Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws

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Introduction

The relation between drug conventions and human rights is one of the most challenging topics nowadays, due to the coexistence of a very repressive international drug system dating from the last century, and still enforced by many countries, and recent developments and victories in human rights. While the international community has advanced significantly in elaborating treaties, and recognizing and trying to implement human rights based on the concept of human dignity, the drug control system is understood by its supporters as a hermetic system, apart from any influence from human rights laws. Despite many possible areas of influence and chances of integrating individual and social rights into the framework of drug conventions, there has been a very strong resistance from many countries.

In this chapter we propose to examine, from a normative point of view, the prevalence of human rights law and the need for respect of individual and cultural rights in applying drug laws. We intend to question if there can be any possible

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exception in international law that would prevent human rights standards and norms from being fully applicable in the field of drug control. In addition to this, we will discuss concrete examples of breaches in international human rights law treaties that are being ignored by those in charge of implementation of drug control treaties in international bodies and national states.

In order to explain the situation, we will begin with a general overview of the international conventions on drugs, and then address their relations to human rights treaties. Even though it is not our objective to analyze all possible human rights violations resulting from drug control treaties or their implementation, we will focus specifically on two relevant issues: one related to individual rights, such as the obligation (or not) to criminalize drug possession for personal use, and secondly, the inclusion of coca leaf as a prohibited substance by the UN and the collective right of the people from the Andean Region to cultivate and consume this plant in a traditional way.

An Overview of the United Nations Drug Conventions

Since 1912, 13 international instruments related to drug issues have been developed. Most recently, the modern drug conventions framework involves three main existing treaties. In general terms, the 1961 United Nations Single Convention on Narcotic Drugs prohibits opium smoking and eating, coca leaf chewing, cannabis resin smoking, and nonmedical use of cannabis, and instituted an international system of control imposing a repressive control on products regularly cultivated and used in many parts of the world.

It is important to place this convention within the context of the Cold War, particularly when discussing the coca chewing prohibition in the Andean Region, since at that time the two superpowers were establishing their areas of influence. It is also noteworthy that the 1961 Convention established deadlines for the gradual elimination of opium within 15 years and coca and cannabis in 25 years, something that never occurred, as we will see elsewhere in this paper. Despite its preamble announcing that the reason for the increase of control would be "a preoccupation with physical and mental health of the people," the only means offered to achieve this goal was the absolute prohibition of the use and trade of such substances and the prosecution of violators of this rule. However, amended few years later, the 1972 Protocol to the 1961 Single Convention highlighted the need to provide access to treatment and rehabilitation for drug abusers concomitantly or alternatively to imprisonment. Currently, there are 186 states that are parties to this convention, as amended by the 1972 Protocol and only nine states are not parties to the 1961 Convention.

The special relevance of this protocol is that it allows states to adopt less repressive measures with respect to users, notably the substitution of incarceration

for treatment. This serves today as a legal basis for European countries that adopt an alternative policy toward users, including treatment options and harm reduction.

Broadening the scope of the international system, the 1971 UN Convention on Psychotropic Substances[1] deals with the control of synthetic drugs. It is noteworthy that, so far, only narcotic drugs related to opium, cannabis, and cocaine were subject to international control, although other substances, such as stimulants, amphetamines, and LSD, until then unregulated, also had psychoactive effects. It was claimed at the time that the harmful effects of these new substances would justify the extension of the same controls available for narcotics. Thus, from 1976 on, when the convention finally entered into force, these new substances, as well as sedative-hypnotics and tranquilizers, were all submitted to international control. In addition, the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations 1988) focus mainly on drug trafficking and the need for criminalization of money laundering: the collateral effects of drug prohibition (or a direct effect of the illicit drug market, others would say). This convention was broadly accepted worldwide, and only eleven states have yet to become parties to it.

Its text was designed to be a repressive tool with the aim to “combat” drug trafficking organizations by expanding the hypotheses of extradition, international cooperation, and confiscation of financial assets of traffickers, while unifying and strengthening the existing legal instruments. It then created a system designed to oppose the military, economic, and financial power amassed by drug traffickers. It also proposed the standardization of definitions used in regard to drug trafficking, and state members were encouraged to increase the repression by tackling new techniques.

In its text, there is common use of strong terms like “danger of incalculable gravity,” “eradication of illicit traffic,” and “elimination of illicit demand.” Article 24 allows parties to “adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.” Some countries commonly use this provision to justify capital punishment for drug crimes.

The 1988 Convention also dictates the eradication of coca cultivation, in a strong message to South American countries, reinforcing the 1961 Convention. Furthermore, it establishes the necessity of monitoring chemicals used in the production of drugs, and of increased efforts against illicit drug production. Specifically on criminal matters, the convention required states to adopt all necessary measures to establish, as a criminal offense in its domestic laws, all activities linked to production, sale, transport, and distribution of all listed substances (art. 3, § 1).

[1] There are, as of November 2011, 183 states that are parties to the Convention on Psychotropic Substances of 1971, according to the INCB. A total of 12 states have yet to become parties to that convention: three of them in Africa (Equatorial Guinea, Liberia, and South Sudan), one in the Americas (Haiti), one in Asia (Timor-Leste), and seven in Oceania (Cook Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu).

