

## **The war on drugs: A human rights indictment**

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My principle argument today will be that the human rights indictment in the war on drugs points not just to the local level, where the abuse is carried out at the hands of governments and their agents, but squarely at the international drug control regime too.

What has been created is a system of human rights risk that makes those abuses more likely and less likely to be addressed.

I will set out:

The now well-known 'unintended negative consequences' of the drug control system and their implications for human rights.

A cycle of positive reinforcement that exists for a failed system, one that is fuelled both by a narrative of existential threat and indicators of success that measure only state effort, not real outcomes.

In doing so those indicators of success in drug control also map closely onto indicators of human rights risk.

I will make three recommendations related to these problems rooted in human rights law and rights based approaches.

Finally I'd like to explain why waiting for the international community to develop a new consensus or review the UN drugs conventions is no excuse for inaction on today's problems, and why breaking consensus need not mean disrespect for international law.

Let me begin in with a quote from one of my favourite books: 'Exterminate All the Brutes' by Sven Lindqvist – an amazing travelog and account of colonialism in Africa.

*'You already know enough. So do I. It is not knowledge that we lack. What is missing is the courage to understand what we know, and to draw conclusions'*

The evidence is already plainly in front of us to understand what we know about the drug war and human rights and to begin to draw conclusions.

Over the decades the war on drugs has become, as a cursory Google search will show, an onslaught on human rights, the scale of which is difficult to fathom.

Aerial fumigation of illicit crops in Colombia - Planes, spraying chemicals over families' fields, food crops, homes and on their skin. This is having effects on food security, ground water, and health. It's affecting pregnancies and even causing genetic problems. There are now more internally displaced people in the country than Darfur; many because of the war on drugs. The true number is unknown.

That's one country.

On the other side of the world in Afghanistan, daughters are sold to pay opium debts to drug lords after teams of men with sticks and scythes rip up the family's crops, leaving them with no income.

Despite abundant opium, millions in the poorest countries are living in pain in large part because the medicines they need are too strictly controlled due to a pathological concern with 'diversion' into the criminal market; and because the fear that has been generated around heroin has led to a fear of prescribing opiates like morphine.

In February 2003, over two and a half thousand people were gunned down in the streets in Thailand in a murderous rampage unleashed by then Prime Minister Thaksin Sinawatra

There about 10.1 million people in prisons around the world. Millions of these are there for non-violent drug offences contributing to prison overcrowding and the appalling state of pre-trial detention in the world.

In the US and UK people of colour are grossly over-represented in prisons – ten to one disparities. The war on drugs is fundamentally racist, too.

There are hundreds of thousands of people in drug detention centres in China. Ten of thousands in such centres in Viet Nam and thousands in Cambodia, Thailand and Laos. They are detained arbitrarily, and inside forced to work, beaten and sexually abused. They are kept inside for years.

International donor funding has ben traced to these centres, from capacity building money to the building of the walls that surround them to prevent escape.

Thirty three states or territories retain the death penalty for drugs on the books. Few use it, fewer still execute. But among those that do, many hundreds are killed every year; it's likely well over a thousand. Iran alone executed around 600 for drugs in 2012.

The UN has lauded Iran as a success in the drug war.

International donor funding has been traced to efforts to help catch traffickers in these states too, with no human rights safeguards attached to that assistance.

The drug war is a daily affront to human rights, from the most grotesque of abuses to stripping away people's privacy, their freedom to manifest their religions and cultures. It even encroaches upon our children's schools.

In drug control the human rights indictment is truly long. It is a net thrown over the entire planet, it is institutionalised in international treaties and UN structures, and the plan for many governments and some agencies is that it should never stop.

A human rights indictment of the drug war is not just about list of abuses for which there are many failures and faults and specific individuals to blame for their own actions. Human rights based approaches demand that we look at the structures that surround abuses.

Violence against women does not happen in a social or political vacuum. Femicides in this country are of course a stark example. Even as specific abuses are investigated and perpetrators brought to justice, the circumstances driving or perpetuating those abuses have to be addressed.

