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**Meeting of the European Union National Drug Coordinators
Malta, 24 April 2017**

Alternatives to Punishment - The UN Perspective

I. Introduction

The main topic of this meeting of the National Drug Coordinators, the issue of "Alternatives to Punishment", is at the core of the current global debate on drug policy. The International Narcotics Control Board (INCB) has repeatedly drawn the attention of the Governments to the importance of this issue - for example at the UNGASS 2016 or at the last CND, but also frequently in its Annual Reports.

As you know, the mandate of the INCB is to monitor the implementation of the three Drug Control Conventions by Member States and to assist Governments in meeting their obligations under these treaties. That means that the INCB has to explain the content of the Conventions, to clarify and highlight the principles of the Conventions and the drug control system. Therefore, I want to deal with the topic of "Alternatives to Punishment" in the light of the provisions of the Drug Control Conventions, highlighting the legal and the policy aspects of this topic.

The question is: How should Governments respond to unlawful drug-related behaviour and to what extent do the three Drug Control Conventions give room for flexibility with regard to the response to such unlawful behaviour?

When tackling drug-related offences, more and more States adopt a variety of alternative measures instead of punishing the offenders. Two examples are

- the Portuguese model which set up the so-called "Commissions for the Dissuasion of Drug Abuse (CDT)"
- and the new Drug Dependence (Treatment not Imprisonment) Act 2014 of Malta which establishes the "Drug Offenders Rehabilitation Board".

On the other hand, in many States, policies have continued to be rooted primarily in punitive criminal justice responses. These States still believe that conviction, harsh punishment and incarceration are the only viable responses to drug-related crime.

II. What do the Conventions tell us?

Let us have a closer look on the text of the Conventions.

1. General rule: limitation of the use of controlled substances to medical and scientific purposes.

First, we need to keep in mind the basic obligation for State Parties contained in the Conventions, which is to limit the cultivation, production, manufacture, and possession of drugs exclusively to medical and scientific purposes¹. Possession of drugs shall **not** be permitted except under legal authority². That means that the use of narcotic drugs or psychotropic substances which is not medical or scientific in nature is to be considered as inconsistent with the conventions and as unlawful behaviour.

To this fundamental principle no derogation is possible. No flexibility is given to State Parties to allow them to regulate the non-medical and non-scientific use of controlled substances, making behaviour considered unlawful under the treaties legal under national systems. Such behaviour remains illegal according to the conventions.

2. Response to unlawful drug-related behaviour

A second question is: how should or could the State react to such unlawful behaviour?

The Conventions require that possession for non-medical and non-scientific use shall be established by the national legislation as a "**punishable offence**"³ or "**criminal offence**"⁴.

This obligation to establish specific behaviours as "punishable or criminal offences" contains several **conditions**:

a) Safeguard clauses

With regards to certain acts, the obligation is subject to the **constitutional limitations** of the State Party.

With regard to possession, purchase or cultivation for personal consumption, the obligation is subject not only to constitutional limitations or principles, but also to the **basic concepts of the legal system** of the State Party⁵.

b) The principle of proportionality

In the context of drug-related offences, the principle of proportionality requires States to respond to illicit activity in a manner that does not exceed the gravity of the offence. They must "*make the commission of the offences ... liable to sanctions which take into account the grave nature of these*

¹ Art. 4 para 1(c) of the Convention 1961; art. 5 para 2 of the Convention 1971

² Art. 33 of the Convention 1961; art. 5 para 3 of the Convention 1971

³ Art. 36 para 1(a) of the Convention 1961; art. 22 para 1(a) of the Convention 1971

⁴ Art. 3 para 1 of the Convention 1988

⁵ Art. 3 para 2 of the Convention 1988

offences"⁶. Punishment for criminal offences has to be adequate and directly proportionate to the seriousness of the crime.

Whereas serious offences shall be liable to **adequate punishment**⁷, offences of a minor nature or the possession of small quantities for personal consumption must not necessarily be liable to conviction or punishment. Under the Conventions, only "serious" offences should be liable to the penalty of incarceration, deprivation of liberty, pecuniary sanctions or confiscation. Offences of a "minor" nature or lesser gravity need not necessarily be subject to punitive criminal sanctions. While the choice of legislative and policy measures to address drug-related crime, including the determination of sanctions, remain the prerogative of States, the Conventions require that these sanctions should take into account the gravity of the offence and the culpability of the offender. This requirement is contained in all three of the Drug Control Conventions⁸.

