates the targeting by police of specialist services for people who use drugs. It can also harm public health as people who use drugs in public areas are more vulnerable to public hostility and this may increase the harms related to drug use.⁴⁴ The recommendation of the West Africa Commission on Drugs is that "the law should discourage the targeting by police of specialist services for people who use drugs (such as drug treatment facilities, and needle and syringe programmes)".⁴⁵ The criminal laws of some West African countries contain offences criminalising persons for permitting the use of premises for unauthorised drug consumption.⁴⁶ Such countries may wish to delete these offences from their laws in order to reduce the stigmatisation of people who use drugs and to encourage the provision of health services for persons in need of them.

Offences Involving Precursors, Equipment and Materials

Article 10: Offences Involving Precursors, Equipment and Materials

(1) A person who manufactures, transports or distributes equipment, materials or precursors

42 Report: Expert Drug Law Model Workshop in West Africa, 19-20 September 2017, unpublished.

43 International Narcotics Control Board, *Report of the International Narcotics Control Board for 1989. Demand for and Supply of Opiates for Medical and Scientific Needs. Special Report Prepared Pursuant to Economic and Security Council Resolution 1989/15. (E/INCB/1989/1/Supp.)* (1989) https://www.incb.org/documents/Publications/AnnualReports/AR1989/1989_ANNUAL_REPORT_SUPPLEMENT_ENG.pdf

44 Rhodes T et al, 'The Social Structural Production of HIV Risk among Injecting Drug Users' (2005) 61 *Social science & medicine* 1026; Rhodes T, 'The "Risk Environment": A Framework for Understanding and Reducing Drug-Related Harm' (2002) 13 *International journal of drug policy* 85

45 West Africa Commission on Drugs, *Background Paper 9: Harmonizing Drug Legislation in West Africa - A Call for Minimum Standards* (2013)

46 Bridge J and Loglo MG, *Drug Laws in West Africa: A Review and Summary* (International Drug Policy Consortium and West Africa Commission on Drugs 2017) http://fileserv.idpc.net/library/Drug-laws-in-West-Africa_ENGLISH.pdf

knowing that they are to be used for the unauthorised cultivation, production or manufacture of controlled drugs commits an offence.

- (2) The burden of proof is on the prosecution to prove all elements of the offence.
- (3) Notwithstanding any other provision of law, neither the possession nor the supply of equipment used in the consumption of drugs may be an offence in law, nor is any such equipment to be subject to seizure or destruction, merely by reason of it being possessed or supplied for such use, or by reason of it containing trace amounts of a controlled drug.
- (4) A person who commits an offence under this Article shall be liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

International Legal Instruments:

This article enumerates the activities directly or indirectly referred to in article 3, paragraphs 1(a) (iv) of the 1988 Convention. The purpose of this provision is not to impede the lawful production, use and distribution of products made with precursors but to prevent their improper diversion for use in contravention of the UN Conventions. The provisions require that the alleged offender must have dealt with the equipment, materials or precursors 'knowing that they are to be used for' the proscribed purposes. The obligation in 1(c) (ii) of the 1988 Convention to criminalise the possession of such equipment is subject to constitutional principles and basic concepts of State Parties' legal systems and does not therefore feature in the provisions of the Model Drug Law.

Commentary:

Paraphernalia and equipment for the use of drugs (such as needles and syringes, pipes, etc.) does not fall within the scope of Article 3 of the 1988 convention, which is concerned with equipment used in the illicit production and manufacture of drugs.⁴⁷ Criminalising the possession of so-called paraphernalia (equipment associated with drug use) leads people who use drugs to share and hide their equipment in unsafe ways. The WHO has stated that countries should not criminalize the possession or the supply of this equipment.⁴⁸

Laundering of Proceeds and Organization, Management and Financing of Offences

There is no model provision in this Model Drug Law. The Model Legislation on Money Laundering and Financing of Terrorism by UNODC and the International Monetary Fund (2005, for civil

⁴⁷ United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (E/CN.7/590)* (1988) https://www.incb.org/documents/PRECURSORS/COMMENTARY_1988CONVENTION/Commentary_to_the_1988_UN_Convention_E.pdf at p291

⁴⁸ World Health Organization, 'Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations.' [2014]

law systems)⁴⁹ and the UNODC/Commonwealth Secretariat/International Monetary Fund – Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (2009, for common law systems)⁵⁰ contain detailed model legislation on laundering, confiscation and international co-operation in relation to the proceeds of crime. The United Nations Convention against Transnational Organized Crime of 2000 also contains key provisions concerning the laundering of proceeds of crime.⁵¹

International Legal Instruments:

Article 3, paragraphs 1(b) (i) and (ii) of the 1988 Convention mandatorily require the criminalization of laundering of drug trafficking proceeds, including conversion or transfer of the proceeds and concealment or disguise of the true origin of the proceeds. The criminalization of the acquisition, possession or use of proceeds is subject to the constitutional principles and basic concepts of the legal systems of States parties (article 3, paragraph 1 (c) (ii) of the 1988 Convention). The organization and management of finance of drug trafficking offences is required by Paragraph 1(a) (v) of article 3 of the 1988 Convention.

Incitement

Article 11: Incitement to Commit Offences

- 1) A person who publicly incites or induces by any means another person to commit any offence under this Law commits an offence.
- 2) For the purposes of this Article the provision of factual information on a controlled drug and its uses, or the expression of an opinion on drug policy or reform, does not amount to incitement or inducement.
- 3) The burden of proof is on the prosecution to prove all elements of the offence.
- 4) A person who commits an offence under this Article shall be liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

49 United Nations Office on Drugs and Crime and International Monetary Fund, *Model Legislation on Money Laundering and Financing of Terrorism* (2005) <https://www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf>

50 United Nations Office on Drugs and Crime, International Monetary Fund and Commonwealth Secretariat, *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems)* (2009) https://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf

51 The United Nations, *United Nations Convention against Transnational Organized Crime* (2004)

Article 12: Incitement to Unauthorised Use by Others

- 1) A person who publicly incites or induces others by any means to use drugs for unauthorised purposes commits an offence.
- 2) The burden of proof is on the prosecution to prove all elements of the offence.
- 3) For the purposes of this Article the provision of factual information on a controlled drug and its uses, or the expression of an opinion on drug policy or reform, will not amount to incitement or inducement.
- 4) For the purposes of this Article the following do not amount to incitement or inducement –
 - a) the provision of sterile injection equipment and related items for safer injection, including (among other things) sterile water, swabs, filters, safe acid preparations, spoons and bowls;
 - b) the provision of any other equipment used to consume controlled drugs by means other than injection including (among other things) pipes, stems, metal screens, alcohol wipes and lip balm; and
 - c) the provision of harm reduction or drug treatment services.
- 5) A person who commits an offence under this Article shall be liable upon conviction to sentence of the court in accordance with the sentencing provisions of this Law (Schedule II).

International Legal Instruments:

The above articles meet the obligation (subject to constitutional principles and basic concepts of State Parties' legal systems) imposed on States by paragraph 1 (c) (iii) of article 3 of the 1988 Convention, namely to establish as a criminal offence the act of publicly inciting or inducing others by any means to commit any of the offences specified in the Convention or to engage in illicit drug use.

Commentary:

This obligation is subject to the constitutional principles and basic concepts of countries' legal systems and the Model Law does not recommend the adoption of these model provisions in countries where no such offence is already in existence. In some countries, existing criminal legislation on incitement undermines public health and impedes HIV prevention by providing a barrier to the effective operation of sterile syringe programs and other forms of harm

reduction. It is for this reason that we have included a Model Drug Law provision so as to assist countries wishing to maintain such offences to mitigate the harm caused to public health by their enforcement.

Attempts, Association or Conspiracy to Commit Offences, Aiding or Abetting and Preparatory Acts

Commentary:

There is no model provision for this conduct which is covered by national laws that govern these various forms of participation and inchoate offences.

International Legal Instruments:

Article 36(2) (a) (ii) of the 1961 Single Convention and Article 22(2) (a) (ii) of the 1971 Convention contain the relevant obligations.

Police Powers of Search, Questioning and Detention; Seizure

Article 13: Powers of Search and Seizure of Incriminating Articles

- (1) Powers of search exercised in relation to activities governed by this Law must only be exercised in accordance with national law and where the officer in exercise of such powers has reasonable grounds to suspect any of the following circumstances -
 - a) that any person is about to commit an offence;
 - b) that any person is in the act of committing an offence;
 - c) that any person has committed an offence.
- (2) Searches must be carried out in accordance with the law, and in a manner consistent with the inherent dignity of the person and the right to privacy.
- (3) Any search of a person must be conducted by an officer of the same sex as the suspect.
- (4) If a strip search is deemed justified and necessary in accordance with the law then it must be conducted in private.

- (5) If an internal cavity search is deemed necessary and in accordance with the law then it may only be conducted by a medical professional and with the informed consent of the person.
- (6) Where the premises searched is a medical centre or premises authorised for the purpose of drug treatment or harm reduction services, a court order must be obtained before the premises may be searched.
- (7) Pursuant to the powers granted in this Article an officer may seize and remove any substance or other article if the officer has reasonable grounds to believe that an offence under this Law has been, is being, or is about to be committed in respect of the substance or article or if the officer suspects the substance to be a controlled drug.
- (8) Equipment used or suspected of being used in the consumption of drugs is not subject to seizure or destruction merely by reason of it being possessed or supplied for such use or by reason of it containing trace amounts of a controlled drug.
- (9) As soon as practicable after seizing a controlled drug the police officer must read aloud to and give to each relevant person a written statement to the following effect: 'You have the right, under Article X of X Law to apply to the [Court/Police Station] for the return of the seized drug on the basis of medical need or other authorised purpose. If you do not make an application within [x amount of time] the drug may be destroyed and only a sample preserved.'

Article 14: Duty to Record and Inform

- (1) In exercising any powers of search and seizure under Article 13 an officer must comply with this Article.
- (2) Before conducting a search of a person, the officer must inform the person of the reason for the search and provide confirmation in writing.
- (3) The officer must make a record of any search conducted under Article 13 on the spot, or if that is not practicable, as soon as reasonably practicable after the search.
- (4) The record of search must state -
 - a) the name of the person searched;
 - b) the object of the search;
 - c) the grounds for making it;
 - d) the date and time when it was made;

- e) the identity of the officer conducting the search;
 - f) a description – and (if possible) photograph – of anything found in the course of the search;
 - g) a description – and (if possible) photograph – of any objects seized; and
 - h) the signature of the person searched or where this is refused, the signature of a witness to the search and a note made of any reason provided by the person searched for not providing a signature.
- (5) The officer, upon completion of the record or as soon as practicable thereafter, must provide the person searched with a copy of the record and retain a copy.