This framework created to control drug circulation includes some specialized bodies: the "political-legislative power" exercised by the UN General Assembly and the CND (Commission on Narcotic Drugs), under the structure of ECOSOC (Economic and Social Council), where drug policy should be debated and defined; the "judiciary," represented by the INCB (International Narcotic Control Board), an independent body with power to impose sanctions in case of non-compliance; and, finally, the "executive body": the United Nations Office on Drugs and Crime (UNODC), headed by an executive director. It is noteworthy that the repressive approach towards drugs is expressed in the very name of the specialized body, related to "drugs and crime."

Thus, control of illicit drugs is organized in a system of classification of substances divided into four tables, based on the need to impose more or less control of the substances therein, supposedly in light of the risks of abuse and addiction. These three international texts, ratified by 95 % of the countries in the world, apparently represent common (repressive) standards regarding the limits to use and produce certain substances, and are still in force today, more than 50 years later.

Since the beginning of the twentieth century, the international community has worked hard and expended a great amount of money to try to enforce these drug conventions provisions, with the main goal to achieve a "world free of drugs" by imposing on all countries the obligation to control and severely punish persons who use (proscribed) drugs and/or those who dare to sell them illegally. Based on voluntary compliance and cooperation of the world community, these treaties directly influenced many to create national laws and widely enforce crimes involving illegal drugs with severe penalties. Rather than being treated as a health issue, drug control became a matter of criminal law, with an emphasis on prohibition and criminal sanctions for all aspects of consuming, producing, and transporting illicit drugs.

Nevertheless, such efforts appear to have been insufficient or misguided when faced with the increased phenomena of cultivation, manufacture, traffic, and use of narcotic drugs and psychoactive substances all over the world. Half a century later, contrary to what was originally expected, the world drug problem has increased, especially in the developing countries that used to be considered only producing countries, and are now facing the situation of drug abuse; something that did not exist 50 years ago (Bassiouni and Thony 1998). At the same time that there is almost universal ratification and national implementation of drug conventions, with no impact on promoting health while applying them, this policy has created many collateral human costs.

Considering the unwillingness of the drug authorities to recognize the unintended consequences of such bad policies, as seen in the last meeting of the UN Commission on Narcotic Drugs in 2012, a human-rights approach is necessary and obligatory, and should prevail over repressive interpretations of drug conventions in international law. If enforcement of drug control obligations is interfering with individual and collective rights, perhaps it is time we discussed not only

normative conflicts between drug conventions and human rights treaties, and their hierarchy in the United Nations System, but also the humanitarian costs of the so called "War on Drugs."

In this article, we are going to first address the conflict between international human rights and drug control treaties, and then focus on important human rights violations arising from their implementation.

Human Rights and Drug Conventions Within the UN System

The United Nations (UN) was created in 1945 by representatives of 50 countries just after World War II, following the failure of the preexisting League of Nations, and currently has 193 member states.

The main purposes of the United Nations, according to article one of its charter, are to "maintain international peace and security (. . .) in conformity with the principles of justice and international law," "to develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of people," and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, and religion" (United Nations 1945). Also, Article 55 of the charter says that it should promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Human rights law essentially rests on international treaties and conventions on the matter, as well as the case law of international bodies, such as the European and Inter-American Court of Human Rights.

In this sense, Cançado Trindade (2009) draws attention to a historical process, which he termed "humanization of international law," as a "gradual expansion of the material content of *jus cogens* in contemporary international case-law," with an obligation to protect the most vulnerable people "of the most complete adversity or vulnerability." It covers, among other important issues, the absolute prohibition of torture and of cruel, inhuman or degrading treatment, followed by the assertion of the fundamental character of the principle of equality and non-discrimination, and of the right of access to justice.

The notion of "humanization" of international law contrasts with an older international order based upon theories such as the voluntarism and unilateralism of the "*Raison d'État*" (or reason of state, meaning a purely political reason for action on the part of a government). The advent of this new primacy of "humanitarian reasons" instead, is the main characteristic of a world that recognizes international human rights law as *jus cogens* (or imperative norms of international law), constructed upon the basic principle of the dignity of all human beings. This recognition is part of a true international legal order, in which human rights violations are not acceptable, based on the same principle of humanity and

universal conscience that limits the old notion of sovereignty when human rights are being violated (Cançado Trindade 2009).

Taking into account this theory, we can say that while drug control treaties represent an old order based on the reason of state, human rights law is directly connected to humanitarian reasons, common to all humankind, irrespective of origin, gender, sexual orientation, nationality, religion, ethnicity, color, language, political opinion or any other discriminating criteria. The relationship between human rights treaties and international drug conventions is an essential issue that still needs special attention from international bodies as both human right treaties and drug conventions are under the same United Nations "umbrella"; however, they have been treated by international drug control bodies in separate ways, as if they had diverse sources.

