

PATHWAY FOR
CREATING A HUMAN
RIGHTS-BASED
LEGAL AND POLICY
ENVIRONMENT
RELATING TO DRUGS



International Centre
on Human Rights
and Drug Policy



USC University of
Southern California

About the International Centre on Human Rights and Drug Policy

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

About the Program on Global Health & Human Rights

The *Program on Global Health & Human Rights* (GHHR), an integral component of the USC Institute on Inequalities in Global Health, is at the forefront of expanding research in the field of health and human rights, and is a leader in developing tools for analysis, programmatic intervention, monitoring and evaluation. Multi-disciplinary, mixed-methods research grounded in equitable partnerships with communities and other collaborators everywhere GHHR works is critical to developing appropriate methodologies and models. GHHR aims to learn with its partners to inform policies and interventions at global, regional, national and local levels that will ultimately create benefits in people's health and lives, particularly among the most vulnerable populations.

About the International Guidelines on Human Rights and Drug Policy

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

About the Implementation Series

Standard setting is a first step towards rights-based action. However, it is not always clear how certain standards – often broadly phrased – translate into concrete measures on the ground. Measuring human rights progress is a further challenge. The *Implementation Report Series* addresses these challenges. Written for a general audience, the reports are intended to highlight key themes or issues in drug policy requiring human rights attention, best practices from local levels that demonstrate rights realisation, as well as tools and methods for translating norms into action. The reports take a positive perspective, focusing on existing efforts and opportunities from around the world showing how action on human rights is possible and practical in the drug policy space, and – in some cases – it is already happening. It is our hope that this series showcases the possibilities for transformative rights-based action in drug policy in a way that is beneficial to those working in drug policy who may not have human rights expertise, as well as those working in human rights who may be unfamiliar with drug policy issues.



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INTRODUCTION

Human rights are an important cornerstone for responses to the harms associated with drug use and the illicit drug trade. There is growing recognition – publicly and politically - that repositioning policy away from a punitive approach is vital, but just a start. Beyond ceasing the worst excesses, governments must fully meet their human rights obligations relating to the health, criminal justice and development aspects of drug policy. The *International Guidelines on Human Rights and Drug Policy* have condensed contemporary human rights law into the first set of human rights standards covering the spectrum of drug policy from production through to use. But far more work is needed on how these guiding standards should be implemented in practice. A key element, addressed explicitly in the Guidelines, is legal and policy review. Such review, however, requires tools and processes. With this in mind, the purpose of this document is to present a feasible pathway for moving towards a human rights-based legal and policy environment relating to drugs.

Guideline IV.2.i

States should: Consider undertaking a transparent review of drug laws and policies to assess human rights compliance

There is much to learn from related sectors. The UNDP *Commission on HIV and the Law* has shown how law can be an incredibly positive force in advancing effective national responses based on public health evidence, and grounded in human rights. Equally, bad laws can impede HIV responses, with detrimental effects for individual and public health, and human rights. The same, of course, is true for laws and policies relating to drugs. In order to build a supportive legal and policy environment, it is important for every country, and relevant stakeholders, to first understand their existing legal and policy situation so as to identify any potential barriers to the realisation of rights that might need to be addressed, as well as those supportive laws and policies that require additional implementation efforts.

Drawing from experience in the response to HIV, we examine cross-cutting principles and lessons that are applicable also to drug policy. While a broad process is presented, *how* the activities are undertaken is critical to their success. As a result, we will describe not only the activities that might be useful, but also key ingredients such as community participation and cross-sectoral action which are critical to making real impact. While there is no one-size-fits-all approach to designing a supportive legal and policy environment, there are clear advantages to learning from the experience of others who have been successful in this regard, and tailoring these generic lessons to the local and issue-specific context.

This document is intended as an entry point into these processes, written for a general audience. Whatever the legal or policy environment, the process and key ingredients we describe can be useful for making rights-based change happen.

A PATHWAY TO CHANGE

Below, we set out the key inter-related activities and processes involved - Legal Environment Assessment, National Dialogue, and Technical Working Group – providing examples from previous processes in the context of HIV. While not prescriptive, the broad pathway to change we outline is to help inform action through understanding the existing environment and supporting key stakeholders to participate, collaborate and enact change. The idea is to bring together the right mix of people, support them to learn together, from one another, and to find consensus about a way forward.