Article 15: Meaning of Reasonable Suspicion for Searches

- (1) For the purposes of this Law a “reasonable ground of suspicion” means the formation of a genuine and reasonable suspicion in the officer’s own mind that they will find an object for which the search power being exercised allows them to search.
- (2) A suspicion will be “reasonable” where there is an objective basis for that suspicion based on facts, behaviour, information and/or intelligence that are relevant to the likelihood that the object in question will be found, so that a reasonable person would be entitled to reach the same conclusion based on the same facts, behaviour, information and/or intelligence.
- (3) A suspicion or knowledge that a person is in possession of a syringe or other material for the purpose of consuming drugs does not constitute a reasonable ground for suspicion under this Law.
- (4) A suspicion or knowledge that a person consumes drugs or is dependent on drugs does not constitute a lawful ground for reasonable suspicion under this Law.

Powers of arrest and detention

Article 16: Powers of arrest and detention

- (1) An officer may arrest a person for an offence under this Law if the officer has reasonable grounds for arrest.
- (2) Any officer conducting an arrest must act in accordance with the law and must clearly identify themselves and the unit to which they belong by showing an official identity card which visibly

displays their name, rank and identity number. Any vehicles used must have clearly visible number plates and any other required or legally prescribed identity markers or numbers.

- (3) The level of any force used in conducting an arrest must be proportionate and no more than necessary.
- (4) An arrest is not lawful unless the person arrested is informed that they are under arrest and of the ground for the arrest as soon as practicable after the arrest.

Article 17: Meaning of reasonable suspicion for arrests

- (1) Reasonable grounds for arrest is the legal test which an officer must satisfy before arresting a person.
- (2) To satisfy the legal test the officer must have formed a genuine and reasonable suspicion in their own mind that -
 - a) the person is about to commit an offence under this Law, or
 - b) the person is committing an offence under this Law, or
 - c) the person has committed an offence under this Law.
- (3) A suspicion will be reasonable where there is an objective basis for that suspicion based on facts, behaviour, information and/or intelligence which are such that a reasonable person would be entitled to reach the same conclusion based on the same facts, behaviour, information and/or intelligence.
- (4) For the purposes of this Article the fact that a person is suspected of consuming a controlled drug or of being dependent on a controlled drug does not constitute a lawful ground for reasonable suspicion.
- (5) For the purposes of this Article the fact that a person is suspected of possessing a controlled drug for personal use, whether authorised or unauthorised, does not constitute a lawful ground for reasonable suspicion.
- (6) For the purpose of this Article possession of a syringe or other material for the purpose of consuming drugs does not constitute a reasonable ground for suspicion.

Powers of Confiscation, Seizure and Destruction

Article 18: Treatment of Seized Material

- (1) An officer may seize –
 - a) substances reasonably suspected to be a controlled drugs; or
 - b) anything reasonably suspected to be connected to the commission of an offence.

- (2) Material seized must be immediately, or as soon as reasonably practicable after its seizure, placed under seal in the presence of the person from whom they are seized, or where this is not possible in the presence of two identifiable witnesses. The sealed container must be prepared in such a manner as to prevent any fraudulent removal. Each container must be numbered and must bear on its wrapping or on a label incorporated in the seal a description of the material that it contains, specifying the amount or weight of the substance seized.

- (3) Sub-paragraphs (a) to (d) apply where the material seized is suspected to be a controlled drug –
 - a) The substance, when dried, must be weighed and both its weight and a description of the weighing method and the date, place and circumstances of the seizure, including the type and number of any packets or other form of container in which the substance was discovered in must immediately, or as soon as reasonably practicable, be noted in a record of the search by the officer conducting it. The record must be signed by the person from whom it was seized or any witness where the suspect is unable or unwilling to sign.
 - b) The substance must be placed under seal and the nature and weight of its contents must be indicated on the wrapping or on a label incorporated in the seal.
 - c) Where the quantity is large, a sample of a sufficient quantity to enable the substance to be determined must be taken. Once the sample has been taken, the containers must be resealed and a report must be prepared, stating the number of samples taken, the nature and weight of the substances contained in each of them and the alterations to the original sealed containers. The original containers must be stored and processed in accordance with the law.
 - d) The substance seized, or where the amount of substance seized is large then a sample of it, must be sent to the responsible authority to determine whether it is a controlled drug.
 - e) If a person from whom a suspected controlled drug is seized has a medical prescription for the controlled drug it is suspected to be then upon production of the prescription to the relevant authority, the person is to have the substance returned to them as soon as reasonably practicable.

- (4) Where the material seized is money, it must be counted immediately, or as soon as possible

after it has been seized, and a note in the record of the search must immediately, or as soon as reasonably practicable made of the quantity seized and the date, place and circumstances of its seizure. The record must be signed by the person searched or the witness where the suspect is unable or unwilling to sign.

Article 19: Rights of an Arrested Person

- (1) The following rights must be afforded to all persons under arrest for an offence under this Law and they must be informed of these rights -
- a) the right to be free from torture and other cruel, inhuman and degrading treatment and punishment;
 - b) the right to be informed of the reasons for their arrest and any charges against them;
 - c) the right to silence and freedom from self-incrimination;
 - d) the right of access, without delay, to a lawyer of their choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by the state or by a non-state institution;
 - e) the right of access to a family member or another adult person of their choice where the person is not of adult age or is otherwise vulnerable;
 - f) the right to humane and hygienic conditions during the arrest period, including adequate water, food, sanitation, accommodation and rest, as is appropriate for the time spent in police custody;
 - g) the right to contact and access a family member or another person of their choice, and if relevant consular authorities or an embassy;
 - h) the right to receive urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities;
 - i) the right to information in accessible formats, and the right to an interpreter;
 - j) the right to apply for release on bail or bond pending investigation or questioning by an investigating authority or the person's appearance in court;
 - k) the right to challenge promptly the lawfulness of their arrest before a competent judicial authority;
 - l) the right to freely access complaints and oversight mechanisms; and
 - m) the right to reasonable accommodation which ensures equal access to substantive and procedural rights for persons with disabilities.

- (2) At the time of their arrest, all persons must be informed of the rights set out in paragraph 1, orally and in writing, and in a language and format that is accessible and is understood by the arrested person.
- (3) Authorities must provide the arrested person with the necessary facilities to exercise the rights set out in paragraph 1.
- (4) Where a person in police custody claims to be or exhibits any signs of being intoxicated or dependent on drugs or undergoing medical treatment for which they have been prescribed a controlled drug, then the police must seek immediate medical attention for the person.
- (5) A person may not be questioned if they are unfit to be questioned (whether on account of intoxication or for any other reason).

Article 20: Police Training, Oversight, Accountability and Record Keeping

- (1) Regulations must make the following provisions –
 - a) provision for the receipt and processing of complaints against the police from members of the public;
 - b) provision for the publication of the process for making a complaint against the police;
 - c) provision for all police officers to be trained about the medical needs of persons who are intoxicated and persons who are dependent on drugs;
 - d) provision for training in the use of drug testing devices before any such devices are deployed;
 - e) provision for the maintenance of accurate and complete records of searches, seizures, charging decisions, and treatment of persons in police custody;
 - f) provision for an independent oversight body to oversee police conduct.

International Legal Instruments:

Article 14 (5) of the 1988 Convention stipulates that “The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in Table I and Table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.”

These provisions have been drafted in accordance with the Luanda Guidelines,⁵² the right to privacy (enshrined in the constitutions of the majority of ECOWAS members), International Human Rights Standards for Law Enforcement⁵³ and in accordance with the Frankfurt principles on Drug Law Enforcement.⁵⁴ The West African countries which do not protect the right to privacy in their constitutions are encouraged to do so.

Commentary:

The vulnerability of people who use drugs to excessively aggressive policing has been documented in many countries. Drug laws should embody protections from abusive drug policing, including protection from illicit stop and search, protection from extortion, protection from violations of due process and protection from interrogation of people when they are in a state of drug withdrawal, or the denial of health care (including medication-assisted treatment) to people while in detention. These provisions have been written in such a way as to enable them to supplement the laws in existence in West African countries.

The Model Law seeks to minimise unnecessary harassment of people who use drugs and who have no intention to traffic drugs. It seeks to enhance transparency and accountability through record-taking and minimise opportunities for corruption.

A police power to arrest persons on account of their drug use makes people who use drugs less likely to access health services where they do exist and exacerbates unsafe injecting practices.⁵⁵ In order to reduce unnecessary burdens on the criminal justice system and to avoid the risk of unjustified pre-trial detention of people who use drugs and concomitant public health harms, it is preferable to provide police and/or prosecution authorities with guidelines on the evidence and forms of conduct that may and may not provide reasonable grounds for the exercise of police powers. Schedule I on Indicative Thresholds will be useful in this regard. Possession of drugs for personal use is not an offence in the Model Drug Law and such guidelines should make it clear to the police that evidence of drug use is not by itself evidence of criminal conduct. Even though possession of drugs for personal use does not in and of itself provide reasonable grounds for search or arrest, powers of seizure and confiscation of controlled drugs apply even

52 African Union, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2014) http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (Luanda Guidelines); Organisation of African Union, *African (Banjul) Charter on Human and Peoples' Rights* (1981) http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf Articles 2, 3, 5, 6, 7 and 26 of the African Charter set out States' obligations to provide all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary.

53 United Nations High Commissioner for Human Rights, 'International Human Rights Standards for Law Enforcement - A Pocket Book on Human Rights for the Police' <https://www.ohchr.org/Documents/Publications/training5Add1en.pdf>

54 International Conference on Drug Policy and Policing, 'Frankfurt Principles on Drug Law Enforcement' (Nov 2013) <http://www.leahn.org/wp-content/uploads/2013/08/131101.-Frankfurt-Principles-on-Drug-Law-Enforcement.-International-Conference-on-Drug-Policy-and-Policing.pdf>

55 Nigeria National Agency for the Control of AIDS, *Legal Environment Assessment for HIV/AIDS Response in Nigeria* (2015) pp 45, 67 http://www.ng.undp.org/content/nigeria/en/home/library/democratic_governance/legal-environment-assessment-for-hiv-response-in-nigeria.html

where the controlled drugs are for personal use. This enables the police to seize and confiscate controlled drugs that are in plain sight of the authorities, or that the police encounter in the course of a lawful search.