This issue was officially brought to the attention of a UN drug control body for the first time in 2008, at the annual meeting of the Commission of Narcotic Drugs (CND), when the world celebrated 60 years of the Universal Declaration of Human Rights. A resolution entitled: "The proper integration of the United Nations human rights system with international drug control policy" was introduced by Uruguay, with the co-sponsorship of Bolivia, Argentina, and Switzerland, saying that, "international drug control activities must be conducted in conformity with international human rights law" (Blickerman 2008). Unfortunately, the representative of China fiercely opposed to it, saying that "discussion of political issues such as human rights are inappropriate at CND." He was joined by Pakistan, Japan, Nigeria, Iran, and Thailand. This example is representative of the objections some countries have to using the term "human rights" in written documents related to drug control.

Based on the UN Charter, it is undeniable that human rights are at the core of the UN system, despite this position. Together with development, and alongside peace and security, human rights represent "one of the three pillars of the United Nations enshrined in the UN Charter." From this statement, human rights, as one the most important goals of the international community, are hierarchically superior to other treaties, and should indeed prevail in case of possible conflicts or overlays with any other instrument, such as drug control treaties, for example.

The only possible conclusion here is that UN drug treaties and drug policies applied by members of the United Nations cannot violate individual and social rights provided for in the many international instruments that are assumed to be binding to state's interventions, as *jus cogens*. It would be totally against the UN Charter to say that a possible obligation to punish drug law violators established in a convention could be more important than a norm enshrined in the charter, guaranteeing respect for human rights. As correctly pointed out by Barrett (2010), human rights treaties "under the Charter take 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)."

In addition, the very text of the drug conventions refers to national constitutional guarantees and concurrent obligations in international law as limiting barriers for

determining the appropriateness of certain policies, in the form of a “safeguard clause” (for example, prohibiting the criminalization of personal possession of illicit substances, as seen in article 3 (2) of the 1988 Trafficking Convention), meaning that there is no unlimited scope for drug treaties to prevail over other hierarchically superior rights.

Human Rights Violations Arising from Drug Laws

Despite the recognized prevalence of human rights treaties over drug conventions in theory, the concrete application of drug laws can unlawfully impose grave breaches to human rights treaties and standards, as it has already been pointed out by academics, authorities, experts, and many non-governmental organizations (UN Economic and Social Council [ECOSOC] 2009; World Health Organization [WHO]/United Nations Office on Drugs and Crime [UNODC]/UNAIDS 2009; International Harm Reduction Association [IHRA] 2008; Chiu and Burris 2012).

First of all, as we’ll see later on in this chapter, while prohibiting the private use of some substances, the person’s right not to be subjected to arbitrary or unlawful interference with privacy, family or home (International Covenant on Civil and Political Rights [ICCPR] [United Nations 1966, art. 17]), and not to be discriminated against (United Nations 1966, art. 12), is violated in the name of drug treaties. (See also Walsh in this volume.) Moreover, the current drug control system may violate the individual right of “everyone to the enjoyment of the highest attainable standard of physical and mental health,” based on article 12 of the International Covenant on Economic, Social, and Cultural Rights.

As already stated by Anand Grover, Special Rapporteur on the topic appointed by the United Nations Human Rights Council, states have an obligation to prevent epidemics, and countries that do not apply harm reduction measures, such as syringe distribution and other preventive measures, can create serious risks to health. In his conclusion to the report on criminalization of drug use, he says that the “so-called ‘campaign for a drug free world’ could actually result in violations of the right to health, as people who used drugs might not come forward to get the care they needed for fear of being arrested, or could be denied health care if they sought help” (Grover 2010). Nevertheless, there is no consensus among the UN bodies to include harm reduction as a preventive measure, at least in United Nations Office on Drugs and Crime (UNODC) official documents (see UNODC 2009).

There are also violations of the right to health when the international drug treaties provide for unnecessary limits in accessing essential medications (UNODC 2011a, b; ECOSOC 2010; WHO 2011), as the International Narcotics Control Board has already recognized: “Although the World Health Organization (WHO) considers access to controlled medicines, including morphine and codeine,

to be a human right, it is virtually non-existent in over 150 countries," said its president (INCB 2010).

Besides, the right to receive ethical treatment (United Nations 1982), and the World Medical Association's International Code of Medical Ethics (World Medical Association [WMA] 2006) is not provided for in the drug conventions. Many of these rights are frequently denied to persons accused, convicted or even suspected of drug offenses, especially in countries that adopt enforced treatment or coerced hospitalization for drug users. Recent examples of drug rehabilitation centers in horrible conditions, where drug users are beaten, whipped, and shocked with electric batons, were denounced by non-governmental organizations (Human Rights Watch 2011).

The topic of treatment as an alternative to conviction or punishment is actually being debated. Although here there is no space for further discussion on this subject, there are many important documents from UN and European bodies, including the UNODC, highlighting the importance of health care for drug offenders (UNODC 2010; UNODC/WHO 2009; EMCDDA 2005). Unfortunately, countries mostly apply punishment rather than voluntary treatment for drug abusers.

Due to this, another impressive example of violation of human rights in implementing drug laws is mass imprisonment. Especially in Latin America (Metaal and Youngers 2011), but also in the United States (Bewley-Taylor et al. 2005, 2009), exceptionally harsh drug laws, with long prison sentences, are a key factor in rising incarceration rates and prison overcrowding. Millions of people arrested for drug trafficking or even drug possession receive disproportionality severe penalties and this has a direct impact on the penitentiary system in the region.