The same goes for the array of rights abuses in the war on drugs.

Questions must be asked of the system within which those abuses occur - how it frames the problem, what it requires and how its goals are pursued, and how it measures success.

At the UN level, that system is underpinned by three nearly universally ratified treaties from 1961, 1971 and 1988.

What they require is a predominantly enforcement and supply side response. There is a system for estimates of need for controlled medicines, but it's not working well. And there are provisions relating to treatment and rehabilitation, but they are weak and vague. They are almost entirely lacking in human rights content. One specific mention in over 100 articles, and then in a weak and undermined way.

These treaties essentially establish the international prohibitionist paradigm of drug control.

Their terms have been widely followed with national drugs laws modelled on them. This, of course, is appropriate, as with ratifying any treaty - it's a shame it's not happened more with human rights! But the drug conventions, unfortunately, are not good laws.

There are specific UN entities overseeing this system:

The treaty body that monitors conformity with the conventions - the International Narcotics Control Board.

The political body - the Commission on Narcotic Drugs - a functional commission of ECOSOC

These institutions are dysfunctional in my view, and fail to expose inherent problems with international efforts. Instead, they expend enormous effort on achieving and

maintaining consensus, thus protecting the 'integrity' of the drug control regime itself.

In 2005 Kofi Annan criticised what he saw as a conflation in the UN system of 'consensus' (where some dissent is possible) with unanimity (where all agree). This, in Annan's view leads to lowest common denominator politics. We see this at the CND. It never votes on any resolutions aside from whether to schedule yet another substance.

The CND is also lacking in transparency with weaker and weaker reporting of its deliberations and weak civil society participation.

INCB, meanwhile, has refused outright to condemn even torture<sup>1</sup>, and attacks progressive states while congratulating some of the most abusive. It operates mostly behind closed doors. No accountability, no transparency.

In 2008, however, the UN Office on Drugs and Crime, an office of the UN Secretariat that serves as guardian of the conventions, issued a startlingly candid report in which it identified the 'unintended negative consequences' of the current system:

1. The creation of a criminal market of macro economic proportions – and the violence and corruption that flows from that
2. Policy displacement from health to law enforcement – i.e. more effort and money spent on policing and prisons than health

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<sup>1</sup> A year after this speech the INCB finally requested that states 'consider' abolishing the death penalty for drug offences.

3. Geographic displacement – production and transit routes shifting to new places as enforcement interrupts them
4. Substance displacement – people moving to other substances if enforcement leads to a reduction in supply
5. And finally the stigmatisation and marginalisation of people who use drugs

The entire drug control edifice is torn asunder in these five observations. The blame for the greatest harms of the drug trade laid at the feet of the system– while the demand and supply reduction foundations of that system are dismantled.

Fuelling this is a narrative of perpetual and existential threat which is contained not just in political rhetoric and media reporting where we are used to them but even the legally binding treaties where such language has no place.

Addiction is seen as an ‘evil’ the international community has a ‘duty’ to ‘combat’ under the 1961 Single convention.

The drug trade under these treaties is posed as a threat to the very fabric of society – ‘a danger of incalculable gravity’, to quote the 1988 trafficking convention.

The threat of drugs is set up. That has to be responded to with heavy enforcement. That creates the criminal market that literally makes the threat come into being. That justifies further spending on enforcement and less focus on health.

All the while the balloon effect and shifting transit routes have brought the threat to new places adding fuel to the fire; new substances and patterns of use have emerged

increasing the perceived threat, and more and more money must be expended to address it.

It is a positive feedback loop that has become a vortex of abuse.

That cycle has to be broken.

In the midst of this there is another cycle. The stigma and marginalisation of certain groups grows as the threat is further ramped up. And now there is someone to blame.

We already know all too well that when a perpetual and existential threat is the starting point, human rights abuses will follow. Additionally, when a certain group is marginalised, they will face the brunt of it.

