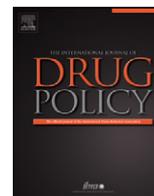




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### Commentary

# Security, development and human rights: Normative, legal and policy challenges for the international drug control system

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#### ABSTRACT

This commentary addresses some of the challenges posed by the broader normative, legal and policy framework of the United Nations for the international drug control system. The 'purposes and principles' of the United Nations are presented and set against the threat based rhetoric of the drug control system and the negative consequences of that system. Some of the challenges posed by human rights law and norms to the international drug control system are also described, and the need for an impact assessment of the current system alongside alternative policy options is highlighted as a necessary consequence of these analyses.

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#### Introduction

This commentary addresses some of the challenges posed by the broader normative, legal and policy framework of the United Nations for the international drug control system. In doing so it draws on existing work and also presents, it is hoped, some new perspectives. The 'purposes and principles' of the United Nations are briefly explained and set against the threat based rhetoric of the drug control system and the negative consequences of that regime. Some of the challenges posed by human rights law and norms to the international drug control system are also described, and the need for an impact assessment of the current system alongside alternative policy options is highlighted as a necessary consequence of these analyses.

#### Normative, legal and policy conflict: drug control and the 'purposes and principles' of the United Nations

The 'purposes and principles' of the United Nations are set out in the UN Charter (articles 1 and 55). These three policy 'pillars' of security, development and human rights (UN General Assembly, 2005, para 9; Nowak, 2007) have been reaffirmed in high level agreements as the 'foundations for collective security and wellbeing' (UN General Assembly, 2005, para 9). Under the Charter,

which takes precedence over other international treaties, including the drug conventions (article 103) all member states have agreed to co-operate towards the achievement of these aims (article 56). The reality on the ground for many is of course not reflective of progress, but the legal and political commitments are there.

The international drug control system, premised on a concern for the 'health and welfare of mankind' (preamble, *Single Convention on Narcotic Drugs, 1961*), is posited on the threat posed by drug use and the drug trade to that concern. This is clear from the preambles to the international drug conventions where addiction is seen as an 'evil' the international community has a 'duty to combat' (preamble, *Single Convention on Narcotic Drugs, 1961*), and the drug trade as 'a danger of incalculable gravity' which adversely affects 'the economic, cultural and political foundations of society' (preamble, *Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*). This threat based rhetoric (reflective of other treaties relating to, for example, terrorism and nuclear weapons) is evident also in international political agreements (e.g. *UN Commission on Narcotic Drugs, 2009*), annual General Assembly resolutions (e.g. *UN General Assembly, 2008*) and statements of UN officials (e.g. *Ban Ki Moon, 2009; Costa, 2009*). In 2005, the high level agreement adopted at the World Summit placed that threat squarely in the context of the three pillars of the UN (*UN General Assembly, 2005, para 111*).

This rhetoric, however, inhibits appropriate evaluation of existing policies because a perpetual threat may always justify the means adopted. Policy evaluation must be framed in terms of *that which is threatened*, not the threat. Otherwise, poli-

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cies become self-justifying and self-perpetuating. In the present international context, how have drug control efforts impacted, positively or negatively, upon security, development and human rights?

A series of negative consequences of international drug control have been identified by the UN Office on Drugs and Crime (UNODC, 2008a,b). Here this analysis is passed through the lens of the pillars of the UN (see also [Bewley-Taylor, 2005](#)) to highlight a systemic problem in international drug control and to frame its manifested harms in the light of the aims of the broader system within which it resides.

#### *Drug control has created a criminal black market of macro-economic proportions*

With this black market and the astronomical profits it generates has come corruption, destabilisation of entire countries, environmental damage (e.g. [Friends of the Earth, 2001](#) on aerial fumigation of genetically modified crops with glyphosate, the same chemical used for spraying coca; see also [Witness for Peace, 2009](#)), and the creation of conditions locally, nationally and internationally, including funding for terrorists and illegal armed groups, within which drug related violence has escalated (e.g. [Amnesty International, 2009](#)). As eloquently stated by the UN Development Programme in Colombia 'Illegal drugs have become the centre of gravity of Colombia's conflict. Traffic in narcotics catapulted the military capacity of the armed groups, increased their capacity to obtain income, criminalised their activities, eroded the legitimacy of the political system and internationalised the confrontation' ([UNDP, 2003](#)). A similar observation could be made *mutatis mutandis*, for Mexico and Afghanistan.