Opposite the view of drug treaties that recommend imprisonment as a penalty for drug crimes, the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) when providing rules on crime prevention and the administration of justice, called on member states to "develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender."

In fact, very recently, the final text of CND Resolution 55/2012, on "alternatives to imprisonment for certain offenses as demand reduction strategies that promote public health and public safety," opted not to promote alternative imprisonment, as recommend by the Tokyo Rules. Basically, as some countries could not agree that "providing alternatives to imprisonment" could be "successful means of promoting social integration with full respect for human rights." the expression "for some member states" needed to be added to its text, meaning essentially that they could not reach an agreement on the subject.

Such rejection of alternatives to prison, together with repressive criminal drug policy, can be identified as the direct cause of mass imprisonment worldwide. In this sense, human rights treaties are being violated by enforcing drug treaties when

drug traffickers are confined in overcrowded facilities, violating their rights not to be subjected to cruel, inhuman or degrading treatment or punishment (United Nations 1966, art. 7).

The proportionality principle imposes differences in penalties that are not provided for in most drug laws around the world, especially regarding the seriousness criteria, i.e. when the offense is a preparatory act or an incomplete one. As for maximum limits of the state response, the interpretation of "severe" and "adequate" punishment also include references to international human rights legal instruments as existing and binding limits to penalties, such as the Universal Declaration of Human Rights and other international legal instruments. But drug laws are disproportionate and impose excessive punishment in most cases.

Furthermore, prisons have expensive costs, and by incarcerating so many non-violent drug offenders, public money is being diverted from prevention to repression. While displacing public policies from public health to law enforcement, effective public health-based interventions had their funds diverted to ineffective law enforcement and other repressive measures (Barrett 2010). It is also well documented that not only risky drug use with syringe sharing, but also imprisonment in overcrowded facilities, increases the exposure to HIV/AIDS contamination, confirming that repressive drug laws are violating people's rights.

Finally, while UN human rights bodies consider that capital punishment for drug offenses is in violation of international law, there are still many countries that apply this extreme punishment for drug traffickers, such as Indonesia. Historically, "the death penalty for drug offenses became more prevalent after the adoption of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (Gallahue et al. 2012). According to estimations, executions for drug offenses have taken place in 12–14 countries over the past 5 years (Gallahue et al. 2012). This means that such a policy does not comply with legal instruments on the abolition of capital punishment,[2] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1975), and the 2nd Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty (United Nations 1984).

Drug-related offenses clearly do not fit the category of "most serious crimes" for which the death penalty can eventually be sought[3] before its abolition. Under international law and human rights jurisprudence, such as the Inter-American

[2] General Assembly resolution 2857 (XXVI) of December 20, 1971: Safeguards guaranteeing the protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50 of May 25, 1984). Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 3452 (XXX) of 9 December 1975). See also the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, ST/CSDHA/16.

[3] "High Commissioner calls for focus on human rights and harm reduction in international drug policy," press release, United Nations 2009; Report of the UN Secretary General, capital punishment and implementation of the safeguards guaranteeing protection of rights of those facing the death penalty, ECOSOC, 18.12.09.

Court of Human Rights 2005 (*Raxcacó-Reyes v. Guatemala* Case, para. 69), capital penalty is limited to the "cases where it can be shown that there is an intention to kill that resulted in the loss of life," as mentioned by Mr. Philip Alston, Special Rapporteur on extrajudicial summary or arbitrary executions (Alston 2007, para. 53).

The long list of human rights threats as a result of the application of drug laws also includes violations of individual guarantees in criminal cases involving drugs, and the prohibition of consumption of substances such as the coca leaf, traditionally consumed in the Andes in South America. We conclude this part by saying that the 1988 Convention and its repressive approach are an example of how drug laws, applied without limits, can trigger serious violations of human rights. It is not our objective here to relate exhaustively all the human rights breaches resulting from the application of drug laws, since there are many others to mention. In the next item we will touch upon two relevant issues; one related to an individual right, and another to a collective right: both violated as a result of drug laws.

Human Rights and General Treaties Obligations Regarding Drug Possession for Personal Use

As seen above, it is widely known that the three international conventions establish general obligations concerning drug control. That means that the countries that signed the treaties mentioned must take legislative and administrative measures to adapt their domestic law to the conventions' paradigms. The previous section demonstrated that part of the conventions conflict with human rights standards and norms. We will analyze now the provisions that deal specifically with the use and the possession for use of drugs, trying to understand if the obligations established by the drug conventions in relation to the mentioned topics are in consonance or not with the norms that form the core of the UN System. Along this path, we will explore the drug conventions system to examine its scope and to check if there is room for creating alternative drug policies. This section provides a general perspective on the topic; the discussion will be narrowed later when we analyze the Bolivian drug law and the traditional chewing of coca leaf.

As for the scope of the Conventions, the 1961 and 1971 Conventions' Preambles mention two important aspects that led the parties to sign these treaties: (a) health and welfare of mankind; and (b) the indispensability of the medical use of narcotic drugs for the relief of pain and suffering. The 1988 Convention extended the scope and brought more information about the reasons the parties decided to create a third convention on drugs. The 1988 Convention mentions illicit trafficking as an international criminal activity, the link between the traffic of drugs and

psychotropic substances and other criminal offenses, involvement of children in the drug market and, again, the serious threat to health and welfare of mankind.