So to my first recommendation – Let's watch our words.

Because by our words we seem to make reality. Never again refer to drugs as a 'scourge', a 'threat', an 'evil' or any of this kind of language, no matter your intentions. It's deeply harmful, irresponsible, and gets people killed. Never again refer to someone as a 'junkie' or 'drug abuser' or any stigmatising term. It's dehumanising, and when we dehumanise people human rights abuse follows.

That's my first recommendation. The easy one. The difficult ones are next I'm afraid.

We are talking here about an enormous systemic failure. I believe human rights abuses in the war on drugs are appropriately categorised as systemic at the international level.

This requires a systemic response at the international level.



And here is what leads me to the importance of the forthcoming UNGASS on drugs in 2016 and the role of human rights within that process.

We should not expect much from the UNGASS in terms of an outcome document or any serious reconsidering of the drugs conventions – there are too many states interested in seeing that not happen.

But that does not mean that the process cannot be hugely influential. I believe it can and must be a line in the sand.

So my second recommendation is that this process should be the impetus for decades of human rights law and jurisprudence to be applied to the UN drug conventions, and the operation of the drug control framework.

Even before the drug conventions are reformed – no matter the outcome of the UNGASS – the proper application of human rights law can help contain the excesses, clarify positive obligations, and identify conflicts between these legal regimes demanding remedy.

The drug conventions must be interpreted in line with human rights law, and where conflicts exist, and I see some, these must be resolved in favour of the rights in question.

A second component of this, one I believe must at least gather steam through the UNGASS process, is the need for international guidelines on human rights and drug control.

Not 9 months after Sept 11 2001, the Council of Europe adopted guidelines on human rights and counter terrorism. We also have guidelines on HIV and human rights within the UN, and recently - and of significant relevance to post prohibition scenarios, mind you - on business and human rights.

We are decades into the drug war and into the international drug control system and we have no such guidelines.

If states are at all serious when they talk about human rights in the lead up to the UNGASS then this must be a concrete outcome to strive for – not simply the use of human rights language to add to the rhetoric.

In my view such guidelines must rest on universally applicable norms, even as drug laws must allow greater flexibility for local circumstances.

The guidelines should contain both specific provisions – death penalty, due process and so on - but also legal tests that allow for human rights analysis of less clear cut issues.

Let me give an example. Random school drug testing has become commonplace in many countries, with nothing in the way of analysis of the child's rights, including a basic test of their best interests. It is a clear privacy infringement. There are potential negatives, such as eroding trust, encouraging truancy, exclusion from school (a risk factor for drug use, ironically), and dragging young people unnecessarily into treatment systems. Not to mention attaching a serious stigma to them. Yet the largest study carried out in the US shows that it has no positive effect – there is not even a working theory as to how it might possibly work.

It is the essence of arbitrariness - a word that should ring alarm bells among legal scholars.

So what would mitigate this? Scientific evidence is a major part of it. In rights terms, perhaps, the right to benefit from scientific progress and its applications as supportive of many other rights, including the right to health.

But evidence is not enough. Measures should also be appropriate in human rights terms.

So let us consider another well-known legal term:

Proportionality.

What about the criminalisation of personal use or possession and the right to privacy? Is banning this across a range of substances justifiable with reference to well-established human rights tests? Where is the assessment of whether there was or is no less restrictive means for achieving the stated aims? And remember, the burden must be in favour of the right in question and the on the state to make its case. When has this been done?

Let's think, though, about legitimate aims...what exactly are the aims of drug control and how is success measured? According to the treaties and the rhetoric the aim is the improvement of health – due to concerns about addiction.

This is good. It's a legitimate aim.

But we currently measure it in arrests, seizures of drugs, hectares of crops eradicated, and how many people use certain substances.

None say anything much about health or social harms of themselves.

What they tell us is how much governments are doing to address a declared threat. As such, the effort, without anything in the way of real life success, is claimed *as* success, and the system is vindicated.

