

➤ Reflections on Human Rights and International Drug Control

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Less than a year after the September 11th 2001 attacks, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism. The issue had already been under United Nations (UN) consideration, and by 2005 a Special Procedure had been put in place, with a recurring focus on human rights and terrorism at the UN Human Rights Council. In 2011, a set of guiding principles on business and human rights were submitted to the Council by John Ruggie, the Special Rapporteur on the issue. Over time, various thematic debates, declarations and guidelines have developed on issues such as indigenous peoples, children, women, climate change, poverty and HIV, among many others. However one might view their relative quality and impact, the application of human rights to these issues is appropriate. Furthermore, the recognition at the international level of the human rights risks associated with areas like business enterprise or counter-terrorism is essential.

However, a century after the genesis of a worldwide fight against drug addiction and illicit trafficking, no such thematic guidelines or mechanisms exist today. Human rights in international drug control have instead traditionally been absent, and are viewed as a nuisance by many governments and UN agencies. At the same time widespread – and, in some cases, systematic – human rights abuses in its pursuit have been well documented.¹ Human rights abuses related to drug control are not merely a matter for individual nation states. Instead, the international control system itself, by its aims and current operation, makes such abuses more likely. In particular, the system consciously avoids addressing important but controversial issues in order to preserve the appearance of international consensus. As such, it is appropriate to categorise human rights abuses related to drug control as systemic at the international level. Even as national efforts to end abuses and ensure accountability must be ramped up, there must also be a simultaneous and urgent effort to address the institutional weaknesses and normative gaps in the international drug control regime itself.

INDICATORS OF RISK AND SYSTEMIC ABUSE

The 1961 Single Convention describes drugs as a ‘danger of incalculable gravity’ and an ‘evil’ that the international community has a ‘duty to combat.’² However, despite this moralistic underpinning, human rights abuses resulting from drug law enforcement are now widely documented. Consider the following four cases.

¹ For an overview see *Count the Costs: 50 Years of the War on Drugs*, ‘Undermining Human Rights,’ <http://www.countthecosts.org/seven-costs/undermining-human-rights>.

² ‘Preamble,’ *Single Convention on Narcotic Drugs*, 1961.

'Javier', an eleven year old boy from Guaviare in Colombia, describes his experiences of the aerial fumigation of illicit coca plantations:

My family farmed coca and food crops... Where we're from, the people don't get any help... People even die of starvation out there. And that's why they grow coca. It's the only way to earn a living... The planes often sprayed our community. People would get very sad when they saw the fumigation planes. You see the planes coming – four or five of them – from far away with a black cloud of spray behind them. They say they are trying to kill the coca, but they kill everything... The fumigation planes sprayed our coca and food crops. All of our crops died. Sometimes even farm animals died as well. After the fumigation, we'd go days without eating. Once the fumigation spray hit my little brother and me... I got sick and had to be taken to the hospital. I got a terrible rash that itched a lot and burned in the sun... Two years ago, after the last round of fumigation, we couldn't take it anymore and we were forced to flee. The farm was abandoned. My parents separated and they put me into an orphanage run by a Catholic priest. I miss my family terribly. When I said goodbye to my mom and dad, I couldn't stop crying.³

In June 2012 a 23 year-old woman, Tran Ha Duy, was sentenced to death in Vietnam for carrying four kilos of methamphetamine into the country from Qatar. She and her 21 year-old sister, who received twenty years imprisonment, had been involved with foreign traffickers as couriers in order to earn money they said they required for 'their daily needs'. According to prosecutors, this was about \$500 - \$1000 per trip. Duy had originally been sentenced to life in prison for what she had done, but the Vietnamese Government successfully appealed and she was sentenced to death.⁴

Mario was 21 when he was arrested in Jakarta for purchasing a small amount of shabu (amphetamine). On July 13, 2009, he was found guilty of possession and sentenced to one year and four months imprisonment and given a fine of IDR 2 million (about \$220). The fine was too large for his family, who had been surviving by collecting scrap plastic and on Mario's now nonexistent income as a motorcycle taxi driver. Due to his inability to pay, Mario's sentence was increased to eighteen months. The family's tiny income was subsequently spent on visits to see him, as well as on constant bribes to access the prison, and to keep Mario healthy within his heavily overcrowded confines.⁵