Legal Environment Assessment (LEA)

A *Legal Environment Assessment* (LEA) is a participatory process that helps identify how laws and policies affect health outcomes, rights realisation, wellbeing and livelihoods, especially for vulnerable populations. LEAs may be seen as a 'gateway' to advance advocacy and find consensus on priority actions.

The focus of an LEA can be wide. It could, for example, cover the legal environment for the prevention of communicable diseases, including HIV, and may encompass the health, development, and criminal justice issues involved. It could also take a somewhat narrower approach, focusing on a specific group. This requires some judgment and initial consultations. Too broad a scope and the process may become too large an undertaking, restricting in-depth discussion and analysis. Too narrow, and key issues may be overlooked, and opportunities for change lost. To better manage an LEA the process should fit within a given national context, rather than the scope being dictated in the abstract.

What we have learned from previous processes – primarily in relation to HIV - is that LEAs can provide valuable insights into how laws and policies interact to promote effective or ineffective governance and how they might create barriers for accessing various services. They can be initiated by government ministries and are generally overseen by a multi-stakeholder committee. While it is vital for civil society to be meaningfully involved, governments should facilitate the process as they are ultimately responsible for the creation and implementation of legal and policy frameworks.

Affected populations, such as people who grow illicit crops or use drugs, may approach the law mainly from the perspective of their negative experiences, without a full sense of how the law might provide useful protections if appropriately drafted and implemented. At the same time lawmakers may not fully understand the lived experiences of affected populations and how the laws they write actually affect real people's lives, including in unexpected ways. Meaningful participation is therefore what really distinguishes an LEA from more traditional types of legal assessments. Whereas in some cases a legal consultant or team is brought in to conduct a legal 'scan' and present findings, the LEA process involves an array of stakeholders. The value is not only in the findings of the assessment but in its process through which shared understanding can be developed. The assessment team should therefore include people from different backgrounds such as law, development, security and public health, whose job it is to engage everyone, from government to civil society. In doing so they are tasked with helping people see the relevance of the law to the topic as it relates to their work and/or lived experience. This includes capacity building during the process to help duty bearers (who may have no previous human rights experience) to understand their specific obligations, and to help rights holders know their rights and the processes available to them if they believe their rights have been violated.

Guideline 1.4

Everyone has the right to participate in public life. This includes the right to meaningful participation in the design, implementation, and assessment of drug laws, policies, and practices, particularly by those directly affected.



