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THE ELEPHANT IN THE ROOM: DRUGS AND HUMAN RIGHTS IN LATIN AMERICA

Juan Carlos Garzón, Luciana Pol

- *A revision of the current drug policy in the region and the world is necessary in order to address systematic human rights violations.*

ABSTRACT

This article seeks to expose the tensions between the enforcement of drug laws and human rights. Due to their varied impacts and negative consequences, drug policies can act to increase violence against, and cause the repression of, the most vulnerable sectors of the population in the countries where they are being implemented.

Starting with an analysis of the impacts of the implementation of the international drug control regime and critical factors related to the violation of human rights, the authors highlight the challenges that United Nations Special Session of the General Assembly in 2016 (UNGASS 2016) faces in defining drug policies for decades to come, with special attention given to Latin America.

KEYWORDS

War on drugs | Human rights | International Drug Control Regime | United Nations Special Session 2016 | Latin America | UNGASS

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The workings of the International Drug Control Regime (IDCR) has led to systematic abuses of human rights and fundamental freedoms. Despite considerable evidence of the harm caused by the punitive enforcement of drug laws, it is only recently that people have begun to talk openly about this issue. For decades, the implementation and monitoring of drug control conventions has ignored states' obligations in the area of human rights. The multilateral bodies in charge of overseeing the IDCR have been carrying out their mandates while ignoring the elephant in the room.

In this context, calls for a review of current drug policies are growing stronger in the run-up to the United Nations Special Session on the world drug problem in 2016 (UNGASS 2016), which will convene to assess the strengths and weaknesses of the current regime.

The purpose of this article is to briefly analyse the tension that exists between the implementation of the IDCR and the protection of human rights by showing how, in the framework of the so-called "war on drugs," human rights obligations have been overlooked or, at best, only marginally acknowledged. In the second section, evidence will demonstrate how, in practice, the enforcement of drug laws has produced varied effects and negative consequences, with special attention on Latin America. Finally, this text will discuss recent developments in relation to UNGASS 2016.

The elephant in the room: the divorce between drug policies and human rights

The international drug control regime is based on three treaties: the Single Convention on Narcotic Drugs, 1961; the Convention on Psychotropic Substances, 1971; and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. As a whole, the regime's objective is to control drugs to guarantee that they are available for medical and scientific purposes, and prevent the diversion of a defined set of substances for other uses. From a human rights stance, it is important to highlight that the preambles of the three conventions contain references to "health" and "welfare of mankind" as superior "moral" objectives. Human rights, on the other hand, are only explicitly mentioned once in the three treaties: in Article 14(2) of the Convention of 1988.

Although, and as is the case with many other treaties, there are only minor references to human rights, the conventions must be applied and interpreted in accordance with existing human rights obligations. As Rodrigo Uprimny points out, the state's duty to respect these rights is an obligation that has its basis in the Charter of the United Nations – a treaty that prevails over all other conventions. Thus, states' obligations with regards to drug control must be interpreted in a way that is compatible with international human rights obligations – and not the other way around.¹ However, in practice, there has been a divorce between the fulfilment of the commitments required under the IDCR and human rights obligations.

How does one explain this divorce? There is no single answer. On one hand, one can argue that the conventions oblige countries to adopt criminal sanctions to combat all aspects related to the production, possession and trafficking of drugs, and that this has resulted in the adoption of repressive policies.² It is the predominantly punitive interpretation of responsibilities that has led to human rights abuses and the deterioration of personal freedoms. From this standpoint, compliance with drug conventions has led to non-compliance with human rights obligations.

On the other hand, and as the United Nations Office on Drugs and Crime (UNODC) argues, while it is true that human rights have been violated in the name of the war on drugs, nothing in the drug conventions permits acts such as torture, coercion, humiliating and degrading treatment or the death penalty.³ In fact, the conventions permit countries to adopt a proportional response, for example offering non-custodial alternatives for minor offences. From this perspective, the problem is not the conventions themselves, but rather how they are interpreted.