A 13 year-old schoolgirl in the US, Savana Redding, was strip-searched following a tip from another student that she had ibuprofen on her person. Two female school officials searched her, enforcing the school's anti-drug policies. '[T]hey asked me to pull out my bra and move it from side to side', Savana said. 'They made me open my legs and pull out my underwear.' No drugs were found.⁶

Why recount these particular cases? After all, one could mention the tens of thousands displaced by aerial fumigation in Colombia; the thousands executed for drug offences; the hundreds of thousands in abusive drug detention centres; the millions incarcerated for minor drug offences; the millions living with HIV and millions more denied access to prevention and treatment services; or the tens of thousands killed in drug related violence. Yet these real stories accomplish two main goals. First, they provide a human face for the statistics. Second they highlight an inherent contradiction in current drug control efforts. All represent examples of 'successful' control efforts – crops eradicated; traffickers and buyers punished; and school searches to identify students who may be using drugs. Yet, all also represent clear indicators of human rights risk.

³ Quote in: Jess Hunter-Bowman, 'Real life on the frontlines of Colombia's drug war' in *Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People*, ed. Damon Barrett (IDEbate Press, 2011), <http://www.childrenofthedrugwar.org/>.

⁴ Le Quang, 'Vietnamese student given death penalty for drug smuggling,' *ThanhNien News*, June 20th, 2012, <http://www.thanhniennews.com/index/pages/20120620-vietnamese-students-sentenced-to-death-for-drug-smuggling.aspx>.

⁵ Asmin Fransiska, Ricky Gunawan and Ajeng Larasati 'Between Diego and Mario: Children of the drug war in Indonesia' in Damon Barrett (ed.), *Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People*, (IDEbate Press, 2011), <http://www.childrenofthedrugwar.org/>.

⁶ Adam Liptak, 'Strip-Search of Girl Tests Limit of School Policy,' *New York Times*, 23 March 2009, http://www.nytimes.com/2009/03/24/us/24savana.html?_r=0.

Health; prosecution; extradition; policing; restrictions and bans on certain cultural, religious and indigenous practices; and the eradication of crops. Each case reflects some aspect of international obligations under the UN drug conventions. These require states to adopt a predominantly enforcement-led response to health and development problems. States parties to the 1961 and 1988 Conventions have to eradicate illicit crops like those grown by Javier's family. States parties have to arrest and prosecute traffickers or couriers like Tran Ha Duy. They are expected to criminalise buyers like Mario, and they are expected to work to prevent drug use among young people like Savana Redding.

Meanwhile, the institutions of the UN drug control system are heavily dysfunctional and fail to expose inherent problems with international efforts. Instead, they expend enormous effort on achieving and maintaining consensus – an unwritten 'spirit of Vienna' precludes the UN Commission on Narcotic Drugs (CND) from voting on anything but whether new substances are brought under international control – and protecting the 'integrity' of the drug control regime itself. Both aspects prevent open and honest debate about problems at international or national levels. In this context, it is worth revisiting an analysis by the UN Office on Drugs and Crime (UNODC) from 2008.⁷ It identified a number of 'unintended negative consequences' of drug control, including:

- **The creation of the criminal market for drugs**

The criminal market for drugs has reached substantial macro-economic proportions. This is the by-product of a supply-focused international system that incentivises illicit production and traffic through inflated criminal market prices. With this comes corruption, destabilisation and violence. These criminal market externalities, coupled with State efforts to repress them, generate large-scale human rights abuses.

- **Policy displacement from health to law enforcement**

Policy displacement from health to law enforcement is a consequence of the creation of a criminal market and subsequent attempts to repress it. As a result, less money and less political attention is spent on public health, while more is spent on responding to trafficking, violence and crime – an ironic departure from the stated aim of the Single Convention to promote the 'health and welfare of mankind.'⁸

- **Geographic displacement (the balloon effect)**

Geographic displacement is an inevitable consequence of supply reduction efforts. As production in one place is diminished, it appears elsewhere in order to meet the same demand. This 'balloon effect' then serves to displace the crime, violence and destabilisation to new geographic areas and communities. This then serves to justify a further expansion of law enforcement efforts and budgets.