Thus, the Conventions concede to State Parties a certain **flexibility** and discretion in the choice of legal and policy measures they deem appropriate to react to unlawful behaviour, especially with respect to offences of a minor nature or possession for personal consumption. In this regard, they have a certain flexibility concerning the choice of measures: criminal sanctions, administrative measures or non-punitive responses depending on the gravity of the offence.

c) Alternative measures:

As important as this flexibility in the choice of sanctions to unlawful behaviour is the possibility for States to apply **alternatives** to conviction and punishment.

All three Drug Control Conventions⁹ explicitly allow States, to provide, as an alternative or in addition to conviction or punishment, that offenders undergo measures of treatment, education, after-care, rehabilitation and social reintegration. "Alternative" means that offences need not necessarily be subject to punitive criminal conviction or sanction at all if they are of a "minor" nature or lesser gravity. In other words: in appropriate cases of a minor nature, the State can refrain from conviction and punishment and can provide, instead of criminal responses, non-punitive measures such as education, rehabilitation or social reintegration.

The 1988 Convention does not limit the application of alternative treatment and care measures to people who use drugs, but more broadly to drug offenders in general. More specifically, offenders who are affected by drug abuse or drug dependence should be provided treatment and aftercare.

3. What kind of alternative measures are allowed?

⁶ Art. 3 para 4(a) of the Convention 1988

⁷ Art. 36 para 1(a) of the Convention 1961

⁸ Art. 36 of the Convention 1961; art. 22 of the 1971 Convention; art. 3 para 4 of the Convention 1988

⁹ Art. 36 para 1(b) of the Convention 1961; art. 20 para 1; art. 22 para 1(b) of the Convention 1971; art 2 para 4(c and d) of the Convention 1988

Alternative measures cover all kinds of non-punitive assistance and help. The term of "treatment" is meant not only in a purely medical sense but - and now I quote the Commentary of the Secretary-General on the 1988 Convention -:

*"Treatment will typically include individual counselling, group counselling or referral to a support group which may involve out-patient day care, day support, in-patient care or therapeutic community support. ... Further treatment services may include drug education, training in behaviour modification, acupuncture, family therapy, relapse prevention training and the development of coping and interpersonal skills. The ability to remain drug-free may also be fostered by rehabilitation and reintegration programmes, such as the provision of further education, job placement and skill training. Therefore measures of treatment, aftercare, rehabilitation, social reintegration and education will in practice often be linked and overlapping"*¹⁰.

*"The fact that article 3 (b), (c) and (d) do not limit the application of additional or alternative treatment and care measures to drug abusers suggests that such measures may go beyond the context of medical and social problems of drug abusers and may be seen in the wider context of measures for the treatment of offenders in general, designed to reduce the likelihood of their offending again"*¹¹

The Commentary of the Secretary General presents a lot of other examples for possible alternative measures. It concludes as follows:

*"The list of additional measures in article 3 (a), (c) and (d) is not exclusive. A state party is not precluded from ordering whatever measures are judged, in the context of its national legal system, appropriate to the particular circumstances of the offender"*¹².

This definition of the Commentary is very large and open and gives room for a great variety of measures.

III. Political Declarations and UNGASS Outcome Document

The principle of proportionality and the concept of alternatives to punishment have been taken up by the [Political Declaration 2009](#)¹³ and the [UNGASS 2016 Outcome Document](#)¹⁴.

1. The **Political Declaration 2009** stated that *"There are limited alternatives to prosecution and imprisonment for drug-using offenders, and treatment services within the criminal justice system are frequently inadequate"*.