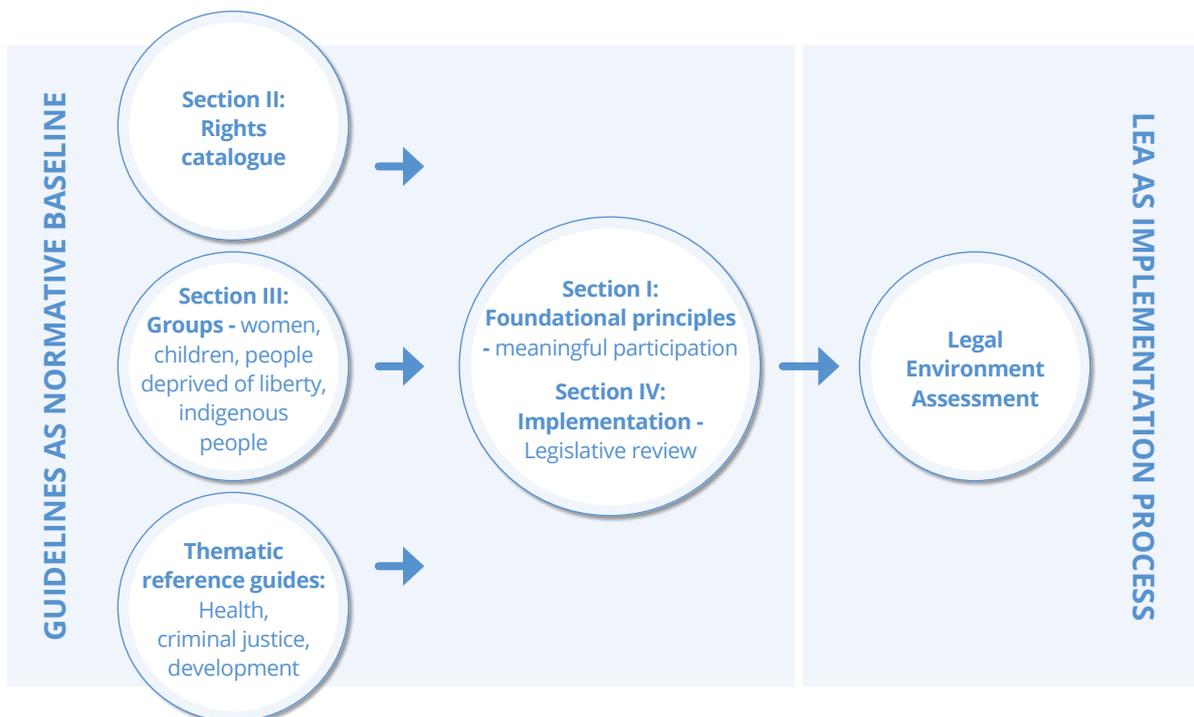
Legal Environment Assessment: Malawi

With support from UNDP, a Legal Environment Assessment was conducted in Malawi in 2012 to examine the legal and regulatory landscape around HIV and AIDS. Through the LEA process, stakeholders including government representatives and parliamentarians gained a deeper understanding of the legal infrastructure around HIV in the country, as well as the opportunities for legal reforms. The LEA led to successful civil society-led advocacy to improve relevant laws and policies. For example, the Southern Africa Litigation Centre (SALC), in conjunction with regional partners and UNAIDS, supported civil society to conduct targeted advocacy with parliamentarians, and helped draft issue briefs describing key concerns that emerged from a contentious draft HIV bill and the recommendations needed to improve the draft bill.

The role of the Guidelines in an LEA

The key issue is to understand the local legal/policy environment. The *International Guidelines on Human Rights and Drug Policy* set a baseline of human rights standards across the drug policy spectrum, based on contemporary human rights law. The Guidelines can therefore operate as a normative baseline for an LEA. For example, an LEA may be broad in scope, and aim to ensure that all human rights are complied with in the context of national drugs legislation and policy. For this purpose, the catalogue of rights set out in Part II of the Guidelines can function as the baseline. Alternatively, the LEA may wish to focus on a specific theme, such as health, criminal justice or development. For each of these, the Guidelines provide thematic reference guides to direct users to the relevant standards. The LEA may instead focus on a specific group. The Guidelines contain dedicated sections on women, children, indigenous people, and people deprived of their liberty. In each case, there is an extensive commentary providing references and support for the relevant standards.

Some of the Guidelines may of course be less relevant to local context. Alternatively, some local issues may not be sufficiently addressed in the Guidelines. In some contexts, the national level protections may already be stronger than the baseline human rights requirement, which is also important to know, but may not be fully implemented. The LEA process allows for a participatory journey, using the Guidelines as a compass.



National Dialogue

National Dialogues are meetings that bring together all the relevant stakeholders to share insights and experiences around the law, policy and human rights dimensions of a specific issue. These can take place prior to the LEA to inform its scope, or after the LEA to develop an Action Plan (see below). If budget allows, it might be useful to have a dialogue first to bring everyone together and determine the scope of the LEA, and then to bring everyone together again afterwards to focus on lessons learned and planning next steps.

The presence of both government and civil society is critical. Only when there are security concerns for affected populations might this not be wise (which might be a particular concern in areas of civil conflict or where there is a high level of violence associated with drugs). By bringing together the people who influence, write, and enforce laws with those whose lives are impacted by them, National Dialogues aim to engage stakeholders in productive conversations in which a broad array of voices can be heard.

This is meant to be a safe space to help everyone broaden their perspective on how laws and policies can help or hinder the improvement of health and the realisation of human rights. It may be useful to work with civil society participants prior to the National Dialogue to ensure that they feel comfortable speaking in a potentially intimidating space. Equally, government representatives may need to be prepared to bring an open mind to these discussions. In the context of drugs and drug policy this may be especially pertinent given that, in many places, it is a politically charged issue on which intense debates persist regarding the best policy approaches. Again, capacity building and sensitisation are important elements.