Since the Conventions do not prescribe any particular way in which States should search, seize, confiscate, destroy or otherwise dispose of controlled drugs or precursors, each State Party will need to take such measures as are necessary and appropriate in the national context.

The law should create, or defer to the use of, a functioning mechanism for police oversight and for people suffering from abusive police practices to make complaints and seek redress.⁵⁶ The law should discourage the targeting by police of drug treatment facilities, harm reduction services, or other services for people who use drugs, and of less serious offending. The law should recognize the vulnerability of drug police to corruption and should embody specific measures to prevent and address corruption in drug policing. In view of the many instances in the history of drug law enforcement in which laws were applied in a discriminatory way or so as to 'crack down' on a marginalised group, drug laws should incorporate mandatory monitoring and evaluation mechanisms to detect and address discriminatory practices in drug law enforcement.⁵⁷ The oversight body should strengthen law enforcement for more selective deterrence, focusing on high-level targets including drug-related activities of individuals in positions of public trust.

Evidential and Procedural Matters

Article 21: Pre-Trial Detention

- (1) Pre-trial detention is a measure of last resort and may only be used where necessary and where no other alternatives are available.
- (2) Regular review of pre-trial detention orders must be provided for in national law. Judicial authorities and detaining authorities must ensure that all pre-trial detention orders are subject to regular review.
- (3) If the judicial authority finds that the completion of the proceedings is being delayed unreasonably by the State or its agents, the judicial authority may make any order it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order to release the accused if the length of their detention is inconsistent with the right of detained persons to trial within a reasonable time.

⁵⁶ West Africa Commission on Drugs, *Background Paper 9: Harmonizing Drug Legislation in West Africa - A Call for Minimum Standards* (2013)

⁵⁷ Ibid.

- (4) Where an order of release is made under paragraph (3) the release may be accompanied by any proportionate and necessary safeguards.
- (5) Judicial authorities must investigate any delay in the completion of proceedings which could substantially prejudice the prosecution, the pre-trial detainee or their lawyer or other legal service provider or a witness.
- (6) In considering the question of whether any delay is reasonable, a judicial authority must consider the following -
 - a) the duration of the delay;
 - b) the reasons advanced for the delay;
 - c) whether any person or authority is responsible for the delay;
 - d) the effect of the delay on the personal circumstances of the detained person and witnesses;
 - e) the actual or potential prejudice caused to the prosecution or the defence by the delay;
 - f) the effect of the delay on the administration of justice;
 - g) the adverse effect on the interests of the public in the event of the prosecution being stopped or discontinued;
 - h) any other factor which in the opinion of the judicial authority ought to be taken into account.

Commentary:

Guidance on pre-trial detention is provided in the Luanda Guidelines.⁵⁸ The presumption of innocence applies to all persons, regardless of the nature of the offence with which they are charged; there is no lawful justification for treating those charged with drug offences as if national and international rights standards do not apply to them.

Article 22: Prosecution of Offences

- (1) Where a person is prosecuted for an offence under this Law, the weight and identity of the relevant substance must be particularized in the charge wherever possible.

⁵⁸ African Union, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2014) http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (Luanda Guidelines); Organisation of African Union, *African (Banjul) Charter on Human and Peoples' Rights* (1981) http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf Articles 2, 3, 5, 6, 7 and 26 of the African Charter set out States' obligations to provide all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary.

Article 23: Proof That the Substance Is a Controlled Drug

- (1) Where a person is prosecuted for an offence under this Law it is for the prosecution to prove that the substance to which the charge relates is a controlled drug by providing a report from the relevant authority in which it is stated that they are satisfied that the substance is a controlled drug for the purpose of this Law, and in which the method used to identify the drug is explained and the weight of that part of the substance which is a controlled drug stated.

Article 24: Analyst Report

- (1) The relevant authority must state in their report the number of samples entrusted to them and the nature and weight of the substance contained in each of them, the number of samples used and the amount of any substance they have identified as a controlled drug.

Powers and Duties of the Court in Regard to Sentencing

Article 25: Powers and Duties of the Court

- (1) When sentencing an offender who has been convicted for an offence under this Law-
 - a) no mandatory minimum sentences may be imposed;
 - b) the court must act in accordance with the sentencing guidelines produced pursuant to this Law (Schedule II);
 - c) the court must provide reasons for its sentencing decision and the offence for which the offender has been sentenced.
 - d) a record must be made of the court's sentence and its reasons.
- (2) The court record must specify both the offence for which the person has been convicted and wherever reasonably practicable both the name of controlled drug in respect of which the offence was committed.

Article 26: General Objectives

- (1) In determining the sentence of an offender who has been convicted under this law the Court must have regard to the following –
 - a) the need to promote consistency in sentencing;
 - b) the need to promote public confidence in the criminal justice system, and the role of transparency in sentencing decisions in promoting public confidence;
 - c) the need for sentencing to reflect the harm caused by the offence and the culpability of the offender, and any mitigating factors personal to the offender.

Article 27: Determining the Seriousness of the Offence and the Applicability of any Mitigating Factors Personal to the Offender

- (1) The court must determine the seriousness of the offence in accordance with the sentencing guidelines provided in Table I of Schedule II.
- (2) The court must determine the applicability of any mitigating factors personal to the offender in accordance with Table II of Schedule II.
- (3) The purpose of determining the seriousness of the offence and the applicability of any mitigating factors personal to the offender is to enable the court to impose an appropriate sentence for an offender convicted of an offence under this law, and in particular to determine –
 - a) whether a custodial or alternative to custody is appropriate;
 - b) the length of any custodial sentence;
 - c) any conditions to be imposed in sentencing an offender to an alternative to custody sentence;
 - d) the level of any fine to be imposed.

Article 28: The Imposition of Fines

- (1) A fine may be imposed in addition to any sentence of imprisonment.
- (2) A fine may not be imposed in lieu of a sentence of imprisonment where the seriousness of the offence or the absence of mitigating factors personal to the offender are such that a sentence of imprisonment is the most appropriate sentence.

- (3) The amount of the fine must reflect the seriousness of the offence in accordance with the bands provided in Table III of Schedule II and any fine must be within the offender's means.

Article 29: Alternatives to Custody

- (1) Where the seriousness of the offence is at the lower end of the scale or mitigating factors personal to the offender are present, the Court must consider the appropriateness of sentencing the offender to an alternative to custody.

Article 30: Voluntary Access to Clinical Assessment

- (1) If there is information (including any such assertion by the offender) that the offender was dependent on a controlled drug when they committed an offence, or dependent at the time of sentencing, following a finding of guilt, the court will request the offender's consent to order a clinical assessment by a qualified health professional to determine the nature of the drugs consumed by the person and their condition at both the time of the offence and the time of the examination.
- (2) Where the offender consents, the Court may order a clinical assessment by a qualified health professional to determine the nature of the drugs consumed by the person and their condition at both the time of the offence and the time of the examination.
- (3) Where the result of an assessment is that the offender was at the time of the offence, dependent on drugs, lacked the financial means to fund their drug habit and that their offending was to finance their drug consumption, the court must note this is a mitigating factor and consider sentencing the offender to an alternative to custody, including drug treatment.
- (4) For the purpose of this Article an offender will be deemed to be dependent on drugs only on the assessment of a qualified health professional, such medical assessment being requested by the court and only on the provision of informed consent for such an assessment from the offender.
- (5) An order for drug treatment may only be imposed with the consent of the offender.
- (6) A person retains the right to refuse to participate in a medical assessment or in drug treatment, and no penalty of any kind may be imposed for such refusal.

International Legal Instruments:

Article 36 of the 1961 Convention requires that serious offences be “liable to adequate punishment, particularly by imprisonment or other penalties of deprivation of liberty”. Article 22 of the 1971 Convention calls for measures to ensure that serious offences (as defined by the state party) are “liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty”. Article 3, paragraph 4 (a), of the 1988 Convention requires that the commission of offences be liable to sanctions which “take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation”. The implication of the Commentaries to the Conventions is that the imposition of a fine in the absence of deprivation of liberty would be appropriate only in relation to a less serious offence, and not as alternative to deprivation of liberty where the offence is serious.⁵⁹ With respect to the seriousness of the offence the *1971 Commentary* suggests that seriousness should be identified on the basis of ‘potential for causing, directly or indirectly, damage to the health of people other than the offender, particularly of people residing in countries other than that in which the offence is committed.’⁶⁰ The *1971 Commentary* appears to have transnational trafficking in mind and suggests that Parties are not required to consider as a serious offence the possession of a small amount of a controlled drug for sale by people who use drugs to finance their own dependency.⁶¹

Article 3(4) (c) of the 1988 Convention provides that ‘in appropriate cases of a minor nature’ countries may provide ‘as alternatives to conviction or punishment’ measures such as education, rehabilitation or social reintegration’.

Article 3(4) (c) of the 1988 Convention provides that in the case of a drug dependent offender the provision of treatment and aftercare may be appropriate. This appears to apply to all offences, including those of a serious nature.

Article 3(5) of the 1988 Convention requires countries to ‘ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences particularly serious’.

Commentary:

*The three international drug control conventions aim to ensure that measures will be implemented more strictly against those whose authority, functions, share of profits and criminal culpability are considered the most serious.*⁶² As control, authority, profit-sharing and

⁵⁹ United Nations, *Commentary on the Convention on Psychotropic Substances 1988 (E/CN.7/589)* (1976) https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_Convention_1971.pdf at p351

⁶⁰ United Nations, *Commentary on the Convention on Psychotropic Substances 1988 (E/CN.7/589)* (1976) https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_Convention_1971.pdf at p348

⁶¹ United Nations, *Commentary on the Convention on Psychotropic Substances 1988 (E/CN.7/589)* (1976) https://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_Convention_1971.pdf at p352

⁶² International Narcotics Control Board, *Report of the International Narcotics Control Board 2007 - Thematic*

overall criminal culpability diminish down the line and the scope of operations is reduced from the international level to the national and local (community) levels, the penalties and sanctions may progressively be reduced.⁶³ According to the International Narcotics Control Board the principle of proportionality must be a guiding principle in drug-related matters.⁶⁴ Whether or not a State's response to drug-related conduct is proportionate will depend to large degree on the extent to which the particular response is necessary and the extent to which it achieves the desired objective. The principle of proportionality can be applied in several ways: small-volume trafficking not tied to organized criminal networks should be distinguished in the law from major trafficking by organized criminal networks with distinct and appropriate penalties depending on the degree of social harm associated with the act.