Reality obliges us to analyse the conventions not solely for their intentions, but rather their results, which have not been consistent with, nor have given priority to, the human rights obligations of states. As Damon Barrett has suggested, the IDCR has ignored the risks arising from its implementation, lacks clear and specific guidelines on such issues and cannot count upon bodies to regulate and monitor compliance as is the case, for example, for trade or counterterrorist activities.⁴

It was only in 2008 that the UN Commission on Narcotic Drugs (CND) even adopted a resolution on human rights⁵ and approval for this resolution only became possible once references to the death penalty, the rights of indigenous peoples and specific UN human rights mechanisms had been removed.⁶ Since that date though, human rights protections have appeared more frequently in resolutions and declarations.

In 2009, the UN Special Rapporteur on torture, Manfred Nowak, cited the enforcement of drug laws as one of the arguments used by governments to justify human rights violations. In 2010, the Special Rapporteur on the Right to Health expressed his concern about "the fact that the current focus on drug control was causing more harm than it aimed to prevent." In 2012, a joint statement of several UN bodies called upon states to close compulsory rehabilitation centres and to set up health care services based on a human rights approach.⁷ In 2010, the UNODC produced a report for the CND on drug control and criminal justice policies from a human rights perspective.⁸ Furthermore, in 2012, the UNODC published a guidance note addressed to its personnel.⁹

What is more, the 2015 report of the International Narcotics Control Board (INCB) expressed concern with states which continue to use the death penalty for drug-related offences.¹⁰ The UN Human Rights Committee called upon these countries to put an end to this practice.

Little by little, acknowledgment of the “elephant in the room” has increased, even though there is still considerable resistance from some states who do not see the need to have drug enforcement laws comply with human rights obligations. For example, more than twelve countries include corporal punishment as a potential punishment for drug-related crimes in their legislation.¹¹ Moreover, countries such as Russia and China openly oppose having this debate. However, even though the debate on abuses has intensified, the negative consequences persist. The punitive approach is still the norm, as is the excessive use of criminal law to address problems that are directly linked to public health and development.

“The war on drugs”: a history of human rights abuses

There is a correlation between the creation and development of an international drug control regime and a variety of abuses and negative consequences. In 2008, the UNODC World Drug Report¹² identified a series of “unintended negative consequences” of drug control actions. The same year, in a guide for its employees, UNODC admitted that “there is a small, but ever present, risk that UNODC activities could have a negative impact on human rights.”¹³ In practice, the IDCR has become a system of risks in which “collateral damage” is the rule, not the exception.

The recently published report of the United Nations Development Programme (UNDP) affirms that “In many countries around the world, drug control efforts result in serious human rights abuses.”¹⁴ Moreover, UNDP states that “Communities also face serious human rights abuses by large-scale drug trafficking organizations.”¹⁵ Under the current regime, not only have states not refrained from interfering in the enjoyment of human rights (the duty to respect), they have also failed to adopt the necessary measures to guarantee and protect human rights.

The list of impacts is long and their implications are far-reaching. The most severe forms of drug enforcement laws have resulted in torture, extrajudicial executions and forced disappearances by agents of the state. In the name of the “war on drugs” and the fight against crime, institutions have ignored their obligations in relation to systematic violations, and not just in a few serious but isolated cases. The brunt of these actions has fallen mainly on vulnerable populations: the young, the poor and the marginalised.¹⁶

In countries where the fight against drug trafficking has been most intense – Colombia, Brazil, Mexico and Honduras, to name a few examples – repression of drug activities has literally led to a “war” with a clearly defined enemy (growers, consumers, smugglers and drug “lords”), the use of armed units (including military forces deployed in public policing and security roles) and thousands of victims.¹⁷

The interventions initiated under the IDCR have exacerbated the violence and the insecurity they were meant to resolve. The fight against drug trafficking has had impacts on numerous communities that find themselves directly affected either due to their geographic proximity to drug trafficking routes or through the dynamics of the violence associated with drug trafficking and sales.