National Dialogue: Democratic Republic of the Congo

Power dynamics between the government and civil society, particularly key populations whose behaviours may be criminalised, can impede meaningful participation in multi-stakeholder processes. In preparation for the National Dialogue in the Democratic Republic of the Congo, capacity building was carried out with 50 MSM, lesbian, and transgender people on human rights, HIV and law. The key population activists then advocated with the government for lubricants to be included as a medical commodity in the national medicines list. Use of lubricants may help minimise potential skin tears and condom damage, thereby reducing the likelihood of HIV transmission during sex. For many, this was the first time they had been in the same room as government officials, and they were able to discuss their sexuality and why lubricants are so important. As a result, the national medicines list was amended to include lubricants along with condoms. Since then, lubricants supply has been ensured and their procurement covered by the national Global Fund grant.

Action Plan

National Dialogues are a place for building consensus, prioritising necessary actions identified through the LEA, and developing a country-level Action Plan to move the work forward. These Action Plans build on findings from both the LEA and the National Dialogue and comprise specific activities designed to improve legal environments, strengthen accountability mechanisms, and provide new relevant indicators.

Unlike from national drug strategies, these Action Plans should be jointly owned by government and civil society, and lay out concrete steps for implementation of the recommendations arising from the National Dialogue. These actions might include, for example, advocacy for legal change, increased budget allocation to specific work areas, review of how to make the national drug strategy more human rights-based, or information campaigns to inform people about their rights. Everyone can be assigned specific responsibilities within the Action Plan.

To ensure a shared vision and joint ownership, broad buy-in is essential. This is created and fostered through participation of stakeholders who are representative of different constituencies throughout the LEA, National Dialogue and creating the Action Plan. A mechanism for follow-up should be in place for reporting on actions taken, and to ensure accountability.

Political realities

Processes such as these will necessarily be influenced by the political climate, which may not always be static. Political support will be essential for getting started, but there may be setbacks with political change. In such cases the process may have to be re-thought. But even where there are setbacks, this process can provide useful information, build capacity of different stakeholders, and open up possibilities for action.



Action Plan: Seychelles

The National AIDS Council in the Seychelles was established in recognition of the need for participation of all sectors of society in the co-ordination and monitoring of the national HIV response. A new National HIV/AIDS Strategic Plan for 2018-2022 was designed to accelerate the national HIV response. The strategic plan was informed by previous strategies as well as the Action Plan that came out of an LEA process led by the Government, in collaboration with UN agencies and civil society. The project was intended to inform actions by clarifying how existing laws and policies – as well as their implementation and enforcement - either supported or undermined an effective HIV response. The Action Plan in turn helped bring attention to interventions for key populations, which is now the main priority of the National Strategic Plan. It provides for lay health providers, as well as offering HIV testing on non-health premises, both of which are new.

Technical Working Group

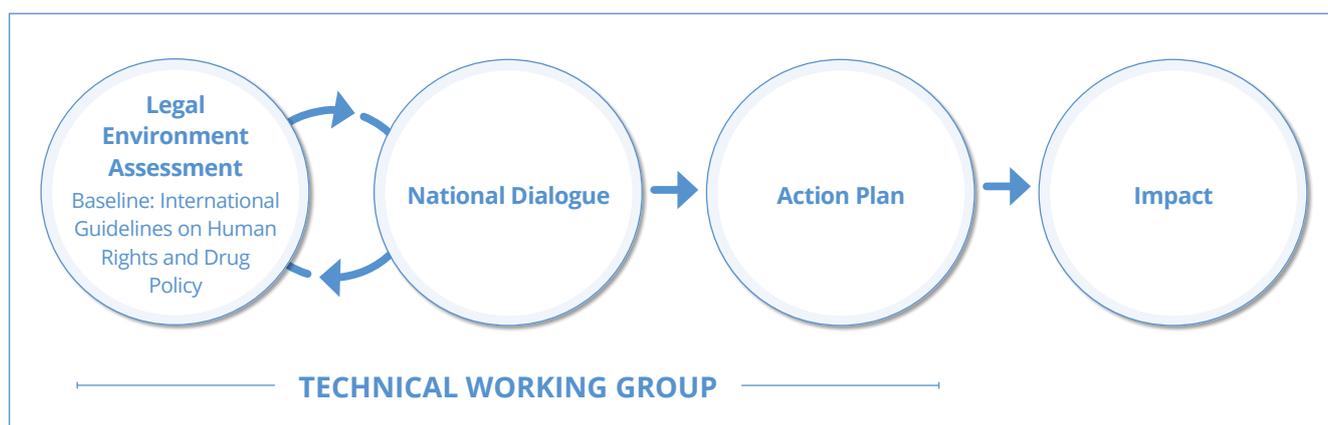
A Technical Working Group is generally established at the onset of an LEA to help guide the assessment. A Technical Working Group provides oversight of the LEA process, lends advice where needed, and assists in the implementation of the Action Plan. It is composed of an assortment of key stakeholders relevant to the local setting and issue representing, for example, government offices, United Nations partners, civil society, and affected populations (i.e. those creating or experiencing the impacts of relevant laws and policies). A working group composed of representatives of these populations, institutions and experts ensures that everyone's respective lived experiences will not be misunderstood and can instead be appropriately factored into policy-making.

