

The Child’s Right to Protection from Drugs: Understanding History to Move Forward

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Introduction

The UN Convention on the Rights of the Child (CRC) stands alone among the core UN human rights treaties in setting out a human right to protection from drugs. Article 33 provides that “States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.”¹ There are two points to note here; first, Article 33 contains two clauses: one relating to drug use and one to involvement in the drug trade. And second, the CRC is connected via Article 33 to the three UN drug control conventions: the Single Convention on Narcotic Drugs 1961 (“Single Convention”), the Convention on Psychotropic Substances 1971 (“1971 Convention”), and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (“Vienna Convention”).² These are the relevant international treaties to which the provision refers. In turn, the preamble of the Vienna Convention sets out, by way of justification for the provisions that follow, States parties’ deep concern that “children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity.”³ This speaks to the issues of drug use and involvement in the drug trade addressed in Article 33. The CRC and the drug control system appear to hold consistent views: States have an obligation to protect children from drugs and concurrent obligations to control those drugs in certain ways. But are there deeper inconsistencies relating to theories and principles underpinning each regime?

The drug supply chain imperils children at each stage, from production to use. Children are harmed through drug use, parental drug dependence, drug-related violence, exploitation in trafficking, and a range of other ways.⁴ But it is meaningless to simply say that children have the right to protection from drugs. What matters is what states do to implement that right, and unlike many other areas of child rights, implementing Article 33 requires action in a legal and policy area long characterized by considerable human rights risks.⁵ It is plausible to ask whether the CRC serves to mitigate these risks or if it provides a child rights justification for the actions that generate them.

According to Anne Orford, law “is inherently genealogical... The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.”⁶ This is not in itself a bad thing, but it be-

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Competing interests: None declared.

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comes problematic when the original justifications for the creation of a regime have been forgotten, become irrelevant, or are now questioned, and where consequently the obligations in place are no longer suited to present conditions. This commentary looks to the development of the international drug control and child rights systems to ask questions about the origins of the child's right to protection from drugs and how that history may affect present understanding of norms. It is an invitation to think critically not only about the drug conventions, but also about the role of child rights in relation to drug policy. It asks, by way of conclusion, whether a teleological approach to Article 33 may expose tensions between apparently complementary regimes.

A brief history of parallel systems and their convergence

The history of the development of the international drug control regime has been investigated at various times and from differing academic disciplines.⁷ None of these investigations have focused explicitly on children and young people; indeed, most do not focus on them at all, focusing instead on the primary drivers of the creation of the regime. On the other hand, while there have been numerous articulations of the development of child rights in the 20th century, the history of the recognition of the child's right to protection from drugs in international law has not received sufficient attention.⁸ The convergence between the drug control and child rights systems is therefore an important gap in the existing literature. I do not propose to provide a comprehensive history in this short commentary, but instead to offer some observations that might be reflected upon when considering how to approach the child's right to protection from drugs today.

While there is a rich history leading to it, the Shanghai Opium Commission of 1909 is widely recognized as the genesis of the international control of drugs. During the proceedings, the Dutch delegation suggested that the prohibition of opium sales to children should be included in the final resolutions of the commission.⁹ But the British delegate, Cecil Clementi Smith, provided an instructive response. This, he said, "has already been carried

out...by every civilised country."¹⁰ In other words, it was too obvious to warrant inclusion as a new international norm. In the end, the commission made no mention of minors in its influential resolutions, and the Opium Convention of 1912, which made some of the Commission's resolutions legally binding, also made no such mention, focused as it was on trade and supply.

An international obligation (outside of colonial possessions) to protect children from drugs was not agreed for another 80 years. This does not mean that concerns about drugs and children were absent in national debates. As Virginia Berridge records, as far back as the 1860s in the UK, "it was the dosing of children that first drew the attention of public health interests." The majority of opium poisoning deaths at the time were among young children, especially babies under a year old.¹¹ In Canada, the Opium and Narcotic Drug Act 1911 was a response both to the recommendations of the Shanghai Commission and to a "cocaine panic, initiated by the Montreal Children's Aid Society."¹² But this kind of concern was not yet sufficient for international attention.

In 1919, the League of Nations was entrusted with mandates relating to both opium (and other drugs) and child welfare under Article 23(c) of its covenant. Two major international conventions on drugs were adopted in 1925 and 1931.¹³ Children, minors, and young people are not mentioned in these conventions; they appear only in treaties of lesser scope adopted in the same years, and which refer to prohibitions of opium sales and smoking in colonial territories.¹⁴ In 1936, the League of Nations adopted a treaty against drug trafficking, but it was very unpopular, reaching as it did too far into national sovereignty.¹⁵ It also omitted mention of children unlike its counterpart, the Vienna Convention, adopted 50 years later.