- **The stigmatisation and marginalisation of people who use drugs**

Finally, the UNODC notes that people who use drugs have been pushed to the margins of society and tainted with a moral stigma. In one of his final reports to the Human Rights Council, Manfred Nowak, then Special Rapporteur on Torture, noted the various 'exceptional circumstances' or 'unique situations' used by government officials to explain acts amounting to torture and cruel, inhuman and degrading treatment. Among them was the threat posed by drugs.⁹ Faced with such perceived threats, history shows us that human rights abuses are more likely, particularly against stigmatised or marginalised groups. People who use drugs have been marginalised and stigmatised through laws and

⁷ 'Making Drug Control 'Fit for Purpose': Building on the UNGASS Decade,' UN Doc No E/CN.7/2008/CRP.17, 7/3/2008.

⁸ 'Preamble,' Single Convention, 1961.

⁹ UN Doc No A/HRC/13/39/Add.5, para 44.

policies, but also through their social association with the drug threat. Other communities have also been marginalised by drug control efforts. Farming communities in producer nations, for example, and ethnic minorities in consumer nations, have both suffered heavily under the various drug wars.

What has been created is an international system of human rights risk. So long as human rights abuses are carried out in pursuit of drug control or human rights situations deteriorate because of the regime, and so long as such problems are camouflaged by the desire for consensus and to protect the integrity of that regime, these abuses and human rights concerns are appropriately categorised as systemic at the international level.

ADDRESSING INSTITUTIONAL AND NORMATIVE WEAKNESSES IN THE DRUG CONTROL REGIME

The General Assembly continually reasserts in its annual omnibus resolution that 'countering the world's drug problem' must be carried out in full conformity with the UN Charter and fundamental human rights norms.¹⁰ The question, then, is what does this require of specific branches of the international system?

The UN drug conventions

These must not be read in a vacuum from international human rights law. While there is nothing about the treaties themselves that requires abusive measures, their many articles do closely relate to various human rights concerns, and there is nothing within them to temper excesses. Instead, each treaty allows States parties to adopt 'more strict or severe measures' than those explicitly codified. Indeed, the official commentary to the Single Convention includes the death penalty as an example of a possible 'severe' approach.¹¹ This may have been the case, legally speaking, when it was originally written in the 1960s, but it is now well out of date. Two specific steps could be taken to rectify this incongruence:

First, a full review of the terms of the drug conventions should be undertaken with the aim of incorporating and applying over fifty years of human rights jurisprudence. To be clear: this is not about amending the conventions. Instead, it is about clarifying their interpretation and application given today's international legal landscape. Consider two of the above examples:

In the Savana Redding case the Juvenile Law Center argued that strip-searching the 13 year-old girl violated international norms of dignity and respect. Further, the majority of the US Supreme Court found that searching Savana violated her rights under the Fourth Amendment of the US Constitution.¹² A child rights analysis under the Convention on the Rights of the Child (CRC) would likely yield a similar finding. But while this case was fairly clear, what about the many other issues relating to children and young people, such as the widespread use of random school drug testing?¹³ These questions remain unclear.

Javier's case is also instructive. Article 14(2) of the 1988 Convention Against Illicit Traffic contains the only explicit mention of human rights in the UN drug conventions, and it relates to crop eradication. So what would an eradication programme that respects human rights look like? What, for example, is the role for free prior and informed consent of indigenous peoples in the Andean region?¹⁴ Again these questions remain

10 See, for example, GA Res 63/197, March 6th 2009, para 1; GA Res 64/192, March 30th 2010, para 2.

11 Commentary on the Single Convention on Narcotic Drugs, 1961, pp. 449–450, para 2.

12 Supreme Court of the United States, Stafford Unified School District#1, et al., *Petitioners v. April Redding*, Respondent (2009) 557 US. No.08-479.

13 See Adam Fletcher, 'Random School Drug Testing: A case study in doing more harm than good' in Damon Barrett (ed.), *Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People*, (IDEbate Press, 2011).

14 See Damon Barrett, 'Bolivia's concurrent drug control and other international legal commitments' International Centre on Human Rights and Drug Policy, 1/7/2011, <http://www.druglawreform.info/en/issues/unscheduling-the-coca-leaf/item/2604-bolivia-s-concurrent-drug-control-and-other-international-legal-commitments>.

unanswered – although it should be noted that the phrase ‘appropriate measures’ is used in article 14(2) and mirrored in article 33 of the CRC(itself relating to drugs).¹⁵ What these cases suggest is that there is a clear need to develop normative guidance on what are appropriate drug control measures in terms of human rights.