This has to change.

Added to this is something else of concern about these indicators. We are talking here about policing, prosecution, sentencing, extradition, rural livelihoods, and controls on human behaviour. The indicators of success in drug control map very closely onto those of human rights risk.

Let me give three examples involving not just specific issues but individual people:

Mario (not his real name) was 21 when he was arrested in Jakarta for purchasing a small amount of shabu (amphetamine). In 2009, he was sentenced to one year and four months imprisonment and given a fine, which was too large for his family, so his 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 its grossly overcrowded cells.

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. No drugs were found.

Han Yongwan was a notorious trafficker caught with the help of the UN Office on Drugs and Crime, and handed over to the Chinese authorities from Burma. He was executed on June 26<sup>th</sup> 2008 to mark UN day against drugs.

Each involves a policy that can be both marked as a success in aspects of drug control and a failure in human rights terms.

States are supposed to catch dealers and punish users. They are supposed to take measures to prevent drug use,

including in schools. They are supposed to catch traffickers – and the UN is supposed to help them.

Here we see the UN Secretariat itself, in the conduct of its mandate, clearly complicit in rights abuses.

Put simply, in pursuing success in drug control, in carrying out what is required by international drug control laws, we are in very dangerous waters for human rights.

So to my third recommendation: I believe that new indicators of success that mean something more than the effort that has been expended must be developed.

New indicators have to be able to include human rights – which have a role in scrutinising both the goals being pursued, and the means adopted to pursue them.

This is no easy task, but even the inquiry is a positive move to break the cycle of positive reinforcement we currently have, one that is so damaging to human rights without this effect entering into any form of official measurement.

What I'm talking about here is accountability.

I just want to raise a final point, that relates to this issue of international consensus.

I have heard time and again from diplomats and politicians this need for a multilateral process on reforming the system or at least questioning it before they will move or take action. Yes, the system has to change, but this will take years, decades perhaps. So in the meantime go on allowing for abuses on your own doorstep while this discussion develops?

That's not acceptable.

Long before the international community agrees to change the system, individual nations must redress the human rights abuses taking place daily in the drug war.

If stopping those abuses brings that state into conflict with the drug control legal framework - it need not mind you -but if it does then all that is exposed is a conflict with human rights norms, within which the only outcome must be one where human rights prevail.

This need not mean disrespect for international law if the drug conventions must be challenged.

Respect for international law is retained in respect for international human rights law, respect for biological diversity, respect for cultural heritage and indigenous peoples rights and many other international legal norms that have been eroded in the war on drugs.

This includes, in my view, the very purposes and principles of the UN, established under the Charter: Security, development and human rights.

Seeking to ensure greater respect for these concurrent legal obligations retains respect for international law even as the necessity of breaching the drugs conventions may approach. In each instance the international legal case for change must be made.

These are bad laws, and many before them have come and gone.

Let me leave you with this by way of conclusion:

A week before the Single Convention on Narcotic Drugs entered into force in December 1964, Mario Savio stood on

the steps of Sproul Hall at Berkeley, and delivered his famous call for freedom of expression and education, and for civil disobedience to respond to institutional wrongs.

I am not calling for civil disobedience in my reference to his speech – let's face it, people are being pretty disobedient already when it comes to drug laws – but I think his words resonate, and tend to run through my mind often when I think about the drug war:

*There's a time when the operation of the machine becomes so odious, makes you so sick at heart that you can't take part. You can't even passively take part. And you've got to put your bodies upon the gears and upon the wheels, upon the levers, upon all the apparatus -- and you've got to make it stop.*

It's my view that rights abuses in the context of drug control are appropriately categorised as systemic.

The proper application human rights law to the international drug control regime – from how we frame the problem, to the design and implementation of law and policy – to measures of success and failure - is an important way that we, as human rights activists and scholars can place our bodies upon the gears and the wheels, the levers and upon all the apparatus of the drug war.

Thank you.