We know preambles do not have a binding force; however, their importance consists of the fact they are a key for interpretation, as the 1969 Vienna Convention of the Law of Treaties conveys in article 31 (1). By the text of the preambles, we can say that one of the reasons that drug control was considered necessary by the international community was based on the damage drug use can cause: this damage is not only connected to public health, but it is related to social and economic development. These damages were pointed out by Resolution 39/141, and also by the Quito Declaration against the Narcotic Drugs and the New York Declaration against Drug Trafficking and Drug Illicit Use. In fact, the discussion the international community held on these occasions was important to raise the awareness of the General Assembly about the necessity of a new treaty on drugs.

From the 1970s to the 1980s, there was a switch from a liberal view on drugs, originating in the 1960s, to viewing them as an issue of national security and criminal law. In this context, the use of drugs was seen as a threat to the welfare of the society; in order to eliminate this danger a war was declared and the law was one of its weapons. If drug trafficking was one of the targets of this attack, the reason to combat it was a simple one: It provided drugs for people to use. According to Zaffaroni (1982), at the center of the issue was an idea that did not bear any relation to reality: Every drug user is addicted to illicit substances, and every person addicted to drugs will commit serious criminal offenses. He also asserts that Latin American laws inspired by the Drug Conventions—especially those concocted by the "drug war generation" in the late 1980s—are based on this stereotype of a "young addicted criminal drug user." Prohibiting the use of drugs was a way to guarantee social and economic security.

Therefore, it is no surprise that the Conventions' preambles emphasize that their purpose is to limit drug use to medical and scientific purposes only. The 1961 Convention's article 4 establishes the general obligation to "take such legislative and administrative measures as may be necessary. (2) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use, and possession of drugs." The 1988 Convention goes further and imposes penalization of some of the actions (when committed intentionally), meaning that all countries should turn them into criminal offenses.

Barring the use of drugs can be an arbitrary limitation to the right to privacy—protected by the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights—especially because countries want to prohibit people from using drugs in their homes. Going beyond this perspective, those criminal offenses are mostly related to the offender and not to his acts. Users become one of the main legal concerns: They have to be dealt with either as offenders or addicts (in this sense, someone who needs health assistance).

Concerning more specifically the possession of drugs for personal use, the drug conventions proscribe the possession of drugs for the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the three drug conventions.

It becomes clear that the general obligation brought by the Single Convention does not oblige parties to consider drug consumption as a crime, not even by the 1971 or by 1988 Conventions. A close reading of the penal provisions of the treaties—article 36 of the Single Convention, article 22 of the 1971 Convention, and article 3 of the 1988 Convention—reveals the disconnection between this general prohibition-oriented obligation and the mandatory criminalization of certain conduct. In the list of actions that are to become criminal offenses in parties' domestic law, we cannot find the term *use* per se. Therefore, we can say that there is no specific obligation to criminalize the use of drugs within any the conventions.

The problem becomes more complex if our attention is directed to "possession for personal use." This is because possession is one the actions the parties must define as a criminal offense according to the actual drug conventions' system. However, there are two types of possession: possession for illicit drug trafficking and possession for personal use. There is no doubt that signatories are obliged to criminalize the first one, while the penalization of the second type is questioned.

Boister (2001) affirms, in relation to the Single Convention, that it "does not appear that article 36 (1) obliges parties to criminalize possession of drugs for personal use" (p. 81), since the main idea of the 1961 Convention is the prohibition of illicit trafficking of drugs and not the ban of use. Historical background information can also ratify Boister's opinion: the convention's draft originally entitled Article 36 "Measures against Illicit Traffickers" (United Nations 1973, p. 112).

The discussion becomes even more complex when we focus on Article 3 (2) of the 1988 Convention. A first reading can lead one to understand that the 1988 Convention obliges parties to turn possession for use into a criminal offense. It is a fact that the approach here is much more restrictive with less room for flexibility. Nevertheless, two considerations must be taken into account before one insists on the idea of a rigid, inflexible obligation.

Although it constitutes a grave paradox, the prohibition of the use of drugs—and, as a consequence, their very possession and cultivation—is contrary to long-standing human rights norms. Drug conventions did not take into consideration the violations they would promote when obliging several countries to bar drug consumption. This lack of attention to human rights standards was mitigated by the wording of the treaties, in the opening phrase of article 3, section 2: "Subject to its constitutional principle and basic concepts of its legal system." This fragment is called a "safeguard clause" (United Nations 1973, p. 81) and the reason for that is quite simple: A party would not violate the convention if its domestic law considers the penalization of possession of drugs for use unconstitutional or contrary to its basic principles.

We can say, therefore, that there is the possibility of a party overcoming the indication, found in article 3, section 2 of the 1988 Convention, by making use of the safeguard clause. One can justify non-criminalization by saying that, according to their domestic law system, prosecuting for drug possession for personal use is not within the interest of society, or that controlling what people consume or possess in their private homes would be a violation of the right to privacy, or that self-destructive behavior may not be subject to punishment (Bewley-Taylor and Jelsma 2012).