Therefore, *"Member States should, working within their legal frameworks and in compliance with applicable international law, consider allowing the full implementation of drug dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to incarceration"*.¹⁵

2. The **UNGASS Outcome Document 2016** contains Operational recommendations regarding:

*"Proportionate and effective policies and responses, as well as legal guarantees and safeguards pertaining to criminal justice proceedings and the justice sector"*¹⁶

¹⁰ Commentary of the Secretary General to the 1988-Convention, para 3.109

¹¹ Commentary of the Secretary General to the 1988-Convention, para 3.107

¹² Commentary of the Secretary General to the 1988-Convention, para 3.114

¹³ http://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_52/Political-Declaration2009_V0984963_E.pdf

¹⁴ <http://www.unodc.org/documents/postungass2016//outcome/V1603301-E.pdf>

¹⁵ Political Declaration 2009, Chapter 8 *Drug use and dependence care in the criminal justice system*, paras 15,

16(a)

¹⁶ Resolution S-30/1, Operational recommendation n°4 (j) - (o)

In this chapter, which is much more elaborate than the Political Declaration of 2009, the General Assembly recommends the following measures:

(j) *Encourage the development, adoption and implementation - with due regard for national, constitutional, legal and administrative systems - of alternative or additional measures with regard to conviction or punishment in cases of an appropriate nature... taking into account the Tokyo Rules;*¹⁷

(k) *Consider sharing ... information, lessons learned, experiences and best practices on the design, implementation and results of national criminal justice policies, including, as appropriate, domestic practices on proportional sentencing, related to the implementation of the three international drug control conventions, including article 3 of the 1988 Convention;*

(l) *Promote proportionate national sentencing policies, practices and guidelines for drug-related offences whereby the severity of penalties is proportionate to the gravity of offences and whereby both mitigating and aggravating factors are taken into account.*

IV. Political implementation and implications

Now, having looked at the provisions of the Conventions and the Political Declarations, we turn to the application of these principles in practice.

1. In recent years, some States have reassessed their criminal justice responses to drug-related offences, in particular with regard to offences of lesser gravity and those committed by persons affected by drug abuse and dependence. This development has coincided with a conceptual shift which recognises that drug dependency is a disease that needs to be treated and for which an over-reliance on punitive measures may have significant human costs while yielding limited results.

I would like to emphasize that this development does not occur in violation or in spite of the Conventions but in application thereof. In adopting alternatives to conviction and punishment for drug-related offences of a lesser gravity, such as possession for personal use and other minor offences, States are simply availing themselves of the discretion given under the Conventions.

2. Non-custodial responses do not only alleviate the burden of incarceration on national prison systems; they also contribute to a more effective and long-term rehabilitation of persons affected by drug abuse and drug dependence by affording them treatment opportunities over punishment, allowing them to work towards a life void of drug dependence and rid of the social stigma associated with imprisonment.

Efforts to place offenders who abuse drugs or are drug dependent within the purview of the relevant authorities responsible for health and social welfare, instead of putting them into prison, can contribute to create an environment of support for those afflicted with drug dependence and to cultivate an attitude of understanding of drug abuse. In turn, such an approach should act as an effective prevention tool, particularly among young people.

3. On the other hand, there are still States whose drug policies rely predominantly on interdiction, law enforcement and criminal justice responses. Extensive use of incarceration for low-level drug offenders and over-incarceration can still be found in many States.

¹⁷ Resolution 45/110, annex

The INCB has repeatedly called upon States to give due regard to the principle of proportionality in the implementation of criminal justice policy in their efforts to address drug-related crime. Already in 2007, the INCB dedicated the thematic chapter of its Annual Report to the topic of proportionality¹⁸. Already then, in 2007, the Board underlined that "disproportionate responses undermine the aims of the conventions and undermine the rule of law". And the Board called on Governments "to comprehensively review the responses by their legislative, judicial and executive arms of government to drug-related offences, in order to ensure that they are proportionate".

And since then, we have constantly reiterated that there is no treaty obligation to incarcerate drug users for consuming drugs or for committing minor offences.

4. Additionally, and more worryingly, some States have applied extra-judicial responses to suspected or purported drug-related activities or offences. Such acts constitute a serious breach of the legal obligations to which the States are held by the Drug Control Conventions and by the corpus of international legal instruments to which they have adhered. The Conventions require criminal justice responses to drug-related criminality, which include internationally-recognized due process standards and which reject extrajudicial sanctions of whatever nature. The Board repeatedly called upon all Governments concerned to put an immediate stop to such actions.