As a result, the second step to be taken in order to eliminate regime incongruence should be the creation of a set of basic normative guidelines on human rights and drug control. These should set the baseline for determining what measures may be deemed appropriate in pursuit of States parties’ obligations under the drug conventions. It should also form the basis of an annual debate at the UN CND.

The International Narcotics Control Board (INCB)

Joanne Csete’s paper deals with the INCB in detail, and I associate myself fully with her views. For now it is sufficient for me to note that, as the quasi-judicial monitoring mechanism for the drug conventions, it is incumbent on the Board to properly apply human rights law to its deliberations and advice to states. The above review should facilitate this, though it requires institutional will from the Board – given that it is an independent mechanism. The fact that this will is lacking (along with an acceptable understanding of international law) was evident in 2012 when the INCB President refused even to condemn torture (or ‘any atrocity’) in the name of drug control, citing a lack of mandate within the drug conventions.¹⁶

The Commission on Narcotic Drugs (CND)

The CND’s first session was in 1946, but it was not until 2008 that it finally adopted a resolution on human rights. Yet this resolution avoided specifics and merely asked the UN Office on Drugs and Crime to incorporate human rights into its work. Further, during the drafting process it was heavily watered-down, conspicuously removing any reference to the newly adopted indigenous people’s declaration; the moratorium on the death penalty; and the Human Rights Council, or its Special procedures. During the debates (of which I was a part as a civil society member of the UK delegation) China claimed that it was ‘ridiculous’ to require the CND to operate in line with human rights law, while Japan challenged whether the Universal Declaration was part of international law at all.

Since then, human rights safeguards have become easier to insert, as much as a result of the change of administration in the US as with the development of ‘agreed language.’ Under the George W. Bush administration, reference to human rights would routinely be blocked by the US delegation. This no longer happens to such an extent, resulting in more rights language being agreed upon. One reason why a state like the US can exert such influence (above that afforded by its traditional superpower role at the UN) is the fact that the CND almost never votes.¹⁷ This in effect affords each state a veto if it wishes to dig in its heels on an issue. To prevent this, most resolutions are watered down to the lowest common denominator – with some killed off outright. What this ‘spirit of Vienna’ generates is an ongoing appearance of international consensus when there are, in fact, clear and growing tensions.¹⁸

This appearance is further bolstered by poor civil society engagement at the CND. While it has improved somewhat over recent years, it still remains poor, especially when compared with other UN forums. In 2011 a resolution was brought forward on improving civil society participation in line with ECOSOC resolution 1993/31 (which sets out the relevant procedures). Initially, it was vigorously opposed by China and later by

¹⁵ Damon Barrett and Philip Veerman, *A Commentary on the UN Convention on the Rights of the Child: Article 33, Protection from Narcotic Drugs and Psychotropic Substances* (Leiden: Brill/Martinus Nijhoff, 2012).

¹⁶ For a transcript and audio recording see <http://www.ihra.net/contents/1196>.

¹⁷ Except to decide on whether to include a new substance under international control.

¹⁸ See David Bewley-Taylor, *International drug control: Consensus Fractured* (Cambridge University Press, 2012).

Germany, after it had been watered down so as to be – in the German view – retrograde. It was eventually approved, although much changed from its original form. In the 2012 session, the first official civil society hearing was held. Nevertheless, matters worsened when NGOs were censored in their attempts to criticise both the Executive Director of UNODC (for his lack of leadership on HIV), and the INCB (for the quality of its legal reasoning).¹⁹ It is clear that processes for meaningful civil society participation must be put in place. However, it is also clear that some national delegations would prefer to curtail civil society engagement with the system.

These reforms have been suggested many times before, as has a new Special Procedure on human rights and drug control.²⁰ But given the already stretched workload of the Human Rights Council, the CND may be a more appropriate forum for this issue. Just as Special Procedures were developed by the former Commission on Human Rights, there is nothing procedurally barring the CND (also a Functional Commission) from instituting its own mechanism. It could also submit an annual report to the Human Rights Council's March session, which would coincide with the annual CND session in the same month. Its mandate could, in turn, be based on the basic guidelines suggested above and form part of an annual thematic segment on human rights. This would demand that human rights issues are brought to the fore at the CND. As straightforward as this may sound, however, there is clear opposition to instituting this mechanism in Vienna. Some delegations simply retain the view that human rights are 'Geneva business.'