It is important to mention that the existence of an "escape clause" is quite rare. In fact, international law provides the opposite, that is, states cannot invoke their domestic legal system as a justification for not complying with international rules (art. 27 of the 1969 Vienna Convention). Highlighting the predominance of constitutional law and the basic principles of the parties' legal systems, the 1988 Convention provided a way for parties to remain within the frame established by the treaty and yet create non-punitive policies in regard to possession (and also purchase and cultivation) of drugs for personal use. The 1988 Convention also establishes some alternatives to conviction and punishment, such as treatment, education, aftercare, rehabilitation, and social reintegration. However, these alternatives are offered only in cases in which the party considers the possession of drugs for personal use as a criminal offense.

So far, we have tried to demonstrate that the drug conventions do not express their intent to prohibit the use of drugs, even though the policies adopted and the measures required aim to limit or eradicate drug consumption. On one hand, their explicit main purpose is to control the trafficking of drugs. On the other hand, the treaties indirectly address the use of drugs by providing rules against the possession, purchase, and cultivation of drugs for personal use, which is in violation of human rights standards and norms. There is, however, room within the established system for countries to deviate from a punitive policy and adopt harm-reduction strategies related to drug consumption, since the 1988 Convention affirms the prevalence of domestic legal systems in cases of possession for use. Nevertheless, even the expression "harm reduction" is banned from all written documents from CND (see Crocket 2010). The next section is dedicated to a specific case of use and possession for use: The coca plant is another example of how drug laws can collide with collective human rights.

Coca Leaf and the Violation of Human Rights of Indigenous People

It is clear that drug policies have become harsher through the years, but in regard to coca leaf, since the first treaty on drugs (the 1961 Single Convention), the use of it—along with its alkaloids, cocaine, and *ecgonine*—has been prohibited. In this

section, we are going to contrast the strategy adopted by the drug conventions concerning coca leaf and human rights norms and standards.

We understand human rights policies as cultural policies (Sousa Santos 2002). Although human rights are put in a meta-juridical position because, apparently, they make it possible to combine a certain group of values—seen as universal principles—with the diversities of multiple cultures, as we have seen previously, the notion of human rights presents many inconsistencies compared to the realities these norms establish.

In this regard, one should establish the premise of the multicultural conception of human rights of Sousa Santos (2002) that, "when conceived of as universal human rights, will tend to operate as a kind of a hegemonic globalization for above, but, in order to operate in a cosmopolitan way, or as a counterhegemonic globalization from below, human rights "must be reconceived as multicultural" (p. 44). He concludes saying, "increasing consciousness of cultural incompleteness as much as possible is one of the most important tasks for the construction of a multicultural conception of human rights." According to the author, human rights, although conceived as universal and abstract, tend to be seen as "local" and not likely to provide for intercultural dialogues. In this sense, international charters' and treaties' values have a specific cultural identity in the Western tradition, which means that rules provided for in the drug conventions, such as the coca leaf ban, cannot be considered as universal, since they are related to specific Western societies, and they are imposed on Andean people without taking into account their meaning in the local culture.

Through the years, the intended universality had to make room for other ways of approaching the issue of use and trafficking of drugs. The proposed alternatives highlighted the differences between cultures as key factors in harmonic international cooperation, diverging from the strategy adopted by the Single Convention (The 1993 Vienna Convention is regarded as a landmark in the universalism–relativism discourse).

The Single Convention is based on a report written in 1950 by the Commission of Enquiry into the Effects of Chewing the Coca Leaf of the United Nations Economic and Social Council. The organization had come to the conclusion that the chewing of coca leaf was addictive and its effects should be considered negative. This report was severely criticized because it lacked technical and methodological accuracy and was racist in many ways. According to Metaal (in this volume), when the UN mission occurred, "advocates of the prohibitionist stance were dominant in the national discussion, where the mission has been more significant, and may have been perceived as allies by the representatives of the international narcotics control bureaucracy" (p. 27).

In this sense, the composition of this document did not provide for any "intercultural dialogue." In prohibiting the traditional use of the coca leaf, drug conventions are not open to mutual and intelligible understanding of another culture, different from a Eurocentric view. In brief terms, the authorities in Vienna

did not consider the opinion of Bolivia itself and the actors directly involved in chewing coca before establishing the prohibition regime.

According to Zizek (2007), cultural groups should not be the mere designates of norms. They should be active participants in the creation and interpretation of the law. If "the Other," as the Andean people are seen, is capable of determining right and wrong in a specific cultural and historical context through the perspective of Kantian ethics, it is also capable of formulating questions that can define fundamental rights. Nevertheless, it is necessary to recognize the existing differences so that tacit civil rules may be addressed.

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was different from the previous conventions, especially in regard to the extension of its repressive purposes. While the 1961 and the 1971 Conventions focused on the inspection of imported and exported narcotic drugs and psychotropic substances, the 1988 Convention decided to add chemical precursors—that is, substances used during the production of drugs—to the list of prohibited substances. Plants that were the raw material of narcotic drugs were not ignored and the prohibition of their cultivation was absolute.