#### *Drug control has resulted in policy displacement from public health to law enforcement*

This widely acknowledged effect has led to public health-based interventions being underfunded and less focus being placed on access to controlled substances for medical and scientific purposes. Attention has been diverted from HIV prevention to law enforcement based approaches to drug use. HIV/AIDS meanwhile, is recognised as not only a public health concern, but also as a security ([UN Security Council, 2000](#)) development ([UNDP, 2006a](#)) and human rights priority ([UNCHR, 2005](#); [UN Human Rights Council, 2009](#)).

#### *Drug control has resulted in geographical displacement*

There are two main manifestations of this, commonly known as 'the balloon effect'. One is related to production, the other to trafficking routes. Both have obvious impacts for security, development and human rights in the newly affected territories. A third form of geographical displacement caused by drug control must, however, be emphasised—human displacement. In Afghanistan, opium bans, forced eradication and threats of NATO bombing contributed to human displacement both internally and into neighbouring Pakistan ([Felbab-Brown, 2009](#)). There are now over four million internally displaced people in Colombia ([UNOCHA, 2009](#)), most due to drug fuelled civil conflict, many as a direct result of anti-narcotic efforts and aerial fumigation campaigns targeting coca. The Government of Colombia estimates there to be closer to three million IDPs. This is because people displaced by fumigation or other counter-narcotics efforts are not, by law, considered displaced. The true number of people displaced by counter-narcotic efforts is extremely difficult to ascertain, due in no small part to the fact that those so displaced are not entitled to social welfare—there is every reason to conceal the real reason from the authorities.

This is, without doubt, a security, development and human rights catastrophe.

#### *Drug control has resulted in the marginalisation and stigmatisation of drug users*

According to UNODC, 'a system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalised from the social mainstream, tainted with a moral stigma' ([UNODC, 2008a,b](#)). The stigmatisation of particular groups is a key indicator of a system within which human rights abuses are more likely for that group. In the context of drug control, stigmatisation and marginalisation affects not just drug users, but peasant farmers and low level drug mules as well, often driven towards the drug trade by poverty or forced into it by violent gangsters. Human rights abuses are often accepted or overlooked due to that systemic moral stigmatisation identified by UNODC and enshrined in the legal framework of the drug control system ([Barrett, Lines, Schleifer, Elliot, & Bewley-Taylor, 2008](#)).

Drug control has surely also had positive outcomes. This should not be denied. But what this brief discussion of harms points to is the need for an impact assessment ([Transform, 2009](#)) of the current international drug control regime *vis a vis* security, development and human rights which includes an analysis of alternative policy options that could achieve better outcomes for these 'foundations for collective security and well-being'. This should involve the spectrum of options from strengthening prohibition, to partial decriminalisation for personal use of some substances and traditional uses of others, to legal regulation, and everything in between (see, for example, [Rolles, 2009](#)). That is a move to evidence based, rather than threat based, policy making.

#### **Normative, legal and policy challenges posed by human rights**

##### *The drug control system as a human rights risk environment*

Human rights violations committed in the context of drug policies are well known and must continue to be documented and brought to public attention. Identifying violations is central to finding redress for individuals and groups, but also serves as an articulation of more systemic and structural problems. This is where human rights poses significant challenges for the international drug control system. The scale and breadth of human rights abuse associated with drug control activities are evidence of the human rights risk associated with carrying out the requirements of the drug control treaties. The abuse is a manifestation of that risk and the lack of attention to human rights obligations. This identifies the current international drug control system as one within which human rights abuses are more likely—a 'human rights risk environment' (on the risk environment and injecting drug use, see generally [Rhodes, 2002](#)).

