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Editorial

Injecting drugs into human rights advocacy

> Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS.
>
> Declaration of Commitment on HIV/AIDS, UN General Assembly Special Session on HIV/AIDS, 27 June 2001

In November 2004, John Shelley initiated legal action against the British Home Secretary under the U.K. *Human Rights Act*. A prisoner in HMP Long Lartin, Shelley claimed that the health of prisoners who inject drugs was being jeopardised by a lack of access to syringe exchange programmes. This, he argued, forced prisoners to share used syringes, putting them at high risk of HIV infection. Shelley claimed that the failure of the government to provide prisoners with access to sterile syringes was in violation of Article 2 (the right to life), Article 3 (the prohibition of torture and inhuman or degrading treatment) and Article 8 (the right to respect for private life) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950). Whilst Shelley's action was dismissed by the U.K. courts in April 2005, it will be considered later this year by the European Court of Human Rights in Strasbourg.

The Shelley case highlights a major concern for HIV/AIDS, harm reduction and prisoners' rights advocates, namely the systematic denial of harm reduction measures to people in prison, placing them at unnecessary risk of preventable harms including HIV and HCV infection. If successful, the Shelley case would represent an important victory for harm reduction advocates internationally by creating the legal basis to expand prison needle exchange programmes (PNEPs) across member states of the Council of Europe. In December 2006, the Irish Penal Reform Trust (IPRT) and the Canadian HIV/AIDS Legal Network were accepted by the European Court as joint third party intervenors in *Shelley* v. *U.K.*, enabling our organisations to provide the Court with detailed written submissions on the health and human rights issues inherent to the case (Irish Penal Reform Trust & Canadian HIV/AIDS Legal Network, 2007a, 2007b).

The IPRT/Legal Network submission examined the operational experience with, and evaluated outcomes of, PNEPs internationally (Lines et al., 2006). In refuting the U.K. government's contention that such interventions promote injecting and create safety problems, the submission reviewed the evidence that PNEPs do not lead to increased drug use or injecting, and result in increased institutional safety by regulating the previously unregulated circulation of illegal and dirty syringes. PNEPs have also proved successful in reducing the sharing and reuse of syringes, therefore serving as important HIV and HCV prevention initiatives.

We also argued that the U.K. has clear obligations in international human rights law to implement health protection and promotion measures in prisons. The U.K. is legally obligated to take steps to prevent the spread of epidemic diseases under Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (the right to enjoyment of the highest attainable standard of health) (International Covenant on Economic, Social and Cultural Rights, 1976). Although the *European Convention*, the treaty which the European Court is charged with enforcing, contains no explicit right to health, we argued that both the right to life (Article 2) and the prohibition of inhuman or degrading treatment (Article 3) impose upon states a duty to protect the lives and well-being of people held in detention, a duty which has been interpreted in previous European Court decisions to include providing detainees with adequate health care (Lines, 2007).

Furthermore, the principle of equivalence requires standards of health care for persons in detention that achieve equivalent health objectives as those pursued outside prisons (Lines, 2006). In the U.K., the House of Lords confirmed years ago that prisoners retain all rights except those necessarily limited by requirements of incarceration (Raymond & Honey, 1983). This must include access to health services (including sterile syringe programmes) that are available to those outside prison—and indeed, stated UK policy is "to provide prisoners with access to the same range and quality of services as the general public" (Department of Public Health, 2004). The Parliamentary Assembly of the Council of Europe recommended that sterile syringes be made available to injecting drug users in prisons as early as 1988 (Council of Europe, 1988), and the Council of Europe has

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subsequently affirmed the human rights principle of equivalence and the obligations of states that flow from it (Council of Europe, 1993, 1998, 2006), as has the European Committee or the Prevention of Torture (European Committee for the Prevention of Torture, 1992). The state's desire to create drug-free prisons does not override these obligations. On the contrary, the case law of the European Court makes it clear that the state's duty to protect the well-being of detainees remains even if the prisoners are engaged in activities that violate prison rules (Lines, 2007).

Whatever the outcome of the case, *Shelley v. U.K.* highlights the potential use of the legal mechanisms provided in international human rights law as tools to promote harm reduction programmes and the rights of people who use drugs, avenues that should be explored further by harm reduction advocates.

In many countries around the world, prisoners are not the only people denied access to life-preserving harm reduction measures. Indeed, the development and mainstreaming of harm reduction programmes in many states, such as syringe exchange and substitution treatment, is hampered by the punitive, prohibitionist policies that drive domestic and international approaches to drug use. These punitive policies are typically rooted in moralistic rationales that entrench and exacerbate systemic discrimination against people who use drugs, rather than pragmatic public health principles and human rights obligations. As a result, in high-income and low-income countries across all regions of the world, people who use illegal drugs are amongst the most marginalized and stigmatized sectors of society, and are put at increased risk of preventable HIV and HCV infection by policies that prioritise prohibition over public health.

