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Title: Human Rights and Drug Policy

1. Introduction

International drug policy is wounded by episodic, sparse as well as severe human rights violations. Increasingly, such violations are used as evidence for reframing, re-structuring or even removing the international drug control architecture. In this paper, I attempt to describe some of the most commonly reported human rights violations connected to drug control whilst at the same time highlighting that such infringements are not prescribed, condoned or encouraged by any of the international drug control instruments.

2. The Framework of International Human Rights

A right is not given by grace, charity or goodwill. A right, as Professor Louis Henkin once said, is "a claim upon society, which has a legal, moral obligation to honor the claim, to respect it, to ensure it, to help realize it"[i].

The cornerstone of international human rights law is what is often referred to as the International Bill of Rights, which is made up of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights (both 1966). A total of ten conventions have been identified by the UN as "core" human right instruments.

The Human Rights Council is the main intergovernmental forum where states discuss and decide on human rights matters of international concern. Each international convention also has a monitoring committee (referred to as a "treaty body") made up of independent experts who engage in a quasi-judicial review of state parties' application of the provisions or that particular convention. In addition, there is a UN agency, the Office of the High Commissioner for Human Rights that is mandated to monitor human rights globally, pronounce itself on issues of concern, and encourage states to improve their performance[ii].

3. International Human Rights Frameworks and Drug Policy

There is nothing in the international drug control conventions that encourages states to take measures that would violate human rights. It is also not true that the international drug conventions dictate that persons who use drugs should be imprisoned. Blanket incarceration is not encouraged by the conventions, by INCB or UNODC.

The international drug control conventions do, however, require that states restrict drug abuse, and that states ensure that persons who use drugs face some sort of sanction. However, the conventions go on to say that states may provide treatment for drug abuse in lieu of such sanctions. Therefore, to place the blame for human rights violations linked to drug use or trafficking at the international level rather than at member state level is misguided, for it is at member state level where the judiciary power lies.

Throughout all international human rights conventions, there is only one reference to drug use and that is contained within Article 33 of The Convention on the Rights of the Child (CRC). It is here where a direct reference to the international drug control conventions is made, as it says that children must be protected from drug abuse as defined in the "relevant international treaties", and that children must also be protected from being used in production and trafficking of drugs. The CRC, which was adopted in 1989, has been ratified by every single UN member state except two (the United States and Somalia), and is the most widely ratified international human rights convention.

> *"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"*[iii].

4. Human Rights Violations Linked To Drug Production, Trafficking and Use

I. The Right of Children To Be Protected From Illicit Trafficking, Drug Production and Drug Use

Enshrined in international law is the right for children to be "protected children from the illicit use of narcotic drugs and psychotropic substances" and to be prevented from "illicit production and trafficking"[iv]. This right should be respected without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

In all actions concerning children, the best interests of the child should always be the primary consideration and so, even if a child has infringed the penal law, they should be treated in a manner consistent with the promotion of the child's sense of dignity and worth and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. In short, the placement of a child in an institution should always be seen as the last resort and such placements should not be for the shortest periods possible[v].

In terms of how this right is monitored and assessed is the subject of much debate and also of much criticism[vi], as many feel these rights are not monitored, assessed or followed up as much as they should be. There are reports of the death penalty being applied to children some countries[vii] and even in the most developed countries, the following human rights failings may be found[viii]:

- Lack of comprehensive drug services for children who have drug problems
- Lack of consistency of approach when a child is at risk due to parental drug use
- Lack of support for children who live in households where addiction is prevalent
- Lack of action on the spread of new psychoactive substances via the internet which are accessible to children

II. The Right To Life

Every human being has the inherent right to life and the law must protect this right. The death penalty is therefore prohibited in countries where the Optional Protocol to the International Covenant on Civil and Political Rights has been ratified and it is not allowed to be used on children in any country. The death penalty can also not be used by bodies such as the International Criminal Court. However, there are a number of situations where states may deprive individuals of life itself and to which international human rights law does not raise an objection (for example, where life is threatened)[ix].

For countries which have not abolished the death penalty, the sentence of death may be imposed only 'for the most serious crimes'. This is limited to an intention to kill, which

resulted in loss of life. Drug offences (including possession and trafficking) do not meet this threshold.