In an attempt to characterize the traditional use of coca plant, Bolivia and Peru negotiated article 14 (2) of the 1988 Convention. The article states that parties must take measures in order to prevent the cultivation of any plant containing narcotic or psychotropic substances, although it makes explicit reference to the opium poppy, coca bush, and cannabis plants. (See also Feeney and Labate in this volume.) The two signatories argued that this provision would violate human rights and their people had the right to use coca leaf for traditional purposes:

> Article 14 (2). Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

This effort tried to overcome the Universalist model through intercultural dialogue that focused on isomorphic issues. This means that, although they derive from different universes, they can be transformed in a unit in which the values of the conflicting positions are mostly preserved. The fact that coca leaf produces cocaine—mainly a Western concern—does not mean it must be extinguished, especially since its use by another culture is involved (Sousa Santos 2002).

Since 1961, when the coca leaf was included in the list of prohibited substances and the conventions conveyed no proper distinction between the coca plant and cocaine, the Andean region has been suffering much damage. The Single Convention provisions are in opposition to the UN Declaration on the Rights of Indigenous People (2007), which aims to protect, respect, and value the cultural practices of native people. It undeniable that international documents contradict themselves since, on the one hand, the drug conventions put a negative value on the habit of

chewing coca leaf, establishing an obligation to eradicate the bushes; while, on the other hand, the declaration brings at least some minimum standards of respect for the culture of these peoples.

Article 8, section 1, of the Declaration states: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." The process of ending the cultivation of coca leaf conflicts with the mentioned provision, and is an attempt of adapting their traditions to Western-Christian cultural standards. The same line of thought applies to article 11, section 1, and article 12, section 1, of the same document.

Other provisions, such as article 15, state that indigenous people were given the right to dignity and the diversity of their culture, traditions, and history. Parties may take measures in consultation and in cooperation with indigenous people in order to combat prejudice and eliminate discrimination, and to promote tolerance, comprehension, and good relations between indigenous people and other segments of society.

The Declaration on the Rights of Indigenous People became a landmark in matters of human rights since it established standards to be followed in regard to the subject of indigenous people. The international policies of drug control have not internalized these paradigms, although this is a field in which the life and rights of indigenous people are handled on a daily basis. The drug control policies are an example of how powerful agents can change the fates of individuals in countries that have a subordinate position in the international system. In addition, the International Covenant on Civil and Political Rights, article 18, section 1, is also a relevant document on the protection of the rights to freedom of thought, conscience, and religion. As a consequence of these rights, people may choose their religion or belief; profess their religious faith individually or collectively, publicly or privately; and manifest their religion or belief in worship, observance, practice, and teaching.

Paragraph three of the same article presents a restriction that can be considered a legal provision to criminalize certain practices of some religions. The article states that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." One may think coca plant rituals could be restricted based on this provision; however, there is no scientific evidence that proves coca leaf chewing or coca leaf tea is a risk to public safety, order or health. Also, implementing restrictions based on moral standards is, at the very least, questionable.

The American Convention on Human Rights is also another important regional document in this discussion and its article 12, sections 1 and 2, assures the freedom of conscience and religion:

> Article 12. (1) Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. (2) No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. (Organization of American States 1969)

We notice that there is a great contradiction amid international drug convention and human rights standards and norms. Considering the serious harms coca eradication can cause, there is one problem that may be a less obvious one, but is certainly charged with symbolic importance: Today's international policies attribute a negative value to the ancient habit of cultivation, consumption, selling and trading, and the ritualistic, social and medical use of coca leaf. The relations between the different Bolivian actors connected by these activities were altered not because they wanted change, but because they were forced to change. Cultural relativism was not considered in the creation or implementation of these legal norms (Chernicharo and Boiteux Rodrigues 2012; Feeney and Labate in this volume).

Other contradictions are verified when we analyze the domestic law of certain countries. The Bolivian Constitution of 2009 recognizes Bolivia as a Plurinational State and establishes that the Bolivian State must protect coca leaf because it is a native plant that was cultivated by their forefathers; it is, therefore, a cultural and natural heritage, and a factor contributing to social cohesion. The constitution also states that production, trade, and industrialization of coca leaf are activities regulated by Bolivian law.

Bolivian Law 1008, passed in 2008, established procedures to treat coca leaves and to control certain substances. The State of Bolivia clearly demonstrated its intention to punish the illicit trafficking of drugs. Due to international pressure, the country has significantly increased the penalties for crimes related to drug trafficking: The first drug law (1962) provided for penalties of between 3 and 10 years of imprisonment; the actual antidrug law (2008) provides for penalties of between ten and 25 years of imprisonment.

The disproportionate nature of the penalties established by the Bolivian antidrug law become even clearer when they are compared to the penalties for other criminal offenses. In 1962, while the penalties for drug trafficking were of 3–10 years of imprisonment, the penalty for homicide was 20 years of imprisonment. In 1988, homicide had penalties of 1–10 years in prison, while drug trafficking had penalties of 10–25 years in jail. In 2012, the homicide penalty was increased to from 5 to 20 years of imprisonment; the penalty for drug trafficking is still more severe: 10–25 years in jail.