There does not appear to be any consistency in sentencing practice in or amongst members of ECOWAS.⁶⁵ In many West African countries the harshness of the minimum sentences results in a big discrepancy between what the law says and what the law does and in the absence of a list of mitigating and aggravating factors this can fuel corruption and undermine the rule of law. The use of mandatory minimum sentences is an obstacle to proportionate sentencing as it precludes a judge from taking into account all circumstances of the offence.

Research suggests that in contravention of the objectives of the Conventions, in some West African countries preferential treatment is afforded to higher level targets on account of the fact that the same punishment applies to all levels of drug trafficking and the courts can decide whether to hand down (i) a combined sentence of imprisonment and a fine (ii) imprisonment or (iii) a fine. This fuels corruption within the judiciary as it favours a situation where fines are frequently applied to high level targets and imprisonment to low-level drug traffickers, for whom the law prescribes the same legal punishment but who are usually unable to pay the fine.⁶⁶ It also results in the majority of individuals sentenced with the most severe punishment for drug offences being made up of the most poor and vulnerable sections of the population, people who use drugs and persons guilty of low-level trafficking roles. Consequently, significant criminal justice resources (including by the police, prosecutors, detention centres and prisons) are spent on arresting and incarcerating low-level offenders while people engaged in high-level drug crimes are left largely free to continue their operations and recruitment of low-level actors.

The imposition of harsh penalties for small scale cultivation by subsistence farmers puts them at serious risk of harassment and bribery by police. In the absence of alternative, sustainable and acceptable livelihoods the imposition of such penalties may breach international human rights

Chapter: *The Principle of Proportionality and Drug-Related Offences* (2008) https://www.incb.org/documents/Publications/AnnualReports/Thematic_chapters/English/AR_2007_E_Chapter_1.pdf

63 International Narcotics Control Board, *Report of the International Narcotics Control Board 2007 - Thematic Chapter: The Principle of Proportionality and Drug-Related Offences* (2008) https://www.incb.org/documents/Publications/AnnualReports/Thematic_chapters/English/AR_2007_E_Chapter_1.pdf

64 International Narcotics Control Board, *Report of the International Narcotics Control Board 2016* (2017), Recommendation 5 https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ebook.pdf

65 Alemika EE, *Narcotic Drugs Control Policy in Nigeria*, vol 11 (Development Policy Centre 1998)

66 West Africa Commission on Drugs, *Background Paper 9: Harmonizing Drug Legislation in West Africa - A Call for Minimum Standards* (2013)

including the right to freedom from hunger and the right to live life in dignity and constitute a significant barrier to development. A development-oriented approach should be implemented to offer opportunities for viable and sustainable livelihoods.

Death Penalty

The International Narcotics Control Board encourages States that retain capital punishment for drug-related offences to consider the abolition of the death penalty for drug related offences.⁶⁷ Pursuant to article 6(2) of the International Covenant on Civil and Political Rights, countries which have not yet abolished the death penalty, may impose it only for 'the most serious crimes'. According to the Human Rights Committee, the treaty body in charge of monitoring the implementation of the International Covenant on Civil and Political Rights, 'most serious crimes' is an expression that must be read restrictively⁶⁸ – and which should not therefore include drug offences.⁶⁹ The potential for imposition of the death penalty for a drug offence is a major obstacle to international cooperation, as countries may refuse requests for extradition or mutual legal assistance from countries that retain the death penalty.

The United Nations Commission on Narcotic Drugs, in its resolution 55/12, encouraged Member States "to consider allowing the full implementation of drug dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to conviction and punishment, in order to help strengthen drug demand reduction policies while promoting both public health and public safety".⁷⁰ The law should specify that treatment decisions – including whether there is dependence and any treatment is clinically indicated – should be made by qualified health professionals, in accordance with international standards informed by the best available evidence and in conformity with human rights norms. In a number of jurisdictions, treatment as an alternative to conviction and punishment has been offered to people who have no clinical need of treatment; other alternatives should be available in such cases in order to best utilise finite treatment resources. In addition, 'failing' court-mandated treatment should not be punishable under criminal law. Relapse is a normal part of the course of drug dependence and not a criminal offense.⁷¹ With regard to drug treatment for offenders who use or may be dependent on drugs, it is advisable that these measures be built on evidence-based clinical guidelines.⁷² In particular, before taking a decision on providing medical

67 International Narcotics Control Board, *Report of the International Narcotics Control Board 2016* (2017), Recommendation 5 https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ebook.pdf

68 United Nations International Human Rights Instruments, *General Comment No. 6: Article 6 (Right to Life) Sixteenth Session (1982) P176f in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (HRI/GEN/1/Rev.9 (Vol. I))* (2008) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI/GEN/1/Rev.9%20%28Vol.%20I%29&Lang=en

69 International Covenant on Civil and Political Rights, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Thailand (CCPR/CO/84/THA)* (2005)

70 Commission on Narcotic Drugs, *Alternatives to Imprisonment for Certain Offences as Demand Reduction Strategies That Promote Public Health and Public Safety (Resolution 55/12)* (2012) https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2010-2019/2012/CND_Res-55-12.pdf

71 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014) p.37

72 World Health Organization, International Narcotics Control Board and United Nations Office on Drugs and Crime (eds), *Guidelines for the Psychosocially Assisted Pharmacological Treatment of Opioid Dependence* (2009)

treatment, the condition of the patient needs to be diagnosed. While health programmes should be the same quality as offered to the population in general,⁷³ countries may consider developing specific programmes to implement alternative measures, or treat drug dependent offenders in the same programmes as other people who are dependent. This would largely increase the number of treatment facilities and therewith reduce the distance to such facilities. A UNODC discussion paper stresses several good practices.⁷⁴ Further commentary on drug treatment is provided in Part III of this Model Law.

In current practice, in some countries in West Africa, and contrary to the United Nations standards and norms in crime prevention and criminal justice, (in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)⁷⁵) young drug offenders and first offenders are sent to prison not as a last resort but as a first resort; young prisoners are not kept separate from adult prisoners, nor are untried offenders kept separate from sentenced prisoners; and the services of at least one qualified doctor and adequate pharmaceutical supplies and psychiatric services may not be available.

Confiscation of Proceeds of Crime

There is no model provision in this Model Drug Law. Drug law enforcement agencies need to work with anti-corruption agencies, anti-money laundering bodies and bodies that deal with organized crime. MoUs, focal points or similar need to define modus operandi for sharing information. The Model Legislation on Money Laundering and Financing of Terrorism by UNODC and the International Monetary Fund (2005, for civil law systems)⁷⁶ and the UNODC/Commonwealth Secretariat/International Monetary Fund - Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (2009, for common law systems)⁷⁷ contain detailed model legislation on laundering, confiscation and international co-operation in relation to the proceeds of crime. The United Nations Convention against Transnational Organized Crime of 2000 also contains key provisions concerning the laundering of proceeds of crime.⁷⁸

73 World Health Organization and United Nations Office on Drugs and Crime, 'Principles of Drug Dependence Treatment - Discussion Paper' [2008] Geneva, Switzerland: World Health Organization <http://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf>; United Nations Office on Drugs and Crime, *Drug Abuse Treatment and Rehabilitation: A Practical Planning and Implementation Guide* (UN 2003) https://www.unodc.org/pdf/report_2003-07-17_1.pdf

74 United Nations Office on Drugs and Crime, *From Coercion to Cohesion Treating Drug Dependence through Health Care, Not Punishment - Discussion Paper* (2010) https://www.unodc.org/docs/treatment/Coercion_Ebook.pdf

75 General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* (A/RES/40/33) (1985) <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

76 United Nations Office on Drugs and Crime and International Monetary Fund, *Model Legislation on Money Laundering and Financing of Terrorism* (2005) <https://www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf>

77 United Nations Office on Drugs and Crime, International Monetary Fund and Commonwealth Secretariat, *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems)* (2009) https://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf

78 The United Nations, *United Nations Convention against Transnational Organized Crime* (2004)

Creation of Working Groups

Article 31: Creation of Working Group on Alternative Sanctions

- (1) There shall be constituted a working group of experts to advise the government on the range and application of alternatives to conviction and punishment and to monitor their effective and cost-effective application.

Commentary:

On account of lessons learned around the world, more and more states now enable their authorities to apply a range of custodial and non-custodial sanctions for drug-related offences to fit the particular crime and the particular offender, rather than operate on the basis of 'one size fits all'.⁷⁹ Countries using alternative measures for drug offenders implement them at various stages of the proceedings, depending very much on their legal systems and traditions. Alternatives could be implemented at a police or prosecution stage through cautioning and orientation to health education or treatment, or as a condition to drop charges. In civil law systems with investigative judges they may be used as an alternative to pre-trial detention. At the trial stage they could be used as pre-sentencing measure and may justify an exemption of punishment. Evidence from Europe suggests that the earlier the diversion takes place, the more effective it is.⁸⁰

In line with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)⁸¹ domestic law should provide for a wide range of non-custodial measures, from pre-trial to post-sentencing provisions. A list of the non-custodial measures that may be provided is given in Rule 8.2 of the Tokyo Rules. Further guidance on alternatives to imprisonment is available in rules 57 to 66 of the United Nations Standard Minimum Rules for the Treatment of Women Prisoners Non-custodial Measures for Women Offenders (the Bangkok Rules);⁸² as well as in the UNODC handbooks on basic principles and promising practices on alternatives to imprisonment and on strategies to reduce overcrowding in prisons;⁸³ and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which deal specifically with those and other issues in the juvenile justice context.⁸⁴ The Tokyo rules provide a set of basic

79 International Narcotics Control Board, *Report of the International Narcotics Control Board 2007 - Thematic Chapter: The Principle of Proportionality and Drug-Related Offences* (2008) https://www.incb.org/documents/Publications/AnnualReports/Thematic_chapters/English/AR_2007_E_Chapter_1.pdf

