

Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws

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Introduction

The relation between drug conventions and human rights is one of the most challenging topics nowadays, due to the coexistence of a very repressive international drug system dating from the last century, and still enforced by many countries, and recent developments and victories in human rights. While the international community has advanced significantly in elaborating treaties, and recognizing and trying to implement human rights based on the concept of human dignity, the drug control system is understood by its supporters as a hermetic system, apart from any influence from human rights laws. Despite many possible areas of influence and chances of integrating individual and social rights into the framework of drug conventions, there has been a very strong resistance from many countries.

In this chapter we propose to examine, from a normative point of view, the prevalence of human rights law and the need for respect of individual and cultural rights in applying drug laws. We intend to question if there can be any possible

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exception in international law that would prevent human rights standards and norms from being fully applicable in the field of drug control. In addition to this, we will discuss concrete examples of breaches in international human rights law treaties that are being ignored by those in charge of implementation of drug control treaties in international bodies and national states.

In order to explain the situation, we will begin with a general overview of the international conventions on drugs, and then address their relations to human rights treaties. Even though it is not our objective to analyze all possible human rights violations resulting from drug control treaties or their implementation, we will focus specifically on two relevant issues: one related to individual rights, such as the obligation (or not) to criminalize drug possession for personal use, and secondly, the inclusion of coca leaf as a prohibited substance by the UN and the collective right of the people from the Andean Region to cultivate and consume this plant in a traditional way.

An Overview of the United Nations Drug Conventions

Since 1912, 13 international instruments related to drug issues have been developed. Most recently, the modern drug conventions framework involves three main existing treaties. In general terms, the 1961 United Nations Single Convention on Narcotic Drugs prohibits opium smoking and eating, coca leaf chewing, cannabis resin smoking, and nonmedical use of cannabis, and instituted an international system of control imposing a repressive control on products regularly cultivated and used in many parts of the world.

It is important to place this convention within the context of the Cold War, particularly when discussing the coca chewing prohibition in the Andean Region, since at that time the two superpowers were establishing their areas of influence. It is also noteworthy that the 1961 Convention established deadlines for the gradual elimination of opium within 15 years and coca and cannabis in 25 years, something that never occurred, as we will see elsewhere in this paper. Despite its preamble announcing that the reason for the increase of control would be “a preoccupation with physical and mental health of the people,” the only means offered to achieve this goal was the absolute prohibition of the use and trade of such substances and the prosecution of violators of this rule. However, amended few years later, the 1972 Protocol to the 1961 Single Convention highlighted the need to provide access to treatment and rehabilitation for drug abusers concomitantly or alternatively to imprisonment. Currently, there are 186 states that are parties to this convention, as amended by the 1972 Protocol and only nine states are not parties to the 1961 Convention.

The special relevance of this protocol is that it allows states to adopt less repressive measures with respect to users, notably the substitution of incarceration

for treatment. This serves today as a legal basis for European countries that adopt an alternative policy toward users, including treatment options and harm reduction.

Broadening the scope of the international system, the 1971 UN Convention on Psychotropic Substances¹ deals with the control of synthetic drugs. It is noteworthy that, so far, only narcotic drugs related to opium, cannabis, and cocaine were subject to international control, although other substances, such as stimulants, amphetamines, and LSD, until then unregulated, also had psychoactive effects. It was claimed at the time that the harmful effects of these new substances would justify the extension of the same controls available for narcotics. Thus, from 1976 on, when the convention finally entered into force, these new substances, as well as sedative-hypnotics and tranquilizers, were all submitted to international control. In addition, the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations 1988) focus mainly on drug trafficking and the need for criminalization of money laundering: the collateral effects of drug prohibition (or a direct effect of the illicit drug market, others would say). This convention was broadly accepted worldwide, and only eleven states have yet to become parties to it.

Its text was designed to be a repressive tool with the aim to “combat” drug trafficking organizations by expanding the hypotheses of extradition, international cooperation, and confiscation of financial assets of traffickers, while unifying and strengthening the existing legal instruments. It then created a system designed to oppose the military, economic, and financial power amassed by drug traffickers. It also proposed the standardization of definitions used in regard to drug trafficking, and state members were encouraged to increase the repression by tackling new techniques.