A meta-analysis conducted by Werb et al. concluded that armed violence and high homicide rates could be a consequence of the prohibition of drugs.¹⁸ In Mexico, a recent study elaborated by Valeria Espinosa and Donald Rubin found that interventions carried out by the army to repress narco-trafficking caused an increase in homicide rates.¹⁹ In Colombia, some estimates indicate that drug production operations cost the lives of between 4,000 and 7,000 people each year and have displaced between 180,000 and 277,000 people.²⁰

Severe drug prohibition regimes favour criminal sanctions as a primary response, leading to the application of disproportionate punishments and ever increasing sentences. In Latin America in particular, both minimum and maximum sentences have increased up to twenty fold in the last 50 years.²¹ A special mention should also be given to the use by 33 countries and territories of the death penalty for drug-related crimes.²² Hundreds of people have been executed in countries such as China, Iran, Pakistan, Indonesia and Thailand. Also, half a million people are being held in detention centres – as part of their punishment – in countries such as Cambodia, Vietnam and Laos.²³

In some countries, the need to repress the illegal drug market has been used to justify the introduction of exceptional legislative measures that override due process protections. Based on arguments that the exceptional threat posed by organised crime and the complexity involved in addressing the problem, laws and policies such as arbitrary pre-trial detention have been adopted, unjustifiably expanding the state's detention powers, in contradiction to normal understandings of justice. As Alejandro Madrazo points out, the costs of the war on drugs also include costs at a constitutional level: that is, the abandonment of certain basic democratic requirements mainly in the form of the reduction or abandonment of fundamental principles of law or the restructuring of government obligations. Such modifications are introduced on the basis they are needed to fight the threat of drug production and trafficking.²⁴

The excessive use of repressive measures – which, the majority of the time, are related to minor offenses – have caused prison populations to grow. This, in turn, has worsened the problem of overcrowding in various countries. In the United States alone, the total number of people in prison rose from 330,000 in 1972 to nearly 2.3 million people in 2011.²⁵ 50% of the prisoners in federal prisons and 20% of those in state prisons were convicted of selling or buying drugs.²⁶

In the case of Brazil, the Law on Drugs (Law n° 11.343/06), was adopted in 2006, which raised the minimum sentence for trafficking and, at the same time, decriminalized possession for personal use. However, the law did not make a clear distinction between these categories. As a result, the incidence of these crimes in the justice system rose considerably, and contributed to the overall increase in the total number of prisoners. In 2006, 47,472 people were detained for drug trafficking, which represented 14% of arrests for all crimes.²⁷ The official data for 2013 shows that 30% of the prison population had committed drug trafficking crimes. People imprisoned for drug-related offences are a sizeable group in the majority of Latin American countries: 45% in Bolivia, 34% in Ecuador and 24% in Peru.²⁸ Authors such as Loic Wacquant identify imprisonment as a mechanism for controlling marginalised groups (even replacing ghettos) and the war on drugs is the process that sustains and justifies these criminal prosecutions.²⁹

A matter of special concern is the incarceration of women for drug-related crimes. In Latin America, the female prison population practically doubled between 2006 and 2011, rising from 40,000 to more than 74,000. The majority of these women are imprisoned due to minor drug-related offenses. Imprisonment has devastating impacts on the detained women, their children, families and communities.³⁰

Furthermore, compulsory crop eradication and fumigation programmes have had negative impacts on the population. In some cases, these actions have led to the displacement of people, a decline in their standard of living, food insecurity and social conflict. In the specific case of Colombia, there is evidence that the use of glyphosate for spraying has had negative effects on human health and the environment.³¹

What is more, the criminalisation of consumption and the obstacles to implementing harm reduction programmes have stimulated high risk behaviour – such as sharing syringes and needles – and the spread of HIV and Hepatitis C in some countries.³² Punitive treatment of a public health problem – such as addiction to, and the problematic use of, drugs – has also limited the access to quality health treatments and augmented the likelihood of drug overdose.³³

In sum, the negative impacts of the punitive enforcement of a prohibitionist model have been broad and severe. Meanwhile, with regards its own objectives, the IDCR has made only modest progress. Despite partial advances in some countries – such as declining cocaine consumption in the United States and Europe, which has contributed to a decrease in production³⁴ – the magnitude of the demand for drugs has not changed substantially at the global level. Yet, in spite of its low levels of efficiency, the IDCR has succeeded in creating real humanitarian crises in a number of countries with consequences falling upon the most vulnerable sectors of the population. This is especially true of countries that adopt repressive measures in circumstances of institutional weakness marked by low levels of transparency and little state capacity to provide citizens with public services.