The dearth of international attention paid to human rights abuses against people who use drugs – including denial of effective health promotion and harm reduction interventions – suggests that some of the same moralistic assumptions that drive repressive drug policy also impede the development of progressive human rights discourse in this area.

Writing in 1996, Norbert Gilmore observed that "little has been written about drug use *and* human rights. Human rights are rarely mentioned expressly in drug literature and drug use is rarely mentioned in human rights literature" (Gilmore, 1996). Ten years later, campaigning NGOs, legal advocates and organised groups of people who use drugs are increasingly invoking human rights norms in their work (e.g., Canadian HIV/AIDS Legal Network, 2006; Elliott et al., 2005; Human Rights Watch, 2004; Lines, 2007). Yet it remains the case that, in most countries, drug policy and legislation are rarely informed by international human rights obligations, and drug issues rarely enter into the discourse of human rights mechanisms and monitors, at either the national or international level. It is within this vacuum that human rights abuses flourish with little public comment, and HIV and HCV spread with little public concern.

At the UN level, resolving this situation through established mechanisms is complicated by the inherent contradictions faced by that organisation on the question of drugs (e.g., Bewley-Taylor, 2003). On the one hand, the UN is the body tasked by the international community with promoting and expanding global human rights protections. On the other, it is also the body responsible for promoting and expanding the international narcotics control regime that is predominantly prohibitionist in its orientation, the very system that not only encourages the denial of human rights to people who use drugs through their criminalization and marginalization, but also provides states with a legal backdrop against which they often offer justification for those abuses.

Legal experts and harm reduction advocates have identified flexibility within the current UN conventions that could temper the dominant prohibitionist paradigm of the regime if the willingness to interpret and implement them in such a fashion were present (e.g., UNDCP, 2002). Yet political pressures operating through the UN system have often hindered such constructive approaches, and have replicated the overarching tension between human rights and drug prohibition within the triangle of the three main UN drug control bodies. The UN Commission on Narcotic Drugs (CND), the central, inter-state policy-making body of the UN system in relation to drug control, works on a consensus system whereby any member of the Commission, including those staunchly committed to prohibition, can block resolutions seen as tempering or balancing prohibition with other concerns (Fazey, 2003). Not surprisingly, efforts to inject human rights principles into CND decision-making have seen limited success to date, such as recent resolutions on preventing HIV amongst injecting drug users that contain passing reference, in preambular paragraphs, to the *Universal Declaration of Human Rights* (UN Commission on Narcotic Drugs, 2004, 2006).

The CND also directs policy for the UN Drug Control Programme within the UN Office on Drugs and Crime (UNODC). For its part, at least insofar as its work on HIV prevention and drug use is concerned, the UNODC declares itself to be guided by both the prohibitionist drug control conventions and the UN's human rights norms, without any clear attempt to reconcile the consequent contradictions (UNODC, undated). In addition, UNODC's extensive dependence on funding from prohibitionist states such as the USA, Sweden, Italy and Japan has so far prevented any unambiguous policy and programmatic support at the highest level from UNODC for harm reduction, including on human rights grounds (Jensema & Thoumi, 2003). Finally, the International Narcotics Control Board (INCB), the 13-member organ that monitors states' compliance with the UN drug conventions, has a long history of opposition to harm reduction, of pressuring states to implement drug control at the expense of public health (a matter of grave human rights concern), and of praising states that violate human rights in the name of drug control (Csete & Wolfe, 2007). This hardly makes for a human rights- or harm reduction-friendly global policy environment.

So it is not surprising that, all too often, experience has shown us that where the drug control and human rights regimes come into conflict, prohibition has been allowed to trump human rights, or at least take human rights off the agenda. Yet in recent years, there have been a few examples where UN human rights bodies and monitors have stepped forward to raise concerns about the treatment of people who use drugs. In some cases, these concerns have come from unlikely sources.

The UN Special Rapporteur on Violence Against Women, for example, in her 1999 report on the United States, called for "a policy review of the impact of drug laws on women" (UN Special Rapporteur on Violence Against Women, 1999). The Special Rapporteur stated forcefully.

> The United States is criminalizing a large segment of its population; this segment is overwhelmingly composed of poor persons of colour and is increasingly female. This criminalization leads to overcrowding in prisons. The Special Rapporteur believes that this situation not only arises from, but also may result in unequal protection. People with a criminal record may in some states be denied welfare, housing, custodial rights to their children and access to social services. The Special Rapporteur also believes that many of the drug-related offences for which women are incarcerated in the United States may be more appropriately handled by a community-based system of welfare and social support (UN Special Rapporteur on Violence Against Women, 1999).