In its text, there is common use of strong terms like “danger of incalculable gravity,” “eradication of illicit traffic,” and “elimination of illicit demand.” Article 24 allows parties to “adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.” Some countries commonly use this provision to justify capital punishment for drug crimes.

The 1988 Convention also dictates the eradication of coca cultivation, in a strong message to South American countries, reinforcing the 1961 Convention. Furthermore, it establishes the necessity of monitoring chemicals used in the production of drugs, and of increased efforts against illicit drug production. Specifically on criminal matters, the convention required states to adopt all necessary measures to establish, as a criminal offense in its domestic laws, all activities linked to production, sale, transport, and distribution of all listed substances (art. 3, § 1).

¹ There are, as of November 2011, 183 states that are parties to the Convention on Psychotropic Substances of 1971, according to the INCB. A total of 12 states have yet to become parties to that convention: three of them in Africa (Equatorial Guinea, Liberia, and South Sudan), one in the Americas (Haiti), one in Asia (Timor-Leste), and seven in Oceania (Cook Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu).

This framework created to control drug circulation includes some specialized bodies: the “political-legislative power” exercised by the UN General Assembly and the CND (Commission on Narcotic Drugs), under the structure of ECOSOC (Economic and Social Council), where drug policy should be debated and defined; the “judiciary,” represented by the INCB (International Narcotic Control Board), an independent body with power to impose sanctions in case of non-compliance; and, finally, the “executive body”: the United Nations Office on Drugs and Crime (UNODC), headed by an executive director. It is noteworthy that the repressive approach towards drugs is expressed in the very name of the specialized body, related to “drugs and crime.”

Thus, control of illicit drugs is organized in a system of classification of substances divided into four tables, based on the need to impose more or less control of the substances therein, supposedly in light of the risks of abuse and addiction. These three international texts, ratified by 95 % of the countries in the world, apparently represent common (repressive) standards regarding the limits to use and produce certain substances, and are still in force today, more than 50 years later.

Since the beginning of the twentieth century, the international community has worked hard and expended a great amount of money to try to enforce these drug conventions provisions, with the main goal to achieve a “world free of drugs” by imposing on all countries the obligation to control and severely punish persons who use (proscribed) drugs and/or those who dare to sell them illegally. Based on voluntary compliance and cooperation of the world community, these treaties directly influenced many to create national laws and widely enforce crimes involving illegal drugs with severe penalties. Rather than being treated as a health issue, drug control became a matter of criminal law, with an emphasis on prohibition and criminal sanctions for all aspects of consuming, producing, and transporting illicit drugs.

Nevertheless, such efforts appear to have been insufficient or misguided when faced with the increased phenomena of cultivation, manufacture, traffic, and use of narcotic drugs and psychoactive substances all over the world. Half a century later, contrary to what was originally expected, the world drug problem has increased, especially in the developing countries that used to be considered only producing countries, and are now facing the situation of drug abuse; something that did not exist 50 years ago (Bassiouni and Thony 1998). At the same time that there is almost universal ratification and national implementation of drug conventions, with no impact on promoting health while applying them, this policy has created many collateral human costs.

Considering the unwillingness of the drug authorities to recognize the unintended consequences of such bad policies, as seen in the last meeting of the UN Commission on Narcotic Drugs in 2012, a human-rights approach is necessary and obligatory, and should prevail over repressive interpretations of drug conventions in international law. If enforcement of drug control obligations is interfering with individual and collective rights, perhaps it is time we discussed not only

normative conflicts between drug conventions and human rights treaties, and their hierarchy in the United Nations System, but also the humanitarian costs of the so called “War on Drugs.”

In this article, we are going to first address the conflict between international human rights and drug control treaties, and then focus on important human rights violations arising from their implementation.

Human Rights and Drug Conventions Within the UN System

The United Nations (UN) was created in 1945 by representatives of 50 countries just after World War II, following the failure of the preexisting League of Nations, and currently has 193 member states.

The main purposes of the United Nations, according to article one of its charter, are to “maintain international peace and security (...) in conformity with the principles of justice and international law,” “to develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of people,” and “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, and religion” (United Nations 1945). Also, Article 55 of the charter says that it should promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Human rights law essentially rests on international treaties and conventions on the matter, as well as the case law of international bodies, such as the European and Inter-American Court of Human Rights.