Some would no doubt dispute this analysis. It has been claimed for example that human rights abuses related to drug law enforcement are not drug control issues, per se. The death penalty for drugs, for example, is a sentencing issue; police abuse in relation to drug law enforcement is a policing issue etc. ([Takahashi, 2009](#)). The argument, however, does not stand up to scrutiny, and abandons decades of human rights teaching relating, for example, to homophobic and gender-based violence, racism and human rights abuses relating to counter-terrorism. It is impossible to divorce the cultural, legal, policy and political environment from such abuses. The international drug control system is no different.

Drug control as a human rights risk environment provides a useful framework from which a human rights-based approach emerges as a response. It focuses on structural and systemic change to reduce

and, if possible, eliminate human rights risk and promote positive realisation of rights. It requires that the core principles of human rights underpin all policies and interventions (e.g. universality, non-discrimination, a gender focus, participation, transparency and accountability). It demands evidence based scrutiny of means and ends, appropriate benchmarking and indicators, appropriately disaggregated data to assist in identifying patterns of discrimination and vulnerability, and proper allocation of resources geared towards those individuals and groups (see for example, UNDP, 2006b; UN Committee on the Rights of the Child, 2003; Danish Institute for Human Rights, 2007). It is therefore multidisciplinary and marries with the recommendations that emanate from other disciplines. Its added value is that it encompasses these elements and is backed by international law and existing international commitments. As a whole, a human rights-based approach therefore challenges the drug control system's goals, laws, policies and institutions.

#### *Human rights law and international drug control*

A human rights-based approach is not solely legalistic, but the law does serve as its normative and authoritative foundation. The drug conventions cannot displace human rights law. As noted by the International Law Commission, which was established in 1948, to pursue the progressive development and codification of international law, 'No rule, treaty or custom, no matter how special its subject matter... applies in a vacuum' (International Law Commission, 2006, para 120). This is essential. Human rights law operates at all times alongside the drug conventions (International Court of Justice, 1996).

Indeed, the importance of human rights law as a 'normative counterweight' to the drug conventions has previously been identified (Barrett & Nowak, 2009; Elliot, Csete, Kerr, & Wood 2005). The application of human rights law and jurisprudence to the interpretation and implementation of the drug conventions is crucial, and has already been demonstrated with harm reduction where it is increasingly seen as a requirement of international law, not an optional intervention permitted by the drug conventions. (See for example CESCR, 2006, 2007, 2009.) As noted clearly by the UN Special Rapporteur on the Right to Health, 'Every state... has an obligation to implement, as a matter of priority, national comprehensive harm reduction services for people who use drugs (Hunt, 2008). Further scrutiny of the drug conventions through the lens of human rights law is therefore needed.

Few human rights, however, are absolute and may be lawfully restricted. But rather than being a limitation, this poses an incisive question for the drug control system. Many rights are restricted by drug control laws and policies, this is clear. The test for when these restrictions are permissible, however, does not lie in drug control legislation or policies. It lies in human rights law. Broadly, any restriction on human rights must be prescribed by law, in pursuit of a legitimate aim, foreseeable, and proportionate to the aim pursued. (See, for example, European Court of Human Rights, 1976, 1991.) It is unlikely that the first three tests would pose much of a challenge to current drug control laws. The fourth, however, is central to a human rights analysis of the drug control regime. If a law or policy cannot achieve or has not achieved its aim over a considerable length of time, then can the restrictions on human rights that stem from that law or policy ever be proportionate and therefore permissible? It should be borne in mind that in considering this, the seriousness of the restriction (which varies depending on the right and individual circumstances) its breadth (in this case global and applicable to everyone) and its duration (in the case perpetual) will be key, balanced against other concerns such as public health and security, public order and morals etc.