One example of a country where the death penalty is used quite significantly is in Iran. The sixth annual report on the death penalty in Iran revealed that the number of executions in 2013 is the highest reported in more than 15 years, and the trend continues in 2014. Indeed, in 2013 alone at least 687 people were executed, which is a 16% increase compared to the previous year[x]. Public executions remain high and possession and trafficking of narcotic drugs remain the charges the most commonly used against those executed. Moreover, there are several juvenile offenders among those executed, and more than 40% of the executions either were not announced by the authorities or they were conducted secretly. Ethnic minorities were over-represented in the latter group. Many of those who were executed were subjected to unfair trials, torture and forced confessions.

In cases linked to drug trafficking or drug mule behaviours, the likelihood that someone may face the death penalty very much depends on individual circumstances and the country in which the offence took place. Recent examples of this include the case of Lindsay Sandiford, from the UK, who at the time of writing faces the death penalty via firing squad in Indonesia, unless she can successfully appeal against the courts[xi].

III. The Right To Healthcare and Treatment

The right to health as contained in article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) requires States to recognize the right to health of all people. The right to health contains freedoms and entitlements, including the right to be free form non-consensual medical treatment and to be free from torture. Forced labour, solitary confinement and treatment administered without consent may violate international human rights law, including the right to health and the right to be free from torture, and cruel, inhuman or degrading treatment or punishment[xii].

As part of state's positive obligation to protect people from cruel, inhuman or degrading treatment, states have to take steps to protect people from unnecessary pain related to a health condition. In a 2009 report to the Human Rights Council, the Special Rapporteur on Torture stated that "the de facto denial of access to pain relief, if it causes severe pain and suffering, constitutes cruel, inhuman or degrading treatment or punishment". Restrictive government policies and limited availability of pain treatment continue to be a major obstacle to the delivery of palliative care in Russia. Each year, tens of thousands of dying cancer patients (up to 80 percent of them) are denied their right to adequate relief. Such inexpensive drugs as oral immediate-release morphine are largely unavailable through the public healthcare system[xiii]. Notably, a country's difficult financial situation does not absolve it from having to take action to realize the right to health and the World Health Organisation (WHO) state that "no State can justify a failure to respect its obligations because of a lack of resources"[xiv].

In terms of drug use, the 2008 Principles of Drug Dependence Treatment, *discussion paper by the World Health Organization and the United Nations Office on Drugs and Crime* explicitly states that the same standards of ethical treatment should apply to the treatment of drug dependence as other health-care conditions[xv]. Unfortunately, in many countries, people who use drugs may be deterred from accessing medical treatment for fear that their medical information may be shared with other authorities, resulting in imprisonment. This has implications for the HIV/AIDS response of the country and increases the disease burden. Confidentiality for people seeking drug treatment should be assured. Examples of where confidentiality may have been breached includes the case in Ukraine, where drug users claimed that they were identified for arrest based on their efforts to obtain drug treatment information and sterile needles from legal needle exchange sites. Drug users and service providers gave accounts of police harassing, arresting, and severely beating drug users merely for possessing syringes at or near the syringe exchange sites[xvi].

According to ICESCR States must ensure the enjoyment of all aspects of the right to health without discrimination. According to the General Comment, States are required to respect, protect and fulfil the right to health of all people, without discrimination. Drug use or drug dependence, therefore, cannot constitute grounds for curtailing a person's right to access. Therefore, circumstances when evidence-based treatment programmes are available to the general public yet unavailable to persons in detention may also contravene the principle of non-discrimination. In this context, the Special Rapporteur refers to the General Assembly resolution on Basic Principles for the Treatment of Prisoners (A/RES/45/111), which states that, "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation" (Principle 9).