In 1924, the League adopted the Declaration on the Rights of the Child, often seen as the birth of child rights in international law. It was a short document containing five major points, so did not get into the detail of specific social issues.¹⁶ Even so, longer, more detailed drafts of this declaration that did address various minutiae also did not include

drugs.¹⁷ Indeed, throughout the League period, the work of the Committee on Child Welfare and the Opium Advisory Committee, though both in the same section, did not intersect.¹⁸ Each had more pressing concerns.

Following World War II, the drugs and social mandates of the League were transferred to the United Nations through the Charter, along with a new human rights focus. The new General Assembly addressed drugs and children from its earliest sessions. In 1946, for example, UNICEF and the Commission on Narcotic Drugs were both established. But these issues remained separate. Three further protocols on drugs were adopted under the auspices of the UN in 1946, 1948, and 1953.¹⁹ None referred to children or minors.

In 1959, the UN adopted the Declaration of the Rights of the Child. While expanded, and far more of a rights-based document than the welfarist 1924 version, it was also brief, and there is no reference to drugs.²⁰ There was, however, a major focus on drug control at the UN at the time: the patchwork of drugs treaties in place needed consolidation and the idea of a Single Convention on Narcotic Drugs was proposed in the late 1940s. After a decade of negotiation and three major drafts, the Single Convention was adopted in 1961. Children were not a focus in the drafting and do not appear in the final text. Indeed, issues relating to drug users of any age were rare in the negotiations.²¹ The Single Convention remains the bedrock treaty of international drug control; subsequent treaties build upon it, and national drug laws are modelled upon it globally.

By the end of the 1960s, synthetic drugs were becoming a major concern at the UN and weaknesses in the Single Convention were identified. The Convention on Psychotropic Substances was adopted in 1971 to address the former concern, and the Protocol amending the Single Convention in 1972 to address the latter. Among other changes, the Protocol improved its provisions on drug treatment. Neither treaty focused on young people, however, outside of the inclusion of “education” among “measures against drug abuse” in article 38 of the amended Single Convention. By the early 1970s, then, and really by the early 1960s, the basic

strategies and structures of international drug control were in place, and had been developed without reference to specific issues facing children or what this might mean for legal obligations and related responses on the ground.

Unlike the Single Convention, the negotiations of the 1971 and 1972 agreements did include discussion of the threat to young people, albeit in passing. Indeed, it is at this time that we see children entering into drug diplomacy for the first time. The first UN General Assembly resolution focusing on the threat drugs pose to children was adopted in 1971 at a time, when General Assembly resolutions on drugs in general changed in tone and content from being technical and administrative to being more threat-based.²² The threat to mankind and “especially youth” starts to appear more often.²³

During the 1980s, we see the parallel development of the CRC and the Vienna Convention. In 1979, to mark the 20th anniversary of the Declaration of the Rights of the Child, a working group of the Commission on Human Rights was established to begin drafting a new Convention on the Rights of the Child. China presented the first draft provision relating to drugs in 1982, but it was not discussed at the time.²⁴ The first draft of the Vienna Convention was submitted in 1984, and its preamble included the threat to youth as a component of the view that drug trafficking was a crime against humanity.²⁵ That year, a Declaration on the Control of Drug Trafficking and Drug Abuse had been adopted, again expressing the threat to youth.²⁶ In 1986, after two further suggested drafts, the working group on the CRC finally discussed the drugs provision, coming back to it again for technical review with the UN drug control program in 1988.²⁷ Article 33 was ultimately adopted with very little discussion or debate, compared with many other articles in the treaty.²⁸ The General Assembly adopted the CRC in 1989.

The General Assembly adopted the Vienna Convention in 1988, bringing into international law many aspects that were not possible in 1936. In its preamble, the Convention lays out the threat to children, and substantive provisions deal with aggravating circumstances for increased penalties

to meet that threat.²⁹ Both treaties entered quickly into force in 1990.

Critical reflections on the right to protection from drugs

The above is just a sketch, but from it we can make some observations to spur debate around Article 33 of the CRC and its relationship to drug law and policy.

First, the concurrent drafting of the CRC and the Vienna Convention illustrates the political environment from which the right to protection from drugs emerged. As we have seen, the concept of drugs as a threat to children first appears in international discourse in 1971. Most working in drug policy recognize the importance of that year: President Nixon declared drugs as public enemy number one, beginning the “war on drugs” as we now know it. In the years that followed, the narrative of threat became more prominent in drug diplomacy.³⁰ By the late 1980s, when the CRC and Vienna Convention were adopted, “crack baby” scares and the Just Say No campaign of the Reagan era were prominent. The war on drugs was at full steam. It is at this stage that drug control and child rights law converge on the international stage for the first time, in the form of new obligations in a drugs treaty, and a new human right.