DONORS AND THE UN OFFICE ON DRUGS AND CRIME

Currently, human rights criteria rarely influence international funding decisions or programming around drug enforcement, even at the UN. Take the case of Tran Ha Duy, set out above. For years European donors, the US and the UN have been providing Vietnam with money and technical assistance to increase its capacity to catch traffickers and couriers like Tran Ha Duy and her sister. The vast majority of couriers caught are sentenced to death, despite the fact that they are essentially low-level players in the illicit trade. But Vietnam is not unique. Governments have also provided Iran with millions of dollars for drug enforcement, often through UNODC, even as Iran's execution rates have skyrocketed with over one thousand executions in the last two years. Frequently, these executions are carried out without basic due process. On its website, UNODC notes its success in helping catch 61 traffickers in Iran. Harm Reduction International requested information on the whereabouts and sentences of those arrested. To date, UNODC has not responded. Consequently, Human Rights Watch and Harm Reduction International recently called for drug enforcement aid to Iran to be frozen.²¹

Border liaison offices (BLOs) have been built with international funding and UN assistance along Chinese borders to improve interdiction capacity. The Government of Burma recently announced at a UN sponsored meeting that it had extradited 128 people to China via these projects. All may face the death penalty. When asked as to the whereabouts of those it had helped to extradite, the UNODC said that it did not have that information.²² What the Chinese and Iranian cases indicate, therefore, is an absence of systematic human rights safeguards and monitoring of international funding and assistance – including at the UN itself. This represents a basic lack of accountability. Furthermore, these normative, institutional and legal gaps at the international level then feed through into programmes, funding and operational outcomes on various drug control projects worldwide.

19 For an overview see <http://www.drugfoundation.org.nz/content/no-way-behave>.

20 For example, Tom Obokata 'Illicit cycle of narcotic from a human rights perspective', *Netherlands Quarterly of Human Rights* 25 (2007): 159-187.

21 'Iran: Donors Should Reassess Anti-Drug Funding,' Human Rights Watch, 21/8/2012, <http://www.hrw.org/news/2012/08/21/iran-donors-should-reassess-anti-drug-funding>.

22 Damon Barrett, Patrick Gallahue and Roxanne Saucier, *Partners in Crime: International Findings for Drug Control and Gross Violations of Human Rights* (Harm Reduction International, 2012).

In 2011 UNODC developed internal human rights guidelines, largely in response to the above concerns.²³ These are quite far reaching, but much now hinges on how they are implemented. For example, how can UNODC continue to work with Iran on drug enforcement when executions continue at such a pace? More broadly, however, the following steps are required. First, all donors and implementation agencies should support the development of human rights and drug control guidelines as described above. Second, they should audit current project and funding for compliance with those guidelines and, they should take action on gaps and concerns raised. Finally, they should implement a transparent system of human rights impact assessments for future projects.²⁴

CONCLUSION

In her judgment on the Savana Redding case for the Ninth Circuit Court of Appeals, Judge Kim McLane Wardlaw wrote that:

It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude. More than that it is a violation of any known principle of human dignity.

A similar rebuke could be made of a wide array of the practices conducted in the pursuit of international drug control. This article has presented a snapshot of the range of human rights issues involved, the scale of the problem, and the institutional weaknesses in the international regime. The regime, in its current form, is not only out-dated, but by its very aims and operation exacerbates the risk of human rights abuses. Its current institutional set-up further prevents abuses from being properly addressed, and instead works to hinder open and critical debate. I have suggested some avenues for addressing this situation from the top down. But real change in this sector should also come from the bottom up. When effective activism and advocacy to address abuses on the ground can be reinforced by the kind of normative and institutional reforms described, we may perhaps then begin to craft a system in which human rights issues are taken seriously. ■

²³ UNODC Guidance Note, *UNODC and the Promotion and Protection of Human Rights*, (Vienna: 2012), http://www.unodc.org/documents/justice-and-prison-reform/HR_paper_UNODC.pdf.

²⁴ Harm Reduction International has developed a model tool which can be adapted to suit the needs of the relevant donor or agency.