The right to health also contains freedoms and entitlements, including the right to be free form non-consensual medical treatment and to be free from torture. Forced labour, solitary confinement and treatment administered without consent may violate international human rights law, including the right to health and the right to be free from torture, and cruel, inhuman or degrading treatment or punishment. Authorities are obliged under international law to provide all detainees with at least the level of healthcare available in the community, as well as access to essential medicines such as morphine for pain relief. In early 2014 Human Rights Watch[xvii] reported serious human rights violations into the eight treatment centres scattered across Cambodia where about 2200 people are held a year, whom the government claimed were receiving treatment and rehabilitation for drug dependency. Reported violations included lack of access to a lawyer, lack of provision of medical and drug dependency treatment, physical abuse and rape.

IV. The Right To Non-Discrimination

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

status. Direct discrimination arises when there is less favourable or detrimental treatment of an individual or group on the basis of a prohibited characteristics or ground, such as race, sex or disability[xviii]. Indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless justified. Not all differences of treatment are prohibited discrimination under international law. In order to be justified, a distinction must pursue a legitimate aim and be proportional. The means of achieving the legitimate aim must be appropriate and necessary and relevant to the differential treatment. The right to privacy and non- discrimination protects individuals from mandatory and compulsory HIV testing except in cases of blood, organ or tissue donations. Different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, legal reason for detention and necessities of treatment. Children should be separated from adults.

In relation to drug possession, the power of police authorities to search an individual is often brought into question under human rights law. The UK's home office conducted a consultation on the stop and search policy in the UK to investigate the risk of discrimination during such a procedure[xix]. The results of the consultation revealed that a substantial number of respondents indicated that the stop and search powers were not used effectively and that the police uses their power in a discriminatory way or to disproportionately target black and minority ethnic groups. The positive note regarding this consultation was the engagement of the UK government to look into these potential human rights violations issues and to respond positively by increasing training of the police officers.

V. The Right To A Fair Trial and Proportionate Sentencing

There are clear international human rights standards which relate to law enforcement, as well as to sentencing. For example, law enforcement officials are supposed to respect and protect human dignity and maintain the rights of all and should not inflict, instigate or tolerate any act of torture or any other cruel, inhuman or degrading treatment. In terms of sentencing, international standards include that the severity of penalties must not be disproportionate to the criminal offense and that imprisonment should be used as a penalty of last resort and the choice between penalties should take into account the potential for rehabilitation.

Groups like Human Rights Watch (HRW) have documented cases where disproportionality has been questioned. For example, using case studies, HRW have documented cases from the United States of America where arrestees who do not forego a trial by pleading guilty are sometimes given sentences three times as long, as they would have done if they pleaded guilty in the first instance[xx]. This could be considered an obstacle to a fair trial. Other criticisms of the Amercian court system include the use of long minimum sentencing guidelines which local judges cannot overrule, leading to long periods of internment[xxi], which may be better served through alternative incarceration schemes or in the community. Disproportionately high minimum drug possession sentences have been reported in various countries[xxii], where, for example, people have received four year prison sentences for being in possession of relatively small amount of cannabis.

Whilst drug treatment courts have been hailed in many parts of the world as catalysts for positive change for people involved in drugs and crime, some US Drug Treatment Courts have faced criticism for extending the sentences of people who use them (i.e. receiving longer sentences than what they would have received if they had not chosen to go through a drug court)[xxiii]. Cases such as these appear to be counter-intuitive to the philosophy of drug courts, which in many cases have been shown to function well and to lead to diversion away from the criminal justice system.

5. Conclusion and Recommendations

Human rights violations are not condoned by any of the current international drug control conventions. Rather, these often severe infringements lie at the national level and are not supported by any of the major international institutions working on drug policy issues. The international community should work together to better monitor such violations, to assess progress in the field of human rights in areas such as the United Nation's Commission of Narcotic Drugs and to work together during the United Nations General Assembly Special Session on Drug Policy in 2016 to find ways to eliminate breeches in human rights which relate to drug policy areas.