Second, the protection of children was an *ex post facto* justification for a system that was already long in place, and a reason to ramp up its severity if drug use among young people was worsening over time, this was despite the regime that had been put in place. This raises an important question: If the legal architecture for drug control had never been built in this form, but the child’s right to protection from drugs had still been agreed, would we necessarily develop the same drug control system to realize that right? Some States parties to the CRC, after all, have not ratified the drugs conventions. Some may well denounce them in future. The CRC creates obligations independent of the drugs conventions. So what, in other words, does the child’s right to protection from drugs add, independent of its apparent connection to the those treaties?³¹

This leads to a third observation. While drugs entered into international human rights law

through what is rightly recognized as a milestone in the development of child rights, this seems to have been done with little discussion as to what it meant in practical terms for children to have a human right to protection from drugs. Meanwhile, children entered into international drug control law via the most punitive and repressive drugs treaty to date, a characterization justified by its own terms. Despite their apparent coherence, the CRC and the drugs conventions are different kinds of laws. The former is a rights document. The latter put in place a system of market control and transnational criminal law with very little regard for human rights. The case of incitement illustrates the importance of this basic difference. In the drafting of the CRC, incitement to become involved in the drug trade was rejected.³² But it was included in the Vienna Convention at around the same time.³³ It was easier, in effect, to include a measure raising clear freedom of expression concerns and other legal problems in a treaty the drafters knew contained elements that could be unconstitutional for some states, than in one focused on protecting human rights.³⁴

There could be two possible effects of this convergence of different kinds of laws: drug control could be pulled towards child rights and tempered by it, or child rights could be pulled more towards drug control and equated with it. This reflects an ongoing disagreement among NGOs and researchers about Article 33. Some see the CRC as an important check on state actions in drug control.³⁵ Others see it as a child rights confirmation of the existing drug control apparatus, with the concurrent development of the Vienna Convention and the CRC providing support for this view.³⁶ Given the human rights risks associated with drug control, this is a serious debate for child rights scholars and advocates. Protecting children from drugs will be carried out in the context of drug policies, not some abstract realm of child rights implementation. If the right to protection from drugs is merely a child rights stamp on existing drug policies, then Article 33 of the CRC is arguably part of the human rights risk presented by international drug control laws. As I have set out elsewhere, there is evidence that this is how states have seen this right, and that

there has been little resistance to it. For example, States parties have consistently included incitement laws in their periodic reports to the Committee on the Rights of the Child, and the Committee has welcomed and encouraged such laws. In this way, a measure that has been put in place pursuant to the Vienna Convention has translated into child rights compliance uncritically, and after the fact. Further evidence from the periodic reporting process under the CRC shows that more than half of states that retain the death penalty for drug offenses have reported such laws as part of their implementation of Article 33. The Committee has never challenged it.³⁷

Conclusion

The UN drug control system is an example of the past being retrieved as rationalization for present obligations. We see it in celebrations of the centenaries of the Opium Commission and the Opium Convention.³⁸ That history, proudly remembered, reinforces commitment to *present norms*, through which, according to celebratory resolutions, “great progress” has been made.³⁹ But this system was developed without children in mind, whereas the CRC was developed precisely because of the differences in approaches needed for children’s rights and the issues they face. So can that (legal) past be retrieved legitimately to underpin a child’s right to protection from drugs, or do we require a new beginning that starts with child rights theories and approaches? This is important because if the child has a positive right to protection from drugs, agreed by 196 States parties, and if we take child rights seriously at all, then they have the right to drug control of some sort. The question is whether Article 33 provides the imprimatur of child rights to an existing system developed without attention to children’s needs or rights, or whether it can be employed to ask searching questions of that system.

I conclude, therefore, with an empirical challenge rooted in an aim of Article 33. States parties must take appropriate measures to prevent the use of children in the illicit drug trade. So we may ask: Does the criminalization of the drugs market decrease or increase opportunities for the exploitation

of children in the drugs trade? If the answer is that it increases such opportunities, Article 33 is being directly countered. By this teleological reasoning, Article 33 and the drugs conventions would be far from complementary, as their texts and the historical concurrence of the Vienna Convention and the CRC may suggest. They would instead be in conflict in a way that goes to the core strategy of the drug control system.

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