In this sense, Cançado Trindade (2009) draws attention to a historical process, which he termed “humanization of international law,” as a “gradual expansion of the material content of *jus cogens* in contemporary international case-law,” with an obligation to protect the most vulnerable people “of the most complete adversity or vulnerability.” It covers, among other important issues, the absolute prohibition of torture and of cruel, inhuman or degrading treatment, followed by the assertion of the fundamental character of the principle of equality and non-discrimination, and of the right of access to justice.

The notion of “humanization” of international law contrasts with an older international order based upon theories such as the voluntarism and unilateralism of the “*Raison d’État*” (or reason of state, meaning a purely political reason for action on the part of a government). The advent of this new primacy of “humanitarian reasons” instead, is the main characteristic of a world that recognizes international human rights law as *jus cogens* (or imperative norms of international law), constructed upon the basic principle of the dignity of all human beings. This recognition is part of a true international legal order, in which human rights violations are not acceptable, based on the same principle of humanity and

universal conscience that limits the old notion of sovereignty when human rights are being violated (Cançado Trindade 2009).

Taking into account this theory, we can say that while drug control treaties represent an old order based on the reason of state, human rights law is directly connected to humanitarian reasons, common to all humankind, irrespective of origin, gender, sexual orientation, nationality, religion, ethnicity, color, language, political opinion or any other discriminating criteria. The relationship between human rights treaties and international drug conventions is an essential issue that still needs special attention from international bodies as both human right treaties and drug conventions are under the same United Nations “umbrella”; however, they have been treated by international drug control bodies in separate ways, as if they had diverse sources.

This issue was officially brought to the attention of a UN drug control body for the first time in 2008, at the annual meeting of the Commission of Narcotic Drugs (CND), when the world celebrated 60 years of the Universal Declaration of Human Rights. A resolution entitled: “The proper integration of the United Nations human rights system with international drug control policy” was introduced by Uruguay, with the co-sponsorship of Bolivia, Argentina, and Switzerland, saying that, “international drug control activities must be conducted in conformity with international human rights law” (Blickerman 2008). Unfortunately, the representative of China fiercely opposed to it, saying that “discussion of political issues such as human rights are inappropriate at CND.” He was joined by Pakistan, Japan, Nigeria, Iran, and Thailand. This example is representative of the objections some countries have to using the term “human rights” in written documents related to drug control.

Based on the UN Charter, it is undeniable that human rights are at the core of the UN system, despite this position. Together with development, and alongside peace and security, human rights represent “one of the three pillars of the United Nations enshrined in the UN Charter.” From this statement, human rights, as one the most important goals of the international community, are hierarchically superior to other treaties, and should indeed prevail in case of possible conflicts or overlays with any other instrument, such as drug control treaties, for example.

The only possible conclusion here is that UN drug treaties and drug policies applied by members of the United Nations cannot violate individual and social rights provided for in the many international instruments that are assumed to be binding to state’s interventions, as *jus cogens*. It would be totally against the UN Charter to say that a possible obligation to punish drug law violators established in a convention could be more important than a norm enshrined in the charter, guaranteeing respect for human rights. As correctly pointed out by Barrett (2010), human rights treaties “under the Charter take precedence over other international treaties, including the drug conventions (article 103). All member states have agreed to co-operate towards the achievement of these aims (article 56).”

In addition, the very text of the drug conventions refers to national constitutional guarantees and concurrent obligations in international law as limiting barriers for

determining the appropriateness of certain policies, in the form of a “safeguard clause” (for example, prohibiting the criminalization of personal possession of illicit substances, as seen in article 3 (2) of the 1988 Trafficking Convention), meaning that there is no unlimited scope for drug treaties to prevail over other hierarchically superior rights.

Human Rights Violations Arising from Drug Laws

Despite the recognized prevalence of human rights treaties over drug conventions in theory, the concrete application of drug laws can unlawfully impose grave breaches to human rights treaties and standards, as it has already been pointed out by academics, authorities, experts, and many non-governmental organizations (UN Economic and Social Council [ECOSOC] 2009; World Health Organization [WHO]/United Nations Office on Drugs and Crime [UNODC]/UNAIDS 2009; International Harm Reduction Association [IHRA] 2008; Chiu and Burris 2012).