Recommendations:

- Donors should provide specific funding to the United Nations Office on Drugs and Crime to monitor, assess and make recommendations on human rights violations linked to drug production, trafficking and use
- National drug policies reflect the international right of children to be protected from drug use through providing evidence based prevention programmes, access to basic education and separate youth-focussed drug services
- National drug policies make provisions for children who live in households where drug use and addiction is prevalent
- National, EU and international bodies should work together to restrict the availability of new psychoactive substances via the internet
- National, EU and international bodies should review their policies on supplying funding for drug control activities in countries where the death penalty remains an offence
- National, EU and international bodies including civil society organisations should make clear statements criticising the death penalty for drug offences
- EU bodies should apply human rights guidance to bilateral funding agreements
- International bodies such as the UNODC begin to negotiate a working agreement on extradition procedures, in the case of drug related crime and where the death penalty may be applied against international law
- The WHO continue to review the situation regarding access to essential medicines for palliative care
- The UNODC produce a paper on access to essential medicines and outline how access may be improved whilst respecting the international drug control conventions
- National bodies should ensure confidentiality for patients seeking and undertaking treatment for drug dependence

- National bodies should ensure that that there is easy access to voluntary evidence-based drug prevention, treatment and care services that are available to their population irrespective of age, gender and nationality
- National bodies should ensure that responses to drug law offences are proportionate (i.e. serious offences, such as trafficking in illicit drugs must be dealt with more severely and extensively than offences such as possession of drugs for personal use)
- National bodies should seek effective evidence-based alternatives to incarceration which aim to reduce recidivism among offenders

6. Annex - Human rights reference guide in the context of drug policy

References are non-exhaustive, are provided by way of example only, and are not intended as a definitive statement as to the content of international human rights law.

1- Non-discrimination

- Prohibition on discrimination – ICCPR, Art 26

Right to freedom of thought, conscience and religion - ICCPR, Art 18

- Right to exercise economic, social and cultural rights without discrimination of any kind - ICESCR, Art 2
- Direct discrimination – HRC General Comment 18, para 7
- Indirect discrimination – CERD General Recommendation 14, para 2
- Legitimate and proportional distinctions – HRC General Comment 18, para 13
- Protection from mandatory HIV testing – International Guidelines on HIV/AIDS and Human Rights, Guidelines 3 (para 20(b)) and 5 (para 22(j)) •
- Separation of prisoner categories – Standard Minimum Rules for the Treatment of Prisoners, para 8

2- Rights of Women

- Development and advancement of women – CEDAW, Art 3
- Obligation to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women - CEDAW, Art 6
- Honour defences – CEDAW/C/JOR/CO/4, para 24
- Elimination of prejudices – CEDAW, Art 5
- Responses to violence against women – ECOSOC Res 2010/15
- Women prisoners – Draft United Nations rules for the treatment of women Prisoners and non-custodial measures for women offenders

3- Rights of the Child

- Obligation for the best interests of the child to be a primary consideration - CRC, Art 3
- Non-discrimination with respect to child rights – CRC, Art 2(1)
- Best interests of the child – CRC, Art 3(1)
- General principles for juvenile justice – CRC, Art 40(1)
- Aims of juvenile justice – Beijing Rules, Art 5.1
- Detention to be a disposition of last resort – CRC, Art 37(b)
- Protection of children from illicit drugs – CRC, Art 33
- Right of the child accused of having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth - CRC, Art 40

Law Enforcement

- Right to liberty, security of person, and non-arbitrary arrest or detention - ICCPR, art 9
- Right to be informed of reasons for arrest – ICCPR, Art 9(2)
- Right to be brought promptly before a court – ICCPR, Art 9(3)
- Right to life - ICCPR, Art 6
- Right not to be subjected to enforced disappearance -ICPED, Art 1
- Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment - ICCPR, Art 7
- Right not to be subjected arbitrary or unlawful interference with privacy, family or home - ICCPR, Art 17
- Right to freedom of association - ICCPR, Art 22

• Right to liberty of movement - ICCPR, Art 12
• Obligation to take appropriate measures to investigate acts of enforced disappearance - ICPED, Art 3
• Powers of seizure and confiscation – ECtHR App No. 19955/05; E/CN.4/1995/19/Add.1
• Evidence-based searches and arrests – HRC Comm No. 1493/2006
• Intelligence gathering and the right to privacy – Report of the Special Rapporteur A/HRC/13/37
• General principles – Code of Conduct for Law Enforcement Officials, Art 2
• Prohibition on torture – UDHR, Art 5; CAT, Art 2; Code of Conduct, Art 5
• Use of force – Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