80 Kruithof K et al, 'Study on Alternatives to Coercive Sanctions as Response to Drug Law Offences and Drug-Related Crimes' [2016] Brussels: European Commission

81 General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* (A/RES/45/110) (1991) https://www.unodc.org/pdf/compendium/compendium_2006_part_01_03.pdf

82 General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)* (A/RES/65/229) (2011) https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2010/General_Assembly/A-RES-65-229.pdf, annex

83 Available at <http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html>.

84 General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* (A/RES/40/33) (1985) <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment. In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way that consistent sentencing remains possible, and include inter alia:

- *verbal sanctions, such as admonition, reprimand and warning;*
- *conditional discharge;*
- *status penalties;*
- *economic sanctions and monetary penalties, such as fines*
- *confiscation or an expropriation order;*
- *restitution to the victim or a compensation order;*
- *suspended or deferred sentence;*
- *probation and judicial supervision;*
- *a community service order;*
- *referral to an attendance centre or drug treatment programme;*
- *house arrest;*
- *some combination of the aforementioned.*⁸⁵

*The suspended sentence, whereby a sentence of imprisonment is imposed but not applied unless the person reoffends during a specific period of time, may also be a particularly effective and cost-effective alternative sentence for first time offenders. Useful principles and guidance on the creation and application of community service as an alternative to imprisonment may be found in the Kadoma Declaration on Community Service.*⁸⁶

Article 32: Creation of Working Group on Alternative, Sustainable and Acceptable Livelihoods for Cannabis Farmers

(1) There shall be constituted a working group of experts to advise the government on the development and implementation of alternative, sustainable and acceptable livelihoods for cannabis farmers including the licensing of cannabis cultivation for medical or industrial purposes.

85 General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* (A/RES/45/110) (1991) https://www.unodc.org/pdf/compendium/compendium_2006_part_01_03.pdf

86 UN ECOSOC, *International Cooperation Aimed at the Reduction of Prison Overcrowding and the Promotion of Alternative Sentencing, Annex I Kadoma Declaration on Community Service* (E/Res/1998/23) (1998) <http://www.un.org/documents/ecosoc/res/1998/eres1998-23.htm>

International Legal Instruments

Article 28 of the 1961 Convention specifies that the treaty does “not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes”.

Commentary:

Drug crop eradication in particular, creates a dilemma. For example, cannabis has been grown for consumption and export in West Africa, notably in Nigeria, Ghana and Senegal for decades. This crop provides significant revenue to small-scale farmers. Crop eradication practices in the region rarely ensure that alternative, sustainable and acceptable livelihoods are in place well before any eradication takes place, as is suggested in internationally agreed standards on alternative livelihoods.⁸⁷ There is broad acknowledgement that such ‘containment’ operations against illicit producers “have had limited impact on drug supply” elsewhere and only “serve to exacerbate existing development problems.”⁸⁸

Varieties of the cannabis plant with relatively low psychoactive cannabinoid content, usually referred to as ‘hemp’ instead of ‘cannabis’, have been widely used for its fibre to make paper, denim or sails. The legitimate hemp industry has suffered hugely from the controls imposed on cannabis, but is experiencing a comeback.⁸⁹ Although not required under the Conventions (see commentary on Article 4: Control of Activities above) many countries restrict the cultivation of cannabis for industrial purposes to persons and companies with a government license, presumably on account of operational challenges for the police as both types of the plant have the same appearance. The United Nations Office on Drugs and Crime provides guidance for state authorities for distinguishing industrial cannabis from cannabis grown for purposes that must be controlled pursuant to the drug conventions.⁹⁰

Another possibility is the growing of medical cannabis; this is dealt with under Part III of this Model Drug Law.

87 General Assembly, *United Nations Guiding Principles on Alternative Development* A/RES/68/196 (2014) https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2010-2019/2013/A_RES_68_196.pdf

88 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014) Box 3; and quote from Morris K, ‘Drug Crime and Criminalisation Threaten Progress on MDGs’ (2010) 376 *The Lancet* 1131 who is quoting W. Hall, Professor of public health policy, University of Queensland, Herston, Australia

89 Bewley-Taylor D, Blickman T and Jelsma M, ‘The Rise and Decline of Cannabis Prohibition’ [2014] *The history of cannabis in the UN drug control system and options for reform*. Amsterdam/Swansea: Global Drug Policy Observatory/Transnational Institute

90 United Nations Office on Drugs and Crime, *Recommended Methods for the Identification and Analysis of Cannabis and Cannabis Products* (2009) https://www.unodc.org/documents/scientific/ST-NAR-40-Ebook_1.pdf at paragraphs 3.7 and 3.15

PART III: AUTHORISED ACTIVITIES

Article 33: Commission on Improving Access to Medicines that are Controlled Drugs

- (1) There shall be constituted a Commission on Improving Access to Medicines that are Controlled Drugs, the oversight of which is to be the responsibility of the Minister of Health.
- (2) It shall be the duty of the Commission to prepare a national policy for access to medicines that are controlled drugs and to include within this policy the following objectives -
- a) ensuring adequate supply of medicines that are controlled drugs;
 - b) ensuring availability of controlled drugs that are medicines for use in healthcare delivery, across the full spectrum of health services in rural and urban areas and at all levels of the healthcare system;
 - c) education of regulatory bodies and stakeholders in health and law enforcement on the need for improved availability of controlled drugs for medical and scientific purposes;
 - d) improvement in the capacity, knowledge and skills of healthcare workers to assess, diagnose and prescribe controlled medicines for patients on the basis of medical need;
 - e) promotion of rational prescribing, dispensing and use of controlled medicines;
 - f) strengthening legislative and policy administration in support of a comprehensive, synergistic approach to ensuring access to controlled medicines;⁹¹
 - g) production of national guidelines on the estimation of psychotropic substances and precursors;⁹²
 - h) production of national guidelines on the quantification of opioid medicines;⁹³
 - i) ensuring the national list of essential medicines includes controlled drugs;⁹⁴
 - j) conduct annual reviews of the country's essential medicine list;
 - k) periodic reviews of national legislation and policy to identify obstacles to and opportunities for increasing access to controlled medicines;
 - l) development of programmes on the provision of treatment to people who use drugs, dissemination of knowledge, and provision of harm reduction services to reduce the

⁹¹ Partially based on Federal Ministry of Health of Nigeria, National Policy for Controlled Medicines and Its Implementation Strategies (2017)

⁹² See for example Nigeria National Agency for Food and Drug Administration and Control, *National Guidelines on Estimation of Psychotropic Substances and Precursors* (2017)

⁹³ For an example see Federal Ministry of Health of Nigeria, *National Guidelines for Quantification of Narcotic Medicines* (2017)

⁹⁴ For the WHO Model Lists of Essential Medicines on which national lists are based see <http://www.who.int/medicines/publications/essentialmedicines/en/>

harms related to drug use;

- m) ensuring that national investment in public health measures for drug use equals or surpasses national investment in law enforcement measures against drug trafficking;
- n) ensuring the inclusion of people who inject drugs as a target group in the National AIDS Programme;
- o) ensuring the inclusion of programmes for people who inject drugs in their grant funded programmes for the improvement of health services.

Commentary:

The Committee on Economic, Social and Cultural Rights, the body that monitors the implementation of the right to health as articulated in the International Covenant and Economic, Social and Cultural Rights has held that countries must adopt and implement a national public health strategy and plan of action and ensure access to medicines as defined by WHO.⁹⁵

According to the WHO, countries "need to go a step further than relaxing regulatory restrictions to availability: they should devise and implement enabling policies that promote widespread understanding about the therapeutic usefulness of controlled substances and their rational use. Health professionals should be trained in prescribing and administering controlled substances. Patients should be informed about the benefits and risks of using controlled substances. Drug control and law enforcement personnel should be sensitized to their medical and scientific necessity. Promoting dialogue among all these sectors is also essential to foster understanding and dispel misconceptions about the medical use of controlled substances. Furthermore, it is by integrating the concerns of all sectors that influence the use of controlled substances that policies can achieve the optimal balance between ensuring access and preventing abuse."⁹⁶

No evidence could be found for the existence of national lists of essential medicines for several countries in West Africa. Of those that do have a list, several have not revised the list for many years and they do not contain the drugs listed on the latest WHO list of essential medicines. Even when substances are included on essential medicines list, problems relating to access persist. In its 2017 Report the INCB calls for the provision of training for health-care professionals to ensure rational prescribing practices, noting that "opioids are not to be feared; if administered and monitored properly, opioids are a vital tool for pain management and palliative care."⁹⁷

95 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4 (2000) http://data.unaids.org/publications/external-documents/ecosoc_cescr-gc14_en.pdf, para. 43.

96 World Health Organization, *Ensuring Balance in National Policies on Controlled Substances: Guidance for Availability and Accessibility of Controlled Medicines* (2011) http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D7734FA350433C3F612414073A601F6?sequence=1

97 International Narcotics Control Board, Report of the International Narcotics Control Board 2017 (2018) <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2017.html>

Article 34: Authorised Supply of Controlled Drugs for Medical and Scientific Purposes Including Drug Treatment

There is no model provision as the regulations will depend very much on the financial resources of the country and on the workings of its health care system. The relevant requirements in the international drug conventions are outlined below and a case-study from Senegal is included to demonstrate some of the challenges and also the implications of ambiguous or overly stringent regulations for providing authorisation. The commentary includes a section on relevant guidelines for the provision of drug treatment.

International Legal Instruments

The drugs in Schedule I of the 1961 Convention are subject to special measures of control enumerated in article 2 (1) of the 1961 Convention. These measures are also applicable to drugs in Schedule II and III with the exception of those enumerated in article 2 (2) and (3) and (4) of the 1961 Convention. Article 2(5) leaves it to the States Parties to determine which measures are necessary. In addition to the measures of control applicable to all drugs in Schedule I of the 1961 Convention, opium is subject to further provisions enumerated in article 2 sub-paragraph (6) of the 1961 Convention. Article 7 of the 1971 Convention applies control measures to substances in Schedule I of the 1971 Convention.