There is flexibility in determining the mandate and make-up of a Technical Working Group. This will depend on the structure and scope of the LEA. One structure that has proved to be successful, however, has been that the Technical Working Group should be briefed on the relevant background information (e.g. following an initial National Dialogue) after which the LEA process can be developed, and oversight and reporting mechanisms for the ensuing stages of the LEA are determined. The Technical Working Group can also be an engine for moving the Action Plan forward by retaining communication with all relevant actors.



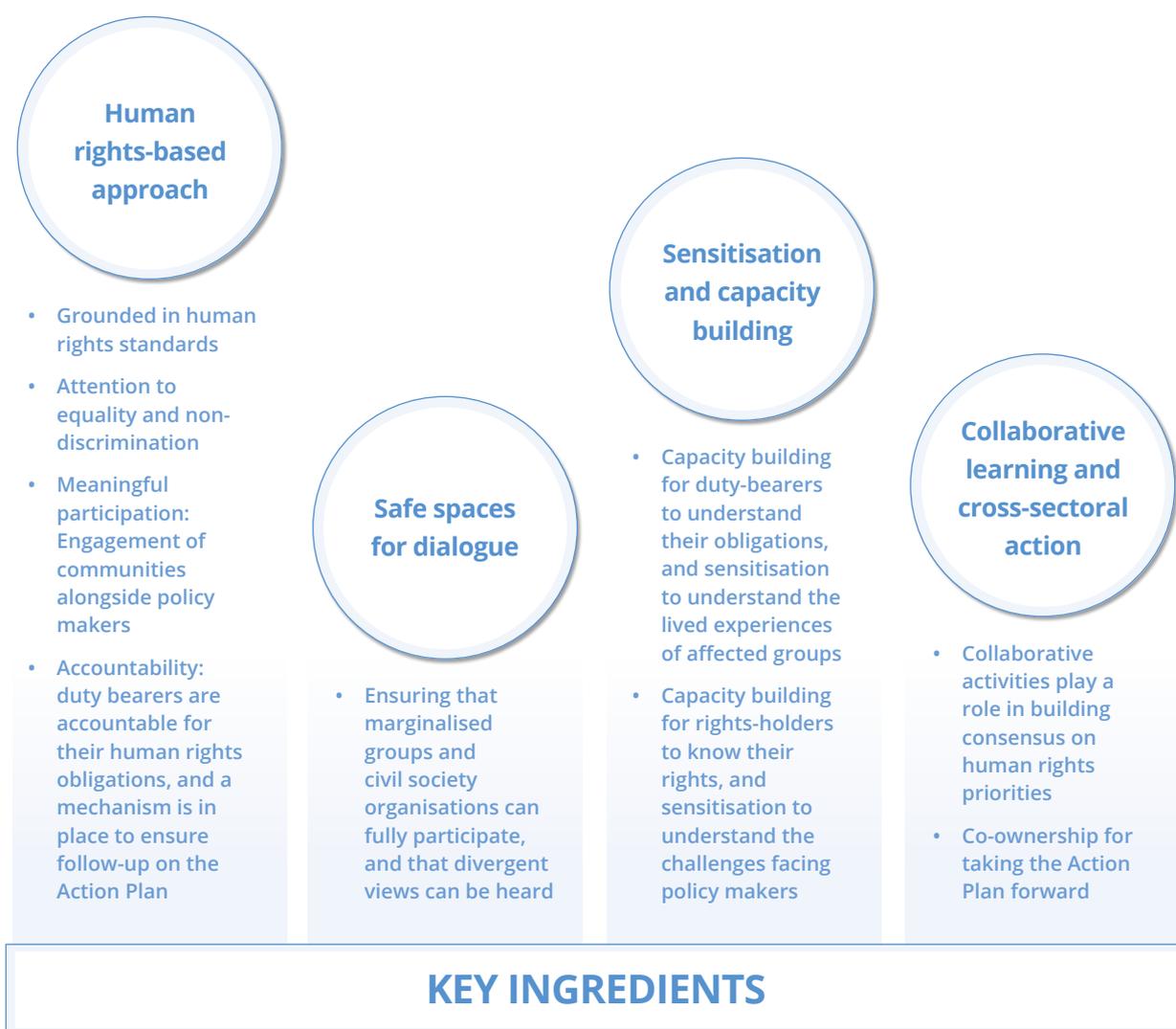
Technical Working Group: Democratic Republic of the Congo