First of all, as we’ll see later on in this chapter, while prohibiting the private use of some substances, the person’s right not to be subjected to arbitrary or unlawful interference with privacy, family or home (International Covenant on Civil and Political Rights [ICCPR] [United Nations 1966, art. 17]), and not to be discriminated against (United Nations 1966, art. 12), is violated in the name of drug treaties. (See also Walsh in this volume.) Moreover, the current drug control system may violate the individual right of “everyone to the enjoyment of the highest attainable standard of physical and mental health,” based on article 12 of the International Covenant on Economic, Social, and Cultural Rights.

As already stated by Anand Grover, Special Rapporteur on the topic appointed by the United Nations Human Rights Council, states have an obligation to prevent epidemics, and countries that do not apply harm reduction measures, such as syringe distribution and other preventive measures, can create serious risks to health. In his conclusion to the report on criminalization of drug use, he says that the “so-called ‘campaign for a drug free world’ could actually result in violations of the right to health, as people who used drugs might not come forward to get the care they needed for fear of being arrested, or could be denied health care if they sought help” (Grover 2010). Nevertheless, there is no consensus among the UN bodies to include harm reduction as a preventive measure, at least in United Nations Office on Drugs and Crime (UNODC) official documents (see UNODC 2009).

There are also violations of the right to health when the international drug treaties provide for unnecessary limits in accessing essential medications (UNODC 2011a, b; ECOSOC 2010; WHO 2011), as the International Narcotics Control Board has already recognized: “Although the World Health Organization (WHO) considers access to controlled medicines, including morphine and codeine,

to be a human right, it is virtually non-existent in over 150 countries,” said its president (INCB 2010).

Besides, the right to receive ethical treatment (United Nations 1982), and the World Medical Association’s International Code of Medical Ethics (World Medical Association [WMA] 2006) is not provided for in the drug conventions. Many of these rights are frequently denied to persons accused, convicted or even suspected of drug offenses, especially in countries that adopt enforced treatment or coerced hospitalization for drug users. Recent examples of drug rehabilitation centers in horrible conditions, where drug users are beaten, whipped, and shocked with electric batons, were denounced by non-governmental organizations (Human Rights Watch 2011).

The topic of treatment as an alternative to conviction or punishment is actually being debated. Although here there is no space for further discussion on this subject, there are many important documents from UN and European bodies, including the UNODC, highlighting the importance of health care for drug offenders (UNODC 2010; UNODC/WHO 2009; EMCDDA 2005). Unfortunately, countries mostly apply punishment rather than voluntary treatment for drug abusers.

Due to this, another impressive example of violation of human rights in implementing drug laws is mass imprisonment. Especially in Latin America (Metaal and Youngers 2011), but also in the United States (Bewley-Taylor et al. 2005, 2009), exceptionally harsh drug laws, with long prison sentences, are a key factor in rising incarceration rates and prison overcrowding. Millions of people arrested for drug trafficking or even drug possession receive disproportionality severe penalties and this has a direct impact on the penitentiary system in the region.

Opposite the view of drug treaties that recommend imprisonment as a penalty for drug crimes, the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) when providing rules on crime prevention and the administration of justice, called on member states to “develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”

In fact, very recently, the final text of CND Resolution 55/2012, on “alternatives to imprisonment for certain offenses as demand reduction strategies that promote public health and public safety,” opted not to promote alternative imprisonment, as recommend by the Tokyo Rules. Basically, as some countries could not agree that “providing alternatives to imprisonment” could be “successful means of promoting social integration with full respect for human rights.” the expression “for some member states” needed to be added to its text, meaning essentially that they could not reach an agreement on the subject.

Such rejection of alternatives to prison, together with repressive criminal drug policy, can be identified as the direct cause of mass imprisonment worldwide. In this sense, human rights treaties are being violated by enforcing drug treaties when

drug traffickers are confined in overcrowded facilities, violating their rights not to be subjected to cruel, inhuman or degrading treatment or punishment (United Nations 1966, art. 7).