Some further relevant provisions include the following:

The 1961 Single Convention, Article 30, paragraph 2 (b) provides “[Governments shall] ... (i) Require medical prescriptions for the supply or dispensation of drugs to individuals. This requirement need not apply to such drugs as individuals may lawfully obtain, use, dispense or administer in connection with their duly authorized therapeutic functions; and (ii) If the Parties deem these measures necessary or desirable, require that prescriptions for drugs in Schedule I should be written on official forms to be issued in the form of counterfoil books by the competent governmental authorities or by authorized professional associations”

The Convention on Psychotropic Substances, Article 9, paragraph 3 permits that countries allow authorized licensed pharmacists or other licensed retail distributors to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities of substances in Schedules III and IV: “Notwithstanding paragraph 1, a Party may, if in its opinion local circumstances so require and under such conditions, including recordkeeping, as it may prescribe, authorize licensed pharmacists or other licensed retail distributors designated by the authorities responsible for public health in its country or part thereof to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities, within limits to be defined by the Parties, of substances in Schedules III and IV.”

In accordance with the 1961 Single Convention, Article 38, paragraph 1: Countries have an obligation to provide both prevention and treatment of substance dependence. The Article declares: “The Parties shall ... take all practicable measures for the prevention of abuse of drugs and for the ... treatment ... of the persons involved”. The 1971 Convention, Article 20, paragraph 1, contains almost identical wording.

Obstacles to access to essential medicines – Case Study - Senegal⁹⁸

Inclusion (or not) in essential medicines list and procurement

Senegal's essential medicines list did not include oral morphine or weak opioid analgesics until 2013. Before that date private pharmacies sold weak opioids, but only hospitals could import morphine and as the importation process was highly complex, few hospitals actually did so. They had to undertake a convoluted bidding process limited to domestic companies.

Focus on hospitals only

Dispensation of all morphine is restricted to regional and national hospitals. Prior to procuring opioid analgesics, healthcare institutions must obtain authorization from the Direction de la Pharmacie et du Médicament. Any hospital—but not a centre de santé or lower level facility—can apply. But there were no clear written regulation, leading to confusion as to who can stock morphine and how the Direction de la Pharmacie et du Médicament determines whether the requests are justified.

Geographic coverage

In rural areas, where the ratio of doctor to patient is said to be low, it is almost impossible for patients to find someone with the authority to prescribe morphine to relieve their pain.

Senegal has a central, state-run agency called the Pharmacie Nationale d'Approvisionnement, which procures medications that are on the country's essential medicines list and distributes them through a network of regional affiliates, known as Pharmacies Regional d'Approvisionnement. Public healthcare facilities can then order these medications at subsidized prices. In theory, this can be an effective vehicle for ensuring the availability of opioid analgesics throughout the country but research showed that injectable morphine was never distributed to any Pharmacie Régionale d'Approvisionnement outside Dakar. Authorities put this down to a lack of demand, explaining that no facilities outside of Dakar ask for morphine. However, when researchers asked doctors outside the capital, several said they wanted to use morphine, but when they asked for it, their pharmacies or Pharmacie Régionale d'Approvisionnement said it was unavailable. Others said they never asked for it because they assumed it was unavailable. Doctors work without morphine because it is unavailable, and because they work without it, government officials assume that they do not need to use it.

Administrative burdens - prescription pads

Senegalese regulations require doctors to write prescriptions for strong opioid analgesics on special prescription pads. These pads must be obtained from a hospital and carry the name of the doctor and a unique number. While the UN 1961 convention specifically allows countries to require their use, special prescription pads are often a significant barrier to the prescription of strong opioid analgesics because they limit the number of people who can prescribe them. In Senegal, only doctors can prescribe morphine. However, because the prescription pads are only dispensed from hospitals that stock morphine, doctors who are not employed by such hospitals will be unable to obtain the pads. Even in certain hospitals, the number of doctors who are given

98 Adapted from Human Rights Watch, *Abandoned in Agony - Cancer and the Struggle for Pain Treatment in Senegal* (2013) https://www.hrw.org/sites/default/files/reports/senegal1013_forinsert_ForUpload.pdf

these pads is limited. According to the head pharmacist at Principal Hospital, only two doctors in the entire hospital are authorized to prescribe morphine.

Administrative burdens - time limits

Under Senegal's law on drugs, doctors cannot prescribe more than a seven-day supply of any substance under Table II which includes morphine. While the law explicitly permits the Minister of Health to extend this time limit by ministerial decree to a maximum of 60 days, no such decree had been issued for morphine. Doctors can give patients only one additional prescription as for table II substances they must be filled within seven days of the date issued. Therefore, patients who need strong opiates must return to their doctor at least every two weeks to get two prescriptions, and go to the pharmacy every week to fill each prescription. Since morphine is only available in Dakar, patients who live outside the capital must travel on a weekly basis. When they are too weak to travel, they may send a relative to Dakar, relocate to Dakar, or suffer at home.

Commentary:

The widespread recognition of the therapeutic value of controlled substances has led to a substantial increase in their consumption in recent years. However, this increase has occurred predominantly in developed countries. In contrast, the availability of controlled substances has remained very low in most developing countries and is far from adequate to meet the medical needs of their populations.⁹⁹

In developing regulations for authorised supply, the following guidance from the WHO may be helpful: "Appropriately trained and qualified physicians, and, if applicable, nurses and other health professionals, at all levels of health care should be allowed to prescribe and administer controlled medicines, based on their general professional license, current medical knowledge and good practice without any further license requirements. All healthcare professionals should be trained appropriately for the professional activities they actually perform, and this applies equally to the prescription of controlled medicines. The competence to prescribe controlled medicines, including strong opioids, should not be restricted to a small number of medical specialties, e.g. oncologists only, and controlled medicines should be available at all appropriate levels of care. Requirements for physicians to obtain a license for prescribing controlled substances may lead to limited access and availability. In all countries, all physicians should be sufficiently trained to treat pain and hence be allowed to prescribe opioid analgesics if necessary. Training for treatment of other conditions depends on whether a condition occurs or not within their specialty. In some countries, other healthcare workers, such as nurses, can specialize in a specific area and are then allowed to prescribe within the area of their specialization as well. Nurse prescribing can be useful e.g. for mitigating pain in a number of

99 Hamid Ghodse, President International Narcotics Control Board, in the preface to World Health Organization, *Ensuring Balance in National Policies on Controlled Substances: Guidance for Availability and Accessibility of Controlled Medicines* (2011) http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D-7734FA350433C3F612414073A601F6?sequence=1

circumstances; for example, during a shortage of physicians or to improve the quality of care. When balancing drug control legislation and policies, it is wise to leave medical decisions up to those who are knowledgeable on medical issues. Therefore, the amount of medicine prescribed, the appropriate formulation and the duration of treatment should be the practitioner's decision, based on individual patient needs and on sound scientific medical guidance (e.g. national or WHO treatment guidelines). An example of how this rule may sometimes be violated is the legal restriction on the maximum daily dosage of strong opioids. Another example is the limitation of the use of strong opioids only to certain conditions such as cancer pain or terminal cancer pain, while other moderate to severe pain remains unaddressed."¹⁰⁰

Article 35: Adequate Provision of Sterile Syringes and Drug Treatment

- (1) In accordance with the right to health the state must ensure access to sterile syringes and drug treatment for people who require them.
- (2) In meeting its obligations under paragraph (1), the state may distribute sterile syringes and provide drug treatment through public health facilities or provide funding to community organizations to provide sterile syringes and drug treatment.

International Legal Instruments

UN member states have committed to ensuring that a wide range of HIV prevention programs is available, including the provision of sterile injecting equipment and harm reduction efforts related to drug use.¹⁰¹ In accordance with the 1961 Single Convention, Article 38, paragraph 1 countries have an obligation to provide both prevention and treatment of substance dependence. The Article declares: "The Parties shall ... take all practicable measures for the prevention of abuse of drugs and for the ... treatment ... of the persons involved".¹⁰² The Convention on Psychotropic Substances, Article 20, paragraph 1, contains almost identical wording.

100 World Health Organization, Ensuring Balance in National Policies on Controlled Substances: Guidance for Availability and Accessibility of Controlled Medicines (2011) http://apps.who.int/iris/bitstream/handle/10665/44519/9789241564175_eng.pdf;jsessionid=1D7734FA350433C3F612414073A601F6?sequence=1

101 General Assembly Special Session on HIV/AIDS 2001, *Declaration of Commitment on HIV/AIDS* (2001) http://www.unaids.org/sites/default/files/sub_landing/files/aidsdeclaration_en_0.pdf, para. 52.

102 The Single Convention on Narcotic Drugs (1961) (as amended by the 1972 Protocol Amending the Single Convention); The 1971 Convention on Psychotropic Substances; The United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances (1988). United Nations Office on Drugs and Crime, 'The International Drug Control Conventions' https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf

Commentary:

Nigeria has developed minimum standards for drug dependence treatment,¹⁰³ and other West African countries should follow suit. The enjoyment of the right to health of all people who use drugs — and are dependent on drugs — is applicable irrespective of the fact of their drug use. It is important that drug use and drug dependence are not conflated: drug dependence is considered a chronic, relapsing disorder that may require medical treatment. By contrast, drug use is not a medical condition and does not necessarily imply dependence. Indeed the majority of people who use drugs do not become dependent and do not require any treatment. In a 2009 report to the Human Rights Council the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment declared “from a human rights perspective, drug dependence should be treated like any other health-care condition”.¹⁰⁴

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan Méndez, stated that the “experience of health-care [for people who use drugs] is often one of humiliation, punishment and cruelty... violations of patient confidentiality... [and] further ill-treatment by health providers”.¹⁰⁵ According to UNODC’s *International Standards for the Treatment of Drug Use Disorders*, effective and ethical drug treatment should be accessible, appropriate, based on scientific evidence, founded on good clinical governance, and constantly monitored and evaluated.¹⁰⁶

The West Africa Commission on Drugs has proposed minimum standards for effective drug treatment, stating that services should be flexible, affordable and accessible to all who need it, and must be voluntary.¹⁰⁷ Governments need to offer a balanced menu of evidence-based treatment services to those in need – including opioid substitution therapy.¹⁰⁸ Forced treatment, forced withdrawal, incarceration in the name of ‘rehabilitation’ and forced labour have no place in a drug treatment setting and represent further violations of the human rights of people who use drugs.

