

EDITORIAL

The Case for International Guidelines on Human Rights and Drug Control

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This special section of *Health and Human Rights Journal* examines some of the many ways in which international and domestic drug control laws engage human rights and create an environment of enhanced human rights risk. In this edition, the authors address specific human rights issues such as the right to the highest attainable standard of health (including health protection and promotion measures, as well as access to controlled substances as medicines) and indigenous rights, and how drug control laws affect the protection and fulfillment of these rights. Other authors explore drug control through the lens of cross-cutting human rights themes such as gender and the rights of the child. Together, the contributions illustrate how international guidelines on human rights and drug control could help close the human rights gap—and point the way to drug laws and policies that would respect, protect, and fulfill human rights rather than breach them or impede their full realization.

Next year marks the 70th anniversary of the adoption of the Universal Declaration of Human Rights, the foundational instrument of the modern system of international human rights law, a system now underpinned by nine core UN treaties and multiple regional conventions. The growth of the international human rights regime has provided a critical tool to address the abusive and unaccountable exercise of state power. Multilateral treaties on drug control predate the foundation of international human rights law by several decades. Beginning with the 1912 International Opium Convention and evolving through a series of conventions adopted under the auspices of the League of Nations, drug control was already a well-established subject of international law by the time the UN General Assembly adopted the Universal Declaration in 1948, and the first UN drug convention in 1961.¹ The preamble of that treaty, the *Single Convention on*

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Narcotic Drugs, states that it is “concerned with the health and welfare of mankind,” suggesting a public health-based context in which treaty provisions should be understood.² Over the last half-century, these two legal systems have exerted significant influence on state practice. Today, the impact of human rights norms can be seen in policy areas as disparate as warfare, terrorism, trade, intellectual property, the environment, and global health, while the three UN drug conventions influence—if not define—domestic drug control policy and law in almost every country of the world.

Both regimes have evolved and expanded over the course of the UN era. In the case of human rights, we have seen an increasing number of states ratify core instruments; an increasing diversity of the instruments themselves (both in terms of subject matter and regional specificity); and growth in the number and influence of UN and regional human rights courts and bodies. International law on drugs has also expanded. A second major treaty, the *Convention on Psychotropic Substances*, was adopted in 1971, bringing more substances under international control, and the *Single Convention* was amended by Protocol in 1972.³ Over time, the punitive nature of the international drug control system also expanded and intensified, with criminal law being used to suppress drug use and drug markets. The third UN drug treaty, the 1988 *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, criminalized the entire drug market chain, from cultivation/production to shipment, sale, and possession (although this last obligation is subject to significant caveats, giving states leeway to refrain from criminalizing possession of scheduled substances for personal use).⁴ The 1988 Convention includes not only offenses related to controlled substances, but also to precursors and money laundering.⁵ The centrality of public health and welfare in the preambles of the 1961 and 1971 drug treaties is absent in the 1988 Convention, which is particularly significant given the ever-expanding evidence base on drugs, drug use, health, and development—evidence which should inform new approaches to drug laws and policies.

Drug control and enforcement activities are prime areas for human rights abuses, not least because, as Barrett and Nowak note, the very indicators of success for drug control efforts are also indicators of human rights risk, and in many cases are actual evidence of human rights violations committed in the course of enforcing various drug-related laws.⁶ These indicators include the numbers of criminal offenses proscribed; people arrested and successfully prosecuted; people in detention; traffickers punished (including by execution in some states); people in drug treatment (both voluntarily and involuntarily); hectares of crops destroyed; and successful military operations against insurgents or criminal gangs.

The international drug control treaties contribute directly to this environment of human rights risk and violations.⁷ The drug treaties are what are known within international law as “suppression conventions.” Suppression regimes obligate states to use their domestic laws, including criminal laws, to deter or punish the activities identified within the treaty, and are therefore “important legal mechanisms for the globalization of penal norms.”⁸ However, while suppression treaties mandate all states to act domestically and collectively to combat crimes defined as being of international concern, they offer no obligations and little guidance on what is and is not an appropriate penal response. As a consequence, as Neil Boister notes, “the drug conventions...provide a broad framework and introduce a no-holds-barred ethos into domestic drug control.”⁹ Floors have been established with no ceilings. In many cases, this is an invitation to governments to enact abusive laws and policies, especially in a global context where drugs and drug trafficking are defined as an existential threat to society and the stability of nations, and people who use drugs and those involved in the drug trade are stigmatized and vilified.¹⁰

At an operational level, the UN exerts little energy toward ensuring that the domestic drug laws mandated by the treaties are drafted and implemented in a manner that safeguards human rights. The UN Office on Drugs and Crime (UNODC)

offers legal assistance to states to ensure their domestic drug laws comply with the terms of the UN drug control treaties. However, much less attention is paid to ensuring that such legislation is compliant with international human rights treaties and norms. The International Narcotics Control Board (INCB), the treaty body established under the drug conventions to monitor their implementation at the national level, routinely criticizes governments for what it considers weak enforcement of drug prohibition. This includes occasionally condemning the adoption of evidence-based measures to protect and promote health, despite this being a fundamental human rights obligation recognized in law by a large majority of the world's states. As recently as 2012, the INCB president publicly rejected the suggestion that the Board had any mandate or responsibility to comment on human rights violations resulting from the domestic drug enforcement measures the INCB itself encourages.¹¹ At the same time, the INCB has often dedicated little attention to encouraging states to fulfill the other major stated objective of the drug control treaties: ensuring access to controlled substances for medical uses, which is itself a matter of human rights.¹² This said, it should also be acknowledged that after years of campaigning by civil society, the INCB has recently become more willing to incorporate human rights commentary and advocacy for access to medicines into its work.¹³