5. Finally, there are States that still retain capital punishment for drug-related offences. The INCB has repeatedly urged these States to consider the abolition of the death penalty for drug-related offences because this kind of punishment is not and can never be proportionate.

6. Policies which apply alternatives to conviction and punishment are sometimes wrongly described as "**decriminalisation**". I don't like this term because it is misleading.

a) The term of "decriminalisation" is very often mixed up with "depenalisation", "liberalisation" and "legalisation". It is true that the EMCDDA has tried to give some definitions to these terms, but these definitions are too sophisticated, and even experts very often do interfuse them.

b) In addition, the term of "decriminalisation" should not be applied to cases when a State applies alternatives to conviction and punishment, whereas the offence itself remains a punishable or a "criminal offence" according to the Conventions, even if it is not subject to a criminal justice response or sanction in the national setting. For example in Portugal, the Law 30/2000 has not legalised or depenalised the possession and acquisition of drugs, as frequently misinterpreted. On the contrary, the acquisition and possession of drugs is still prohibited and deemed a **criminal**

¹⁸ E/INCB/2007/1, INCB Annual Report 2007 Chapter I: "The principle of proportionality and drug-related offences": "The international drug control conventions encourage and facilitate proportionate responses by States to drug-related offences and offenders. Disproportionate responses undermine the aims of the conventions and undermine the rule of law. While many countries have made progress since the Board last addressed proportionality issues in its report for 1996, more remains to be done, particularly in targeting and dismantling major drug trafficking organizations. In several countries, there is a need to better balance law enforcement efforts, so that lower level offenders do not bear the brunt of justice while higher-level offenders are not brought to trial. [...] In the light of the recommendations made in its report for 1996 and the recommendations above, the Board calls on Governments to comprehensively review the responses by their legislative, judicial and executive arms of government to drug-related offences, in order to ensure that they are proportionate, and to make appropriate changes to correct any shortcomings."

offence, but they are sanctioned by **administrative** measures rather than by criminal punishment – provided the quantity held by the offender does not exceed ten days' worth of personal supply.

V. Conclusion

In the responses of States to drug-related offences, the principle of proportionality and the application of alternative or additional measures with regard to conviction or punishment must be key aspects of a sound and effective criminal justice policy.

Of course, in principle, the Conventions provide for criminal responses to drug-related offences such as imprisonment and other deprivations of liberty, but these do not constitute the only measures available to States in addressing and redressing drug-related offences. Under the Conventions, only "serious" offences should be liable to the penalty of incarceration, deprivation of liberty, pecuniary sanctions or confiscation. Offences of a "minor" nature or lesser gravity need not necessarily be subject to punitive criminal sanctions.

In addition, in appropriate cases of a minor nature, States can provide, as alternatives to conviction or punishment, measures such as education, treatment, rehabilitation or social reintegration.

Against that background it is evident that it is totally erroneous to classify the existing international drug control system as a "purely prohibitionist system" - as many proponents of legalisation do. Undoubtedly, there are some domestic policies and practices which might be purely or predominantly punitive, but this is not an obligation arising from the Drug Control Conventions. And it is also clear that in order to avoid over-incarceration, we do not need "new approaches", but Governments should implement the approaches, principles and provisions already available in the three Drug Control Conventions.

The Conventions and the Political Declarations clearly determine that effective drug control policy must rely on a balanced, comprehensive and integrated approach, where health and welfare are at the core of drug control policy, where human rights are promoted and the principle of proportionality is applied. That means that Governments should make greater use of the flexibility which is given by the Conventions, and provide, as appropriate, for alternatives to conviction and punishment.

I am convinced that if Governments in the past had made use of the possibility to apply alternatives to conviction and punishment more extensively, the global debate on the future of drug policy would probably not have turned so easily to the call for legalisation.

The INCB wishes to reiterate its continued support of efforts by States, within the framework established by the Conventions, to develop drug policies which contribute to furthering the health and welfare of mankind through the adoption of humane and proportionate drug policies. These developments are in full compliance with the Conventions, they do not occur in spite of or in violation of the Conventions. In adopting alternatives to conviction and punishment for minor offences or drug-related offences of a lesser gravity, such as possession for personal use, States are simply availing themselves of the discretion they have under the Conventions, subject to some key principles which they themselves have negotiated.