The Technical Working Group in the Democratic Republic of the Congo is composed of 50 members, representing relevant ministries, the UN system, academia, and civil society organisations. It reflects on key issues, offers training and support to government and civil society institutions, and works to influence laws, policies, strategies and resource mobilisation. Its task is not to direct, but to coordinate, provide tools, and try to catalyse and harmonise actions. A key factor to the success of the Working Group is that it remains open and inclusive – always looking for new allies.



Seeing all People as People

A very basic but critical aim of the processes described above is to break through people's preconceptions about other groups or behaviours and help everyone see people as people. This is especially important when so much stigma attaches to the topic in question, and comes from the foundation of inclusion and participation that underpins the process. For some, it may be the first avenue they have had for genuine, safe interaction with government officials, such as police or judges (outside the context of arrest or harassment). For many government officials, it might be the first chance they've had to learn about the lived experience of people involved with drugs rather than simply seeing them as people breaking drug laws. Through the processes above, government officials may be sensitised to the lived experiences of affected populations. Affected populations and civil society in turn may experience the mechanisms and processes that influence how laws and policies come about, and the challenges of governance. If people on each side of the equation can see those on the other side as people with whom dialogue is possible even in the absence of full agreement, progress can be achieved.



MAPPING THE PATHWAY

The diagram below illustrates how these various steps can fit together, providing a country example from similar work in the context of HIV and possibilities using the *International Guidelines on Human Rights and Drug Policy* as a baseline. In the pathway, we propose a hypothetical situation for national-level change. The most pertinent stakeholders include: policy-makers (civil servants and parliamentarians), growers of drug crops, people who use drugs, duty bearers (law enforcement, judges, health workers), and civil society. Going step-by-step, national level activities can feed off one other and create a working network for lasting impact.

- First, it is determined that an **LEA** is the best method to start this process, as there has yet to have been a widespread assessment of existing law and policy.
- The **International Guidelines on Human rights and Drug Policy** serve as a normative baseline and entry point for the LEA
- The LEA reveals that there are significant legal barriers that have negative impact on affected populations' human rights and/or that there are existing legal frameworks needing further concrete support for implementation.
- A **National Dialogue** is planned, and the spotlight is put on the laws and policies identified by the LEA, with breakouts and sensitisation sessions scheduled to specifically address these issues. Duty bearers and affected populations with extensive experience on both sides of these issues are invited to participate.
- A **Technical Working Group** is established, with careful consideration to include a representative cohort of stakeholders, inclusive of affected populations in addition to key government officials.
- The goal of the processes outlined above is to influence and inform a country-specific **Action Plan** in which the findings and relationships built through the LEA and national dialogues can be translated into tangible results
- **Impact:** Through the processes describe above, a different understanding emerges among all stakeholders. Recognition of harmful laws and policies turns into agendas for action. Sensitised duty bearers who have heard from the lived experiences of affected populations bring a newfound toolkit to address inequality, be it in the way law enforcement interacts with affected populations, the way judges decide on certain cases, or how parliamentarians are informed to make decisions.