The cumulative effect of these factors and others means that the human rights impacts of drug control are vast, spanning all regions of the world, engaging the full spectrum of civil, political, economic, social, and cultural rights, and affecting the health and welfare of people and communities, whether they have any involvement in drug use or the drug trade or not. As described by Boister,

Cultivators of land may find their right to property threatened by eradication operations involving the use of herbicides. Innocent holders of property may find their property subject to forfeiture as the proceeds or instrumentalities of crime. The privacy rights of [drug] users may be threatened by the criminalisation of private behaviour. The rights of residents of urban areas may be threatened through

police raids, curfews and warrant-less searches. Suspected suppliers may be subject to detention without trial or the confiscation of property not proved to be linked to trafficking. Once arrested, alleged offenders may be denied fair pre-trial proceedings and a fair trial...Fugitive alleged offenders may be denied the right to be informed of an extradition request, the right to be heard, and the right to legal representation...Once in custody, alleged offenders may be subject to ex-post facto laws. Once convicted, offenders may not receive fair conditions of punishment and protection against cruel and unusual punishment. In particular, states that apply the death penalty for trafficking may threaten the right to life.¹⁴

Despite these direct human rights impacts, and despite the influence of human rights on the development of other areas of international law and policy, international drug control law has evolved until quite recently largely absent this normative guidance. 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.”¹⁵ More than 10 years later, the continuing lack of progress in this area led then-UN Special Rapporteur on the right to health, Paul Hunt, to conclude: “It is imperative that the international drug control system...and the complex international human rights system that has evolved since 1948, cease to behave as though they exist in parallel universes.”¹⁶ At the time of Hunt's comment in 2008, there was little serious discourse on the human rights impacts of drug control, either in the academic literature or the work of UN bodies. Even a cursory mention of human rights in the context of drug control in the statements of the UN Commission on Narcotic Drugs, UNODC, the Office of the High Commissioner for Human Rights, or the many UN human rights treaty bodies or special procedures was an oddity.

Today, human rights advocates and some human rights bodies certainly pay more attention to drug control issues, and drug control agencies pay more attention to human rights issues. In 2015, the Office of the High Commissioner for Human

Rights, at the request of the Human Rights Council, released a study on the human rights impact of the world drug problem. That same year, the UN Human Rights Council staged a thematic session specifically on the topic, drawing formal submissions from the High Commissioner for Human Rights, more than 20 member states, and more than 40 NGOs. Human rights was chosen as one of a small handful of themes formally examined during the UN General Assembly Special Session (UNGASS) on the World Drug Problem in April 2016, at which UN human rights treaty bodies and special procedures again forcefully called for rights-based reform of international drug policy.

The increasing (if often uncomfortable) inclusion of discussions of the human rights impacts of drug control within major United Nations human rights, drug control, and political bodies suggests these concerns are real and growing. Yet while attention to the human rights impacts of drug control has never been more visible, the gap between discourse and practice remains vast. Despite progress, the UN drug control and human rights systems still operate largely in isolation from one another. At the state level, the obligations contained in the three UN drug conventions are often interpreted and implemented in a manner inconsistent with human rights law. The UN drug control bodies still pay insufficient attention to the negative human rights consequences of drug enforcement in their work and their guidance to states. At the same time, the human rights implications of drug control are still not addressed in any systematic or ongoing manner within UN human rights mechanisms and bodies—although in recent years, several human rights treaty bodies have, in response to civil society submissions, begun to adopt conclusions and recommendations in this area on a more regular basis. Importantly, state champions for rights-based and evidence-informed change to international drug policy lack a shared set of standards clarifying human rights obligations in the context of drugs, making it difficult to progress political negotiations in either Geneva or Vienna. We should also not presume that references to “human rights” in UN consensus documents on drug control, while more

common today, reflect a common understanding of that term among member states, or a shared commitment to make drug control efforts compliant with international human rights law. (The same can be said of the now-common reference by states to a “public health approach” to drugs.) As a result, human rights violations linked to drug control are unlikely to be addressed in any meaningful way, beyond simple assertions that drug control efforts must be consistent with human rights obligations, and drug control policies and their implementation are unlikely to be informed by human rights principles and considerations.

Closing this gap between discourse and practice is critical if progress on human rights and drug control is to move from debate or scholarly inquiry to an effective plan of action. A key tool in this effort will be the development and implementation of International Guidelines on Human Rights and Drug Control. Such a document would offer critical guidance to advocates, governments, intergovernmental organizations, and development partners on preventing human rights violations linked to drug control and enforcement, and would create a powerful human rights-based counterbalance to the “no-holds-barred ethos” of drug control described above. There are many precedents for such an endeavor. Over the past two decades, we have seen international human rights guidelines developed in the context of a wide range of global issues, including business, terrorism, HIV, natural disaster response, and protection against abuses based on sexual orientation and gender identity.¹⁷ In numerous instances, such guidelines have been used to inform both legislative and judicial decisions and the conduct of various state (and non-state) actors, thereby advancing law, policy, and practice in ways consistent with states’ human rights obligations—something member states have repeatedly declared is required. This existing body of work illustrates the value of taking a human rights-based approach to complex situations or stigmatized issues/populations, and also provides an important foundation of knowledge and experience from which we can learn in developing guidelines on human rights and drug control.

Article 28 of the Universal Declaration of Human Rights states: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” However, the rights enshrined within the Declaration will never be realized in the context of drug control when the international legal order that defines the regime continues to perpetuate an environment of human rights risk, and when that regime is subject to little or no human rights scrutiny. International Guidelines on Human Rights and Drug Control would be a critical tool for closing this gap, and would help operationalize a human rights-based approach to drug control. Such guidelines are necessary and long overdue, and their advent would be a fitting way to celebrate the 70th anniversary of the Universal Declaration in 2018.

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