Another unexpected critic of prohibitionist drug laws has been the UN Working Group on Arbitrary Detention, which raised concerns in its 2005 Annual Report about the "over-representation" of people who use drugs in the prisons of the world. The Working Group highlighted its concern that the conditions typically required to be given bail (e.g., stable housing, employment, etc.) are often unrealistic for many people who use drugs to meet, potentially compromising their right to due process before the courts. According to the Working Group: "As empirical research in many countries has shown that defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial the bail system deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing" (UN Working Group on Arbitrary Detention, 2005).

The UN Human Rights Committee, in its 2005 report on Thailand's compliance with its obligations under the *International Covenant on Civil and Political Rights*, specifically stated for the first time that the application of the death penalty to drug crimes is in violation of international law. In that same report, the Committee expressed concern over "the extraordinarily large number of killings during the 'war on drugs' which began in February 2003" (UN Human Rights Committee, 2005).

Most significant for harm reduction advocates is the November 2006 report on Tajikistan from the UN Committee on Economic, Social and Cultural Rights. In it, the Committee expressed concern at "the rapid spread of HIV in the State party, in particular among drug users, prisoners, [and] sex workers", and specifically called upon the government to "establish time-bound targets for extending the provision of free ... harm reduction services to all parts of the country" (UN Committee on Economic, Social and Cultural Rights, 2006). This represents the first time a UN human rights treaty body has specifically called upon a state to extend harm reduction programmes.

These examples, though few and far between, suggest the opportunity to use international human rights bodies as a forum to highlight drug use and harm reduction issues, and potentially make progress in challenging prohibitionist policies through strategic, targetted interventions within the human rights system (Elliott, 2004). They are also important in emphasising that when it comes to international law, narcotics control does not justify or permit violations of basic human rights, including states' obligations related to access to medical care and services needed to protect and promote health.

Whilst the three UN drug control treaties do not contain explicit human rights provisions regarding states' responses to drug use, this does not mean the UN narcotics control regime is free to operate without human rights oversight (Single Convention on Narcotic Drugs, 1961; Convention on Psychotropic Substances, 1971; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988). States parties to the UN drug conventions are bound by their overarching obligations under Articles 55 and 56 of the *Charter of the United Nations* to promote "universal respect for, and observance of, human rights and fundamental freedoms" (Charter of the United Nations, 1945). Under Article 103 of the *Charter*, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail" (Charter of the United Nations, 1945). It should follow, as a correct interpretation of international law, that human rights obligations are not ousted by states' adherence to drug control treaties, and indeed take priority over the international narcotics control regime, despite the absence of specific human rights language in the drug treaties themselves. Indeed, the official commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) specifically states that, "particular care must be taken to ensure compliance with relevant constitutional protections and applicable human rights norms" (Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988). More recently, as noted above, the UN CND has adopted two resolutions on responding to HIV/AIDS amongst people who inject illicit drugs that

refer in the preambles to *Universal Declaration of Human Rights*.

Despite this legal direction, UN human rights monitors and treaty bodies have traditionally been loathe to wade into the murky area of prohibitionist drug policy, or to comment on the human rights violations that emerge as a consequence. This silence has become deafening in recent years, when commentary on HIV/AIDS issues has become more common in the reports of UN bodies such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women. Yet, this commentary has typically been limited to issues of sexual transmission; usually ignored is the considerable role played by injecting drug use in driving the HIV pandemic in many regions of the world, and the effects of prohibitionist national and international drug policies in exacerbating the public health crisis (e.g., Human Rights Watch, 2003; Wolfe & Malinowska-Sempruch, 2004). This again poses the question of whether prohibitionist policies, and the stigma surrounding drug use that results, blind human rights monitors to their responsibility to speak out in defense of the rights of people who use illegal drugs, who constitute some of the most vulnerable and marginalized communities in country after country around the world.

Harm reduction advocates and human rights organisations therefore need to become active on that second front identified by Norbert Gilmore in 1996: injecting drug-related issues, and in particular the need for health promotion and harm reduction measures, into human rights discourse, and onto the agenda of international human rights monitors and treaty bodies. This should not dilute efforts to also place human rights on the agenda of the international narcotics control regime, for example, during the upcoming review in 2008/2009, at the UN Commission on Narcotic Drugs, of the "progress" made toward the drug control activities identified a decade earlier at the 1998 UN General Assembly Special Session on Drugs (UNGASS, 1998). Rather, both efforts are needed in achieving the complementary goals of stopping the spread of HIV and respecting, protecting and fulfilling the human rights of people who use drugs.

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