4- Prosecution and Courts

• Right to a fair trial - ICCPR, Art 14
• Right to be presumed innocent – ICCPR, Art 14(2)
Prohibition on retroactive criminal offences - ICCPR, Art 15
• Adequate time and facilities for defence – ICCPR, Art 14(3)(b)
• Prohibition on use of evidence obtained by torture – CAT, Art 15
• Timeliness of criminal proceedings – ICCPR, Art 9(3), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Art 38
• Protection of counsel – HRC General Comment 13, para 9
• Non-prosecution of trafficked persons – Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 2
• Equality of arms – ECtHR Ofrer No.524/59 and Hopfinger No. 617/59
• Impartiality of judiciary – Basic Principles on Independence of the Judiciary, Art 2

5- Sentencing and Prisons

• Treatment of prisoners – ICCPR, Art 10
• Prohibition of the death penalty – ICCPR-OP2
• Restrictions on application of the death penalty – ICCPR, Art 6(2); Report of the Special Rapporteur A/HRC/4/20, para 53; ECOSOC Res 1984/50
• Prohibition on imprisonment related to contractual obligations – ICCPR, Art 11
• Provision of adequate facilities for prisoners – Standard Minimum Rules for the Treatment of Prisoners, paras 9-26
• Communication with family and visits – Standard Minimum Rules, paras 37-39
• Proportionality of penalties – A/CONF.144/28/Rev.1 at p.164

6- Drug prevention, treatment and care

• Right to the highest attainable standard of physical and mental health - ICESCR, Art 12
• Obligation to protect children from illicit use of narcotic drugs and psychotropic substances - CRC, Art 33
• Right not to be subjected to cruel, inhuman or degrading treatment or punishment - ICCPR, Art 7
• Right not to be subjected without free consent to medical or scientific experimentation - ICCPR, Art 7
• Right not to be subjected to arbitrary or unlawful interference with privacy, family or home - ICCPR, Art 17
• Right to an adequate standard of living - ICESCR, Art 11

• Right to appropriate services in connection with pregnancy - CEDAW, Art 12
• Right to non-discrimination - ICCPR, Art 2
• Drug dependence as a health disorder – Report of the Special Rapporteur A/HRC/10/44, para 71
• Evidence based treatment for drug dependence – Report of the Special Rapporteur A/65/255, paras 50-55; A/64/92-E/2009/98, Political Declaration, para 21
• Proportionality of responses to drug laws – E/INCB/2007/1, Chapter 1, paras 13 and 60
• Criminal law should not impede access to drug treatment - Report of the Special Rapporteur A/65/255, para 62

• Detained drug users and access to services – A/HRC/10/44, para 59; CESCR, E/C.12/UKR/CO/5, para 51; A/64/92-E/2009/98, Plan of Action, para 16(c)
• Drug treatment should be voluntary – ICESCR, Art 12; CESCR General Comment 14, para 34; Report of the Special Rapporteur A/64/272, paras 88-91

7- Alternative development and sustainable livelihoods

• Adequate standard of living – ICESCR, Art 11
• Right to Development – A/RES/41/128; AChHPR, Art 22
• Development processes – Report of the Independent Expert A/55/306
• Freedom of choice in development – ACHPR Communication 276/2003, paras 278 – 279
• Requirement for good faith consultations – ILO Convention 169, Art 6
• Conditionality of development assistance – High-level task force on implementation of the right to development E/CN.4/2005/WG.18/TF/3, para 32
• Involvement of women in the development process – Sub-Commission Human Rights Res 1999/15

8- HIV/AIDS

• Right to non-discrimination - ICCPR, Art 2
• Criminal law should not be an impediment to HIV/AIDS services – International Guidelines on HIV/AIDS and Human Rights, Guideline 4 (para 21(d))
• Criminal law, sex workers and HIV/AIDS – International Guidelines, Guideline 4 (para 21(c))
• Mandatory HIV testing – International Guidelines, Recommendations, para 120
• HIV/AIDS and prisoners – International Guidelines, Guideline 4 (para 21(e))
• HIV-specific criminal laws – International Guidelines, Guideline 4 (para 21(a))

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