Unfortunately, this test has never been fully applied to drug control, even in cases where the possibility has arisen. In its disappointing decision in *Prince v South Africa*, for example, the UN Human Rights Committee avoided an in depth analysis of this test (UN Human Rights Committee, 2007). In a case involving religious freedom and cannabis use, the Committee simply stated that 'the prohibition of the possession and use of cannabis, which constitutes the limitation on the author's freedom to manifest his religion, is prescribed by the law'. It noted 'the State party's conclusion that the law in question was designed to protect public safety, order, health, morals or the fundamental rights and freedoms of others, based on the harmful effects of cannabis, and that an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis to enter into general circulation' and concluded that 'under these circumstances the Committee cannot conclude that the prohibition of the possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose.' (UN Human Rights Committee, 2007, para 7.3, emphasis added). There was no scrutiny of the ability of this measure to actually or even potentially achieve the stated aim nor any questioning of the 'threat' posed by cannabis to 'the public at large'. They were taken at face value, bringing into question the conclusion reached.

This question is of course more complex than may be presented in this commentary and the test can vary depending on the right in question and the terms of the relevant convention, but once again, a full impact assessment of the prohibitionist model appears to be demanded. This time it is to provide an objective evidence base to assist in answering the central question of whether human rights infringements inherent in prohibition are justified, or whether they amount to violations.

#### *Placing individuals and communities at the centre of international drug control*

In recent years, human rights law, norms and principles have had an important influence on international policy discussions relating to security and development. The interdependence of the three pillars of the UN was reinforced in 2005 by then Secretary General of the UN, Kofi Annan. In an influential report on UN reform he noted that 'we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed' (Annan, 2005, para 17). In doing so he underscored the central importance of human rights to both security and development.

For many years, security was seen as the absence of armed conflict or the threat of war. Development was viewed solely in economic terms as a process of industrialisation. Human rights were seen as legalistic, with little connection to the other two. These ideas of course abide. But more recently, following the development of human rights treaties, norms and principles, various efforts have sought to place the human being at the centre of policies that previously had been seen as purely macro-economic or military, and the concepts of 'human security' and 'human development' began to be discussed (Nowak, 2007). While complex and still very much debated, human development, broadly, is focused on 'creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests... and it is thus about much more than economic growth.' (UNDP 'Human Development Concept at <http://hdr.undp.org/en/humandev/>. See also Sen, 2001.) Human security is geared towards the eradication of global violence and the creation of conditions within which violence is less likely, including for example, health and economic security (see for example UNDP,

1994; Commission on Human Security, 2003). The individual and community are therefore at the core of both concepts.

In a similar way, human rights asks of the international drug control system a move to more localised and culturally appropriate solutions which place individuals and communities at their centre. What, then, might this mean for the current one-size-fits-all global approach to supply and demand reduction in terms of law, culture, religion, epidemiology, and local security and development conditions? How does this sit against the 'human rights risk environment' identified above? At the least, human rights discourse challenges the drug control system to justify current approaches with reference to concrete impacts upon individuals and communities, rather than measuring success in terms of indicators such as kilos seized, hectares eradicated, prosecutions secured and numbers of people having used drugs, which presume such impact rather than actually demonstrating it. And that is no small challenge.

## Conclusion

International drug control, as currently formulated, may be conceptualised as an 'international risk environment' for the related damage to security, development and human rights that has been documented worldwide. The human rights risk is particularly clear. The first step in addressing this is to begin to shift the debate at the international level away from threat based rhetoric and towards meeting the aims of the UN. Based on modern debates concerning human security and human development, this demands consideration of more locally and culturally appropriate responses that place individuals and communities at the centre of drug policies. An impact assessment of the current approach is necessary, set against alternative policy options that may achieve better results in terms of security, development and human rights. That call is supported by international human rights law.

This assessment should have happened at the ten year review of international drug policy at the UN Commission on Narcotic Drugs (March, 2009). Instead, the same policies, with some minor amendments to language, though hard fought by some of the more progressive governments, were prescribed for the next ten years. Indeed, it may be argued that advocating for a move towards policy based on the aims of the UN naively presumes genuine governmental support for those aims, when in fact other political agendas are more likely the drivers of current drug control efforts. This is likely the case for some governments. But this does not stall the discussion. Indeed, it is one more argument for reframing the debate so that the UN system, within which international drug control resides, is not one behind which these agendas may hide (Barrett & Nowak, 2009).

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