These comparisons reveal the disproportionate system of penalties stated by the Bolivian antidrug law, *Ley* 1008/2008, necessitating a consideration of the damage caused and the legal interests protected. Homicide is the taking of a life; nevertheless, penalties for this are less serious than for drug trafficking. It is obvious that Bolivia takes part in the prohibitionist drug policy and the "War on Drugs" promoted by United States of America and the United Nations. Yet, Bolivia protects the use of coca leaf for traditional purposes. This protection became clear in March 2009, when the President of Bolivia, Evo Morales, sent a letter to the UN General Secretariat asking for the suspension of paragraphs 1C and 2E of article 49 of the Single Convention. These provisions permitted the traditional chewing of coca leaves on the condition that measures were taken in order to end the habit in 25 years:

> Article 49. (1): A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories. (C): Coca leaf chewing; (2): The reservations under paragraph 1 shall be subject to the following restrictions: (E): Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41. (United Nations 1961)

Seventeen countries, headed by the United States of America, contested the Bolivian amendment proposal. The failure to remove coca leaf from the list of illicit drugs led Bolivia to withdraw from the Single Convention in July of 2011. A new attempt at adjustment was made, and the country has successfully re-acceded to the Single Convention again, in January of 2013, with reservations concerning the requirement that "coca leaf chewing must be abolished." With this move, the country has reconciled its international obligations under the drug control system with its 2009 Constitution, which recognizes coca leaf as part of Bolivian cultural patrimony.

It is high time the international community corrected the historical mistake in relation to the coca leaf chewing tradition and eliminated the Single Conventions' provisions that prohibit this ancient practice. It is important to mention that there are a great number of documents that can scientifically elucidate this issue. One of these documents is the 1994 INCB Annual Report that highlights the importance of solving the conflict between the Single Convention's provisions and Andean Countries' laws, as the latter never regarded the use of coca leaf as a criminal offense. Moreover, the document pointed out the necessity of scientific investigation on the real effects of chewing coca leaf and drinking coca tea.

In 1995, the World Health Organization concluded, "the use of coca leaves appears to have no negative health effects and has positive therapeutic, sacred, and social functions for indigenous Andean populations" (Transnational Institute 2012). Consequently, to assure the control over cocaine, it would be enough to include "concentrated coca leaf" as a general term for base paste or coca paste and remove the term "coca leaf" from the Single Convention's list of prohibited substances. By doing so, the problem of cocaine would be placed where it really belongs: away from the indigenous people and closer to the Western world.

This discussion is not only about culture. Assuming that all areas in the life of a group of people are deeply connected, the prohibition of the cultivation and circulation of coca leaf brought, in addition to cultural disrespect, also economic collapse and changes in the social structure and in the solidarity of the Bolivian people. The massive exodus from the areas where coca plants became illegal to places where cultivation continued to be licit conduct reveals that cultural interferences can destroy the basis of a society (Chernicharo and Boiteux Rodrigues 2012).

It is essential that the international community think over the issue of coca and cocaine. It is certainly difficult to live with cultures that are based on different moral standards than our own, and maybe their values are contrary to the reality of the dominant economic order. There is no legitimacy for the international system to destroy the symbolic structures and culture of any peoples. In relation to coca, it is

about time that a democratic-pluralist policy was implemented; a strategy that would respect human rights, allow decriminalization of indigenous culture, and legitimate their own social control mechanisms (including the penal ones). Then human rights notions and a multicultural perspective would be united and mutually comprehended.

Conclusions

The UN drug control system is seen by inside actors as a body isolated from the rest of United Nations, despite the fact that there is no normative base for this assumption. It intends to be a uniform model of control that submits prohibited substances to a strict international prohibition regime, with very limited space given to the therapeutic and medical use of controlled substances, focusing on the criminalization of drug possession and trafficking, with imprisonment as a primary option. Treatment and prevention of illicit drug abuse are considered of less importance, with a very strong rejection of other possibilities, such as alternative sanctions and harm reduction measures. In addition to other human rights violations, the drug control system shows no recognition of the cultural rights of original communities and indigenous peoples in relation to the use of traditional substances, such as coca leaves.

Even if a critical reading of the conventions' terms allows less repressive views, at least with regard to criminalization of drug possession, in reality, its discourse always goes in favor of a repressive solution, rather than accepting decriminalization or non-custodial alternatives. The humanization of the international drug control system is imperative, in order to put the complex figures of human beings at the center of it: recognizing rights, promoting public health based on understanding, information, and respect for others. The framework of the United Nations was based on peace and human rights, and it is not reasonable to believe that we could accept an authoritarian system built only to promote a War on Drugs and to violate human rights under the same institutional umbrella.

A human rights approach to drug laws is essential to avoid and reduce injustice and violations of human dignity. When applying drug laws, the effective acknowledgment of individual and social rights will allow a real transformation in the actual drug control system, and may lead to its replacement with a new one: humanitarian, democratic, and respectful of rights. There is not, nor can there be, any justification or possible exceptions for not recognizing human rights when applying drug conventions. As a matter of hierarchy and human values, human rights treaties will always prevail over drug conventions rules that violate any of its standards. It is time a new order for drug control was recognized and applied, based strictly on humanitarian reason.

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