A PATHWAY TO CHANGE

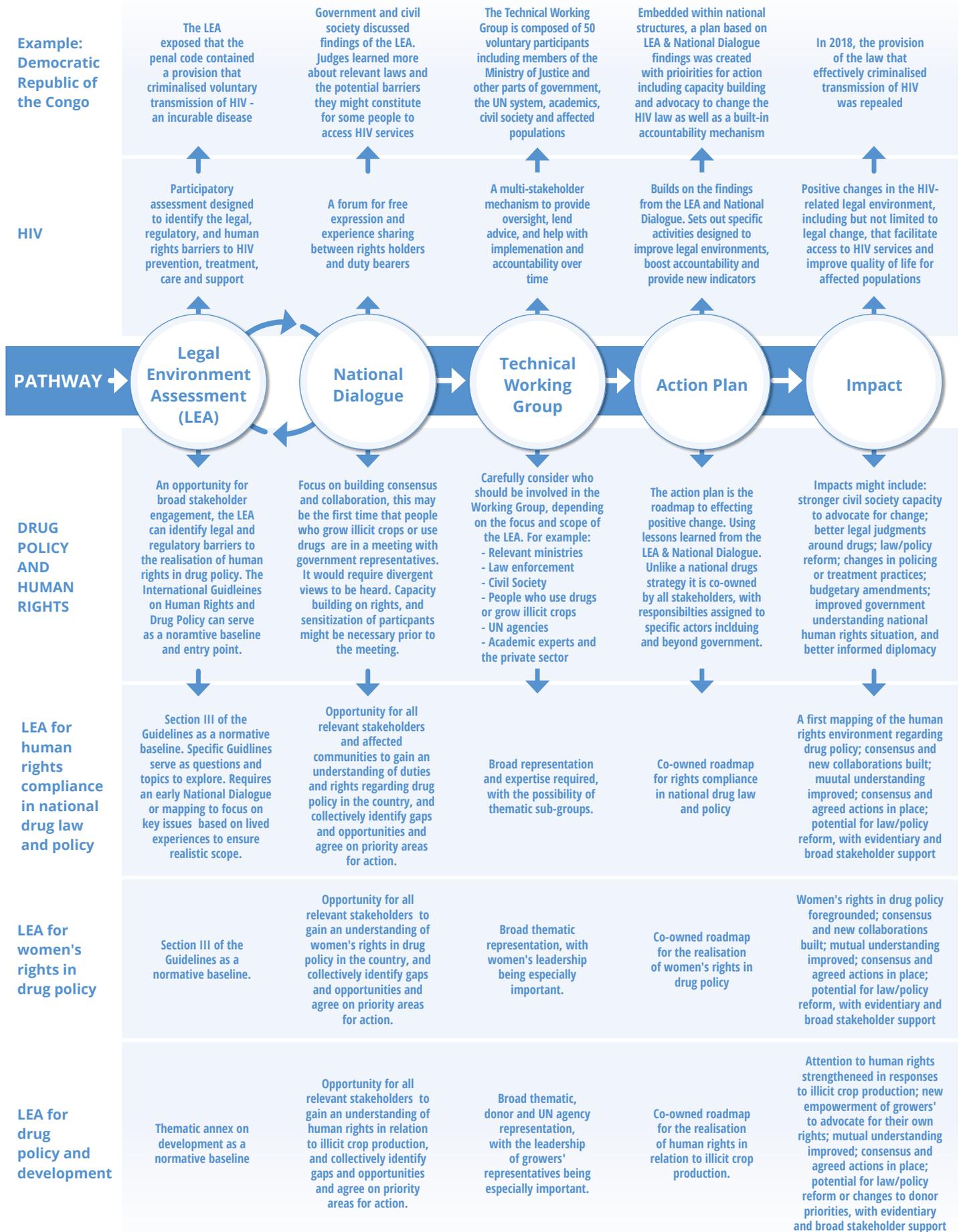
KEY INGREDIENTS:

Human rights-based approach

Safe spaces for dialogue

Sensitisation and capacity building

Collaborative learning and cross-sectoral action



RESOURCES

- *International Guidelines on Human Rights and Drug Policy*

Available at www.humanrights-drugpolicy.org

- UN Development Program, *Legal Environment Assessment for HIV: An Operational Guide for Conducting National Legal, Regulatory and Policy Assessments for HIV*, 2014

- Stop TB Partnership & UN Development Program, *Legal environment Assessments for Tuberculosis*, 2017

Both available at <https://www.undp-capacitydevelopment-health.org/en/legal-and-policy/identifying-human-rights-barriers/legal-environment-assessments/>