103 Federal Ministry of Health of Nigeria, *National Minimum Standards for Drug Dependence Treatment in Nigeria* (2015)

104 General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health A/65/255* (2010) <http://www.ohchr.org/Documents/Issues/Water/ContributionsStigma/others/SPhealthI.pdf>

105 Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez (A/HRC/22/53)* (2013) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/105/77/PDF/G1310577.pdf?OpenElement>

106 World Health Organization and United Nations Office on Drugs and Crime, *International Standards on the Treatment of Drug Use Disorders* (2017)

107 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014)

108 World Health Organization, *Evidence for Action: Effectiveness of Drug Dependence Treatment in Preventing HIV among Injecting Drug Users* (2005) http://www.who.int/hiv/pub/idu/drugdependence_final.pdf

WACD PROPOSED MINIMUM STANDARDS FOR EFFECTIVE DRUG TREATMENT POLICY IN WEST AFRICA¹⁰⁹

The quality of treatment available to drug users in West Africa varies enormously both within and between countries in the region. There is an urgent need to set and implement standards that can help to ensure humane and effective treatment across the region.

Treatment should be scientifically sound and not punitive.

Physical restraints, beating, forced labour, unnecessary isolation or involuntary detention, and humiliation are not scientifically sound practices and have no proven effect for treatment of drug dependence. There should be human rights-centred guidelines for quality of care in this area, and there should be an oversight mechanism to ensure that guidelines are followed.

Treatment options should be flexible.

It is well documented that some people need to try more than one type of treatment before they find one that is effective for them.

Treatment should be affordable and accessible to all who need it.

Since, as the WHO notes, drug dependence is a “chronic, relapsing condition,” some patients may require more than one episode of treatment to reduce or eliminate problematic use. Treatment services should not be denied to anyone on the grounds of having a criminal record, being homeless, or any other discriminatory criteria.

Treatment should be culturally appropriate and gender-sensitive.

The needs of pregnant women and women with children are often particularly acute.

Treatment should be voluntary and should not require compulsory detention.

Treatment (and other health services) should be available to persons in the custody of the state at a level equivalent to services in the community.

In accordance with good health policy, all health care and treatment decisions should be made by qualified health professionals, preferably affiliated with the Ministry of Health, even in court-mandated treatment or in prisons and detention facilities.

The use of methadone, buprenorphine and other controlled opiates for the purpose of treating opiate dependence should not be subjected to criminal prosecution, and made available in accordance with scientifically established principles, as summarised in the 2004 WHO/UNODC/UNAIDS Position Paper.

This standard includes continuing treatment for as long as clinically indicated and not cutting it off after some arbitrary period, using doses that are clinically indicated, and not reducing doses for punitive purposes.

Independent complaint mechanisms through which people mistreated in the course of treatment for drug dependence can report abuses and seek redress should be established.

109 West Africa Commission on Drugs, *Not Just in Transit - Drugs, the State and Society in West Africa* (2014) Box 12

Forcing an individual to undertake treatment violates individual fundamental freedoms and contradicts the right to health contained in the Constitution of WHO, as well as principles of drug dependence treatment advised by WHO and UNODC.¹¹⁰

The African Union has developed 'Continental Minimum Quality Standards for Treatment of Drug Dependence'.¹¹¹ These state that drug dependence is a complex but treatable health condition, and that effective treatment must attend to the needs of the individual. Treatment systems should therefore provide a menu of options to suit individual characteristics, needs and circumstances - including detoxification programmes, opioid substitution therapy (such as methadone programmes) and stimulant substitution treatments, psychosocial treatment and counselling, social support and rehabilitation. These should also be provided in a range of settings - including community-based centres, residential centres, and in other health services that people may access.¹¹² Both UNODC¹¹³ and the European Union¹¹⁴ also have extensive guidance and standards for effective treatment programmes - covering key considerations such as accessibility, screening and assessments, staffing and clinical governance.

Programmes may involve measures such as substitution or maintenance treatment, which are among the interventions that form part of the WHO-UNODC-UNAIDS comprehensive package of interventions for HIV prevention,¹¹⁵ treatment and care for people who inject drugs. Furthermore, concern over the prevention and treatment of drug overdose has been expressed by Member States, including the potential use and availability of opioid receptor antagonists such as naloxone and other measures based on scientific evidence.¹¹⁶

Within regulated parameters and in an environment conducive to fostering access to counselling services and other demand reduction activities- many of these programmes are recognized to effectively address and in many cases prevent the transmission of blood-borne diseases, including HIV, tuberculosis and hepatitis C, overdose and infections related to drug injections.

110 World Health Organization and United Nations Office on Drugs and Crime, 'Principles of Drug Dependence Treatment - Discussion Paper' [2008] Geneva, Switzerland: World Health Organization <http://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf>

111 African Union, *Proposed Continental Minimum Standards for Treatment of Drug Dependence (CAMDC/EXP/4(V))* (2012) http://www.emcdda.europa.eu/attachements.cfm/att_231088_EN_INT10_African%20Union_2012.pdf

112 International Drug Policy Consortium and West Africa Commission on Drugs, *West Africa Drug Policy Training Toolkit - Facilitation Guide* (2015) <https://idpc.net/publications/2015/04/west-africa-drug-policy-training-toolkit-facilitation-guide>

113 United Nations Office on Drugs and Crime, *TREATNET Quality Standards for Drug Dependence Treatment and Care Services* (2012) https://www.unodc.org/docs/treatment/treatnet_quality_standards.pdf

114 Uchtenhagen A and Schaubert M, *Minimum Quality Standards in Drug Demand Reduction EQUUS* (2011) http://www.emcdda.europa.eu/attachements.cfm/att_231071_EN_INT12_EQUS_final_report.pdf

115 United Nations Office on Drugs and Crime, International Network of People Who Use Drugs, Joint United Nations Programme on HIV/AIDS, United Nations Development Programme, United Nations Population Fund, World Health Organization, United States Agency for International Development, *Implementing Comprehensive HIV and HCV Programmes with People Who Inject Drugs: Practical Guidance for Collaborative Interventions* (2017) http://www.unaids.org/sites/default/files/media_asset/2017_HIV-HCV-programmes-people-who-inject-drugs_en.pdf

116 Commission on Narcotic Drugs, *Promoting Measures to Prevent Drug Overdose, in Particular Opioid Overdose (Resolution 55/7)* (2012) https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2010-2019/2012/CND_Res-55-7.pdf

These are commonly called harm reduction programmes. While autonomous in relation to illicit drug demand reduction measures, these programmes should be implemented as a part of comprehensive public health policies and strategies, and not in isolation or as an alternative to drug demand reduction.

Article 36: Authorised Cultivation of Cannabis and Opium for Medical Purposes

There is no model provision as the model would depend on national circumstances.

The opium poppy, coca bush, and the cannabis plant are subject to the control measures enumerated in Article 7 of the 1961 Convention. In its 2014 Annual Report the INCB noted that medicinal cannabis programmes have been introduced in several countries and enumerated criteria that must be respected for the implementation of such programmes.¹¹⁷ In June 2017 the INCB published an 'alert' on the therapeutic use of cannabis¹¹⁸ in which it noted that a growing number of governments are authorising the medicinal use of cannabis, concluding that the practice was indeed permitted by the 1961 Convention under several conditions. These include:

The need for governments to produce estimates of anticipated consumption, which must be submitted to the INCB with details about the number of people using the substance for therapeutic purposes.

If cannabis cultivation for medicinal purposes is planned, the government is required to submit details to the INCB about the geographic area where cultivation will take place. The process must be supervised by a national cannabis agency.¹¹⁹

117 International Narcotics Control Board, *Report of the International Narcotics Control Board 2014* (2015) https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR_2014.pdf

118 International Narcotics Control Board, 'The Therapeutic Use of Cannabis' (2017) https://www.incb.org/documents/News/Alerts/Alert_on_Control_of_Narcotic_Drugs_June_2017.pdf

119 Hallam C, 'INCB on Therapeutic Cannabis' <https://idpc.net/incb-watch/updates/2017/08/incb-on-therapeutic-cannabis>; see also Aguilar S, V Gutiérrez, L Sánchez and M Nougier, 'Medicinal Cannabis Policies and Practices around the World' (2018) http://fileserver.idpc.net/library/Medicinal%20cannabis%20briefing_ENG_FINAL.PDF

PART IV: SCHEDULES AND ANNEXES

Schedule I: Indicative Thresholds for Personal Use

Possession of drugs below the quantities stated in the table indicate possession for personal use rather than with intent to supply or trafficking.

| Cannabis | 3,4-Methylenedioxy-N-methylamphetamine (MDMA, 'ecstasy') | Heroin | Cocaine |
|-------------------------|--|----------------|----------------|
| 20g grams herbal | 2 grams (pure) | 2 grams (pure) | 3 grams (pure) |
| 20g resin | 5 Ecstasy tablets | | |
| up to 4 cannabis plants | | | |

The provision of guideline thresholds is recommended by international legal instruments

The UN's official Commentary on the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychoactive Substances* suggests that the distinction of possession for personal use from possession for trafficking may, in addition to other objective factual matters, be facilitated by the provision of guideline thresholds.¹²⁰

Commentary:

Thresholds serve several purposes; they provide a practical guide to police, prosecutors and the judiciary in determining whether someone in unauthorised possession of drugs, cultivating plants or producing controlled substances in the absence of authorisation, is doing so for their own personal use, or for trafficking purposes. Quantities alone should not guide judgements whether someone is primarily to be treated as a person who uses drugs from a law enforcement perspective or not. Beyond the quantities a person is carrying, it is important that someone's intent is investigated in a holistic manner before determining if the person in question should face criminal charges for supplying drugs. However, carrying amounts below the quantities suggested above should serve as a strong indicator for someone's intent of possession for personal use and should not therefore constitute a crime.

The definition of specific thresholds aims at adding consistency and transparency to the implementation and enforcement of drug laws. Thresholds are likely to diminish corruption as well as unjustified arrests and prosecution of people who use drugs. The above quantities have been derived from research on consumption patterns in various countries. They also take into account the experiences and practical implications of establishing thresholds by various legal systems that operate under drug laws that already treat possession of small quantities and/or consumption of drugs as non-punishable.