Repeated human rights abuses and restriction of freedoms constitute a systematic problem that is hard to hide. In spite of the evidence, there is still strong resistance to implementing drug policies from a human rights perspective.

The IDCR tends to protect itself and preserve its hermetic nature, arguing that changes to drug policies could erode the system and put its legitimacy at risk.³⁵ In view of this, UNGASS 2016 and its preparation process – which includes various spaces for discussion in multilateral forums – provides an opportunity to expose the divorce between the IDCR and human rights, as well as the need to incorporate guidelines that guide the enforcement of drug policies.

Prospects for the future: human rights and UNGASS 2016

In recent years, the debate on drug policies has intensified, as experts, non-governmental organisations and, more recently, current and former political leaders have adopted more critical stances that not only question the policies' effectiveness, but also their grave side effects. One of the issues raised is the negative effects the IDCR has had on respect for, and guarantee of, human rights; a debate that has been particularly strong in Latin America.

At the multilateral level, the joint declaration in 2012 by three Latin American countries – Colombia, Guatemala and Mexico – calling upon United Nations Member States to assess the scope and limitations of current policy is worth highlighting. In that statement, leaders requested that an international conference be held with the goal of taking the necessary decisions. In response to this request, the United Nations General Secretary convened a special session of the General Assembly (UNGASS) in 2016. Since that announcement, there has been an intense discussion on how to guarantee that human rights are kept at the centre of the debate.

The preparatory process for UNGASS is being conducted in Vienna by the Commission on Narcotic Drugs (CND), the UN organ responsible for defining international policies related to illegal substances. Even though in the past the CND showed resistance to the inclusion of other agencies and the participation of external actors, it recently adopted a resolution³⁶ authorising civil society organisations and academics to participate in the preparation and holding of UNGASS.

In its last session in 2015, the UN Human Rights Council took a fundamental step towards ensuring that the human rights perspective will be present at UNGASS. It approved by consensus a resolution – co-sponsored by 47 countries from Europe, Latin America, Asia, Africa and Oceania – that determined that more information is needed to inform the discussion.³⁷ The resolution calls for a panel of experts to discuss drug policies and their impacts on individual rights. This resolution also requests that the High Commissioner for Human Rights prepare a technical report on the issue.

A special section is expected to be included in the UNGASS agenda to address this issue, which constitutes a major opportunity to make up for the historical absence of human rights from discussions on drug policies. Damon Barrett suggests that, similar to other areas – for example, trade – countries should adopt a special procedure on human rights and drug control. This could be the path to establishing criteria to guarantee that IDRC takes into account existing obligations in the human rights field.

A good point of reference is the Organisation of American States (OAS) General Assembly Resolution 44: "Promotion and protection of human rights in the search for new approaches and effective solutions in the development and implementation of policies for addressing the world drug problem in the Americas." Through this resolution, states reaffirm that "...drug policies must be implemented with full respect for national and international law, including due process and full respect for human rights."³⁸

Latin America undoubtedly plays a vital role in this debate, but it must overcome not only its internal differences, but also face strong resistance from other blocks and countries. China and Russia are hard-line opponents to reforming the system. The European Union has a cautious and, on occasions, disinterested attitude towards the debate. Africa has been defending the *status quo* and the need to combat drugs. The United States has recently moderated its position and appears more open to discussion, partly due to the prison crisis it is facing and partly because of the legislative reforms various American states have introduced legalising cannabis. Late 2015 and early 2016 will set the stage for the preparation of UNGASS and may (or may not) bring concrete changes to the current regime.

Regardless of what happens at UNGASS 2016, this change must also be driven from below through more active participation of human rights organisations, especially in the countries that have borne the greatest costs of the implementation of drug policies. It is important to give a voice to the victims of the “war on drugs,” which now number in the thousands, while taking measures to ensure that the negative consequences of the punitive approach will not be repeated.

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