The proportionality principle imposes differences in penalties that are not provided for in most drug laws around the world, especially regarding the seriousness criteria, i.e. when the offense is a preparatory act or an incomplete one. As for maximum limits of the state response, the interpretation of “severe” and “adequate” punishment also include references to international human rights legal instruments as existing and binding limits to penalties, such as the Universal Declaration of Human Rights and other international legal instruments. But drug laws are disproportionate and impose excessive punishment in most cases.

Furthermore, prisons have expensive costs, and by incarcerating so many non-violent drug offenders, public money is being diverted from prevention to repression. While displacing public policies from public health to law enforcement, effective public health-based interventions had their funds diverted to ineffective law enforcement and other repressive measures (Barrett 2010). It is also well documented that not only risky drug use with syringe sharing, but also imprisonment in overcrowded facilities, increases the exposure to HIV/AIDS contamination, confirming that repressive drug laws are violating people’s rights.

Finally, while UN human rights bodies consider that capital punishment for drug offenses is in violation of international law, there are still many countries that apply this extreme punishment for drug traffickers, such as Indonesia. Historically, “the death penalty for drug offenses became more prevalent after the adoption of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances” (Gallahue et al. 2012). According to estimations, executions for drug offenses have taken place in 12–14 countries over the past 5 years (Gallahue et al. 2012). This means that such a policy does not comply with legal instruments on the abolition of capital punishment,² the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1975), and the 2nd Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty (United Nations 1984).

Drug-related offenses clearly do not fit the category of “most serious crimes” for which the death penalty can eventually be sought³ before its abolition. Under international law and human rights jurisprudence, such as the Inter-American

² General Assembly resolution 2857 (XXVI) of December 20, 1971: Safeguards guaranteeing the protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50 of May 25, 1984). Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 3452 (XXX) of 9 December 1975). See also the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, ST/CSDHA/16.

³ “High Commissioner calls for focus on human rights and harm reduction in international drug policy,” press release, United Nations 2009; Report of the UN Secretary General, capital punishment and implementation of the safeguards guaranteeing protection of rights of those facing the death penalty, ECOSOC, 18.12.09.

Court of Human Rights 2005 (*Raxcacó-Reyes v. Guatemala* Case, para. 69), capital penalty is limited to the “cases where it can be shown that there is an intention to kill that resulted in the loss of life,” as mentioned by Mr. Philip Alston, Special Rapporteur on extrajudicial summary or arbitrary executions (Alston 2007, para. 53).

The long list of human rights threats as a result of the application of drug laws also includes violations of individual guarantees in criminal cases involving drugs, and the prohibition of consumption of substances such as the coca leaf, traditionally consumed in the Andes in South America. We conclude this part by saying that the 1988 Convention and its repressive approach are an example of how drug laws, applied without limits, can trigger serious violations of human rights. It is not our objective here to relate exhaustively all the human rights breaches resulting from the application of drug laws, since there are many others to mention. In the next item we will touch upon two relevant issues; one related to an individual right, and another to a collective right: both violated as a result of drug laws.

Human Rights and General Treaties Obligations Regarding Drug Possession for Personal Use

As seen above, it is widely known that the three international conventions establish general obligations concerning drug control. That means that the countries that signed the treaties mentioned must take legislative and administrative measures to adapt their domestic law to the conventions’ paradigms. The previous section demonstrated that part of the conventions conflict with human rights standards and norms. We will analyze now the provisions that deal specifically with the use and the possession for use of drugs, trying to understand if the obligations established by the drug conventions in relation to the mentioned topics are in consonance or not with the norms that form the core of the UN System. Along this path, we will explore the drug conventions system to examine its scope and to check if there is room for creating alternative drug policies. This section provides a general perspective on the topic; the discussion will be narrowed later when we analyze the Bolivian drug law and the traditional chewing of coca leaf.

As for the scope of the Conventions, the 1961 and 1971 Conventions’ Preambles mention two important aspects that led the parties to sign these treaties: (a) health and welfare of mankind; and (b) the indispensability of the medical use of narcotic drugs for the relief of pain and suffering. The 1988 Convention extended the scope and brought more information about the reasons the parties decided to create a third convention on drugs. The 1988 Convention mentions illicit trafficking as an international criminal activity, the link between the traffic of drugs and



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