¹²⁰ United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (E/CN.7/590)* (1988) https://www.incb.org/documents/PRECURSORS/COMMENTARY_1988CONVENTION/Commentary_to_the_1988_UN_Convention_E.pdf p 83

There is considerable variance in the thresholds adopted in these countries. The amounts defined in law or prosecutorial guidance must be meaningful – that is to say, adapted to reflect drug consumption patterns, the quantity of drugs a person is likely to use in a day, patterns of purchasing and market realities. Its main purpose is to ensure that people are not detained, criminalised or otherwise stigmatised for the use or possession of drugs for personal use, and to ensure that drug trafficking offences are efficiently enforced.

Taking this into account, it is recommended that the thresholds outlined above are adapted to local contexts. Drug consumption as well as drug supply may differ strongly between and within countries. Understanding such differences in patterns of consumption and supply and adapting drug laws in general and thresholds in particular to local conditions is important in order to create effective and enforceable national drug laws. Aspects that are known to vary locally include, but are not restricted to, retail purity or active ingredient content of substances, pervasiveness of sharing among drug consumers (e.g. sharing among friends or family), and ease of access to certain substances (low accessibility of a substance might lead consumers to purchase more of a substance once they have access to it). In addition, when setting threshold quantities, it may be taken into account that measurement of these thresholds is a key element of effective implementation of drug laws aimed at decriminalising consumption of drugs. If the police cannot easily determine whether most cases of possession for personal consumption are to be treated as such because thresholds are set too low, a threshold-based approach to decriminalising drug use cannot be implemented effectively. It further will not diminish the workload generated by minor cases – which is key to gaining the support of law enforcement agencies for drug law reform. Thresholds that correspond to common packaging forms on illegal markets make it easier for police to estimate if a given quantity is still below the threshold.

It is recommended that drug laws allow for the exercise of police discretion when a person is found in possession of quantities above the mentioned thresholds and circumstances suggest that possession is for personal use or no clear intent to supply can be established.

Finally, the Model Drug Law recommends that drug laws provide mechanisms to divert people who are dependent on drugs to health services.¹²¹

This Annex was reviewed in 2020 by Adeolu Adebisi, Kwadwo Appiagyei-Atua, Isabela Barbosa, Lansana Gberie, Maria-Goretti Loglo, Prince Luseni, Isidore Obot, Christian Schneider, Khalid Tinasti, and Mu'azu Umaru.

Schedule II Sentencing Guidelines

In sentencing the offender the court must act in accordance with the following sentencing guidelines.

¹²¹ Dependence disorder as defined by the ICD-11 by the World Health Organisation: *disorder resulted from the use of psychoactive substances with specific repetitive rewarding and reinforcing behaviours*. World Health Organisation, 11th International Classification of Diseases (ICD-11) - Classification of substance abuse and other addictive disorders. Available at: <https://www.who.int/classifications/icd/en/>

Steps in Determining Sentence

(1) The court should determine the category and corresponding starting point from regulations provided under this law. The court should then consider whether the presence of the most serious, or serious, factors, as outlined in Table I, require the sentence to be higher than the starting point. The court should then consider revising its provisional sentence in light of any less serious factors (as outlined in Table I) or mitigating factors personal to the defendant, including those listed in Table II.

In determining the amount of any fine the Court should determine the offender’s financial means; any fine must be within the offender’s means and in accordance with Table III below.

Once the Court has determined the appropriate sentence, as a final step, the court, in imposing any sentence of imprisonment, should take into consideration any remand time served by the offender and reduce the sentence accordingly.

In all cases, the court is required to consider confiscation where the relevant authorities invoke the process or where the court considers it appropriate.

Commentary:

The Model Drug Law does not specify starting points or categories, or maximum sentences for offences. Countries are encouraged to introduce starting points for different categories of culpability, demonstrated by offender’s role and harm caused by offence in accordance with Table I. Countries are also encouraged to reduce the maximums they have in place to ensure that they reflect the seriousness of such offences in relation to other criminal conduct. Drug offences should generally not be more severely punished than murder or rape (as is presently the case in many West African countries).

An example of a categories and starting points might be:

| | |
|---|--|
| <i>Category 1: Where one of the most serious factors is present e.g. use of violence</i> | <i>Starting point: 10 years</i> |
| <i>Category 2: Where one of the serious factors is present e.g. motivated by significant financial gain</i> | <i>Starting point: 5 years</i> |
| <i>Category 3: Where none of the most serious and none of the serious factors apply and one of the less serious factors applies e.g. motivated to fund own drug use</i> | <i>Starting point: High fine or Alternative to Custody</i> |

Table I Seriousness of Offence

Culpability demonstrated by offender's role and harm caused by offence

| Most Serious | Serious | Less Serious |
|---|---|---|
| Directing or organising buying and selling on a commercial scale | Motivated by significant financial gain | Performs a limited function under direction |
| Substantial influence on others in a transnational chain or network of offenders | Large scale operation coupled with offender's understanding of the scale of the operation | Engaged by pressure, coercion or intimidation |
| Close links to original source | Operational management function within a chain or network of offenders | Involvement through exploitation |
| Expectation of large financial gain | | No influence on those above in a chain |
| Abuse of position of trust or responsibility | | Very little, if any, awareness or understanding of the scale of the operation |
| Payment of bribes to official by the offender | | Motivated by economic necessity |
| Use of violence or arms by the offender | | Minimal financial gain |
| The holding of a public office by the offender | | Motivated to fund own drug use |
| The use of violence against, or the injury or abuse, neglect, or negligent treatment or maltreatment of children or vulnerable adults | | Isolated incident |
| The use or exploitation of children or vulnerable adults | | |
| Use of legitimate business as cover | | |

Table II Personal Mitigating Factors

| |
|---|
| <ul style="list-style-type: none"> • Involvement due to pressure, intimidation or coercion • No previous convictions • Offender's vulnerability was exploited • Serious medical condition • Age and/or lack of maturity where it affects the responsibility of the offender • Mental disorder or learning disability • Sole or primary carer for dependent relatives • Dependent on drugs and committed offence to fund own drug use • Offence committed to fund own drug use • Absence of alternative livelihood options (including but not restricted to subsistence farmers) |
|---|

Table III Fine Bands

The fines are expressed as one of three levels (low, medium, high) with high representing the appropriate fine for the most serious offending in terms of culpability and harm.

| | |
|----------|--|
| • High | 100 % of weekly income after essential expenses are deducted |
| • Medium | 50-75 % of weekly income after essential expenses are deducted |
| • Low | 25-50 % of weekly income after essential expenses are deducted |

Commentary:

The fine bands are determined by the seriousness of the offence and any personal mitigating factors. The percentages ensure that the punishment imposed is proportionate; if the fines were instead expressed as fixed amounts then the proportionality of the punishment would vary in accordance with the defendant's means instead of in accordance with the culpability of the defendant.

Annex 1: Key terms

Accessibility is the degree to which a medicine or a service is obtainable for those who need it at the moment of need with the least possible regulatory, social or psychological barriers.

Drug Dependence is defined by the WHO Expert Committee on Drug Dependence as "A cluster of physiological, behavioural and cognitive phenomena of variable intensity, in which the use of a psychoactive drug (or drugs) takes on a high priority. The necessary descriptive characteristics are preoccupation with a desire to obtain and take the drug and persistent drug-seeking behaviour. Determinants and problematic consequences of drug dependence may be biological, psychological or social, and usually interact. Dependence is clearly established to be a disorder. WHO's International Classification of Diseases, 10th Edition requires for dependence syndrome that three or more of the following six characteristic features have been experienced or exhibited: (a) a strong desire or sense of compulsion to take the substance; (b) difficulties in controlling substance-taking behaviour in terms of its onset, termination, or levels of use; (c) a physiological withdrawal state when substance use has ceased or been reduced, as evidenced by: the characteristic withdrawal syndrome for the substance; or use of the same (or a closely related) substance with the intention of relieving or avoiding withdrawal symptoms; (d) evidence of tolerance, such that increased doses of the psychoactive substance are required in order to achieve effects originally produced by lower doses; (e) progressive neglect of alternative pleasures or interests because of psychoactive substance use, increased amount of time necessary to obtain or take the substance or to recover from its effects; (f) persisting with substance use despite clear evidence of overtly harmful consequences, such as harm to the liver through excessive drinking, depressive mood states consequent to periods of heavy substance use, or drug-related impairment of cognitive functioning; efforts should be made to determine that the user was actually, or could be expected to be, aware of the nature and extent of the harm."

Rational (medical) use means the appropriate use of a medicine by both health professionals and consumers in their respective roles. Rational medical use aims at meeting the clinical needs of the individual patient by prescribing, dispensing, and administering effective medicines for the medical condition of the patient, at the adequate dose, within the required time schedule and for the required amount of time to treat or cure the patient's medical condition; it should also enable the patient to adhere to such treatment.

Drug Treatment means a formalized program with specific medical or psycho-social techniques aimed at reducing a patient's dependence on controlled substances, thereby improving the general health of the patient. Such measures may include opioid substitution treatment, residential or out-patient services, administration of medicines to reduce cravings or diminish the impact of using controlled substances, psychiatric and psycho-social support services and supervised support groups.

Harm reduction refers to policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of licit and illicit drugs. The harm reduction approach is based on a strong commitment to public health and human rights. Harm reduction helps protect people from preventable diseases and death from overdose, and helps connect marginalized people with social and health services.

All major United Nations bodies have endorsed a comprehensive package of harm reduction interventions (see below), which forms an evidence-based approach to HIV prevention, treatment and care for people who inject drugs. The comprehensive package is also reflected in the Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem.¹²²

Comprehensive package of harm reduction interventions:¹²³

1. Needle and syringe programmes
2. Opioid substitution therapy
3. HIV testing services
4. Antiretroviral therapy
5. Prevention and treatment of sexually transmitted infections
6. Condom programmes for people who inject drugs and their sexual partners
7. Targeted information, education and communication
8. Prevention, vaccination, diagnosis and treatment of viral hepatitis B and C
9. Prevention, diagnosis and treatment of tuberculosis
10. Community distribution of naloxone

122 United Nations Office on Drugs and Crime, International Network of People Who Use Drugs, Joint United Nations Programme on HIV/AIDS, United Nations Development Programme, United Nations Population Fund, World Health Organization, United States Agency for International Development. *Implementing comprehensive HIV and HCV programmes with people who inject drugs: practical guidance for collaborative interventions* (2017)

123 WHO, UNODC, UNAIDS Technical guide for countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users-2012 revision (2013); World Health Organization. Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations - 2016 update (2016).

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