Drug control, human rights, and harm reduction in the age of AIDS

In many countries, HIV prevalence among people who use illicit drugs is high. Yet many governments resist implementing effective HIV prevention measures, and drug users often lack access to care, treatment, and support, including for HIV/AIDS. Growing evidence indicates the dominant prohibitionist approach to illicit drugs is ineffective – and even counterproductive, blocking or undermining measures shown to reduce harms to drug users and to communities affected by open drug scenes. The growing debate over global drug control policy could shift us collectively away from the current, failed prescriptions to a more rational, pragmatic, and health-promoting framework of harm reduction. This article by Richard Elliott is an abridged version of a paper prepared for "Human Rights at the Margins: HIV/AIDS, Prisoners, Drug Users and the Law," a satellite meeting held in Bangkok on 9 July 2004, and organized by the Canadian HIV/AIDS Legal Network and the Lawyers Collective HIV/AIDS Unit (India).[1] The article briefly outlines the impact of these two different policy approaches, examines international law on drug control, discusses how harm reduction reflects a human rights–based approach to drugs, and assesses some strategies for reforming global policy on illicit drugs.

Injection drug use and HIV/AIDS: global health challenges

Injection drug use is pervasive throughout the world and is associated with severe health and social impacts. Injection drug users (IDUs) suffer from disproportionately high levels of HIV/AIDS and other infectious diseases, as well as overdose, and police violence. Overall, the evidence suggests that while IDUs do not enjoy adequate access to antiretroviral therapy and face additional difficulties in adhering to treatment, these challenges can be overcome with appropriate support.

Prohibition versus harm reduction

The enforcement of drug prohibition continues to dominate national and international responses to drug use. The available evidence demonstrates numerous deficiencies with this approach. In some cases, prohibition actually fuels risky injection and drug-storage practices. Policing can impede drug users' access to health services and to programs such as syringe exchanges. Enforcement policies have prompted transition to drug injection among previously non-injecting drug users, as a more efficient, less detectable method. Enforcement has failed to achieve its stated goals of decreasing drug use and improving public order. Allocating significant resources to such ineffectual, and even harmful, approaches is inefficient and carries the opportunity cost of lost investment in more beneficial police services.

In addition, the "war on drugs" has taken a terrible toll from a human rights perspective. Documented violations of human rights by state agents include: harassment, illegal searches, extortion, beatings, and torture (including the use of drug users' addiction as a means to elicit false confessions).[2] Thailand offers one of the more extreme examples: a nationally declared drug war has been associated with the extrajudicial execution of over 2200 suspected drug dealers, many of them likely addicted drug users.[3] Other documented abuses include forced detoxification, forced HIV testing, and forced labour during detention.[4] The war on drugs is also marked by racial discrimination.[5] In contrast to prohibition,

> Harm reduction is a pragmatic and humanistic approach to diminishing the individual and social harms associated with drug use, especially the risk of HIV infection. It seeks to lessen the problems associated with drug use through methodologies that safeguard the dignity, humanity and human rights of people who use drugs.[6]

Harm reduction does not preclude abstinence as a goal, but rather accepts that illicit drug use has been, and will continue to be, a feature of cultures throughout the world, and

that efforts should be made to reduce harms among individuals who continue illicit drug use. In practice, interventions include outreach programs, peer-driven interventions and drug user organizations, needle exchange programs, substitution therapy (eg, methadone maintenance), and safer injection facilities.

Evidence indicates that harm-reduction measures can have a positive impact in preventing HIV infection among people who use illicit drugs and their sexual and drug-sharing partners, can improve their access to health and other services, and are more respectful of their dignity and rights.[7] Yet such approaches are blocked or hampered in many jurisdictions by the lack of political and financial support.

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Drug control and harm reduction in international law

The global system for drug control rests upon three UN conventions requiring signatory states to take various measures to criminalize drug-related activities: the 1961 Single Convention on Narcotic Drugs; the 1971 Convention on Psychotropic Substances; and the 1988 Convention against Illegal Traffic in Narcotic Drugs and Psychotropic Substances.

Three international bodies administer the treaties:

- The UN Commission on Narcotic Drugs (CND) consists of 53 UN member states and is the central policy-making body within the UN system in relation to drug control, with the authority to bring forward amendments to existing treaties or propose new treaties. The CND currently operates by consensus, meaning any single country can block a resolution or other initiative.
- The UN Office on Drugs and Crime (UNODC) "assist[s] UN member states in their struggle against illicit drugs, crime and terrorism." The UNODC is a recent co-sponsor of the Joint UN Programme on HIV/AIDS (UNAIDS) and has shown some support for harm-reduction measures, at least insofar as they relate to preventing HIV.[8] However, the UNODC leadership has criticized harm-reduction advocates as undermining "multilateralism."[9] The contradictions internal to the UNODC, and between the UNODC and other "core values" of the UN, remain to be resolved.[10]
- The International Narcotics Control Board (INCB) consists of 13 individuals and describes itself as "the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions." Members critical of harm reduction dominate the INCB, and the Board continues to decry "drug injection rooms," denying that they serve "medical and scientific purposes" and asserting that any government that allows safer injection sites "facilitates drug trafficking," in contravention of the treaties.[11] The INCB interpretations are not legally binding, but help shape the political climate in which decision-makers determine national policies.

Criminalization and penalties for drug-related activities are the focus of the conventions. But they also contain important qualifications that can, if interpreted and implemented courageously by policy-makers, make some space for harm-reduction initiatives, even if this "room for manoeuvre" is limited.[12]

In particular, the 1961 and 1971 treaties allow for the production, distribution, or possession of controlled substances for "medical and scientific purposes." They also allow states to provide measures of treatment, rehabilitation, and social reintegration as alternatives, or in addition, to criminal penalties. While the 1988 convention requires each state to criminalize possession of a controlled substance even if only for personal consumption, it also acknowledges that this obligation is "subject to the constitutional principles and the basic concepts of its legal system." Various harm-reduction measures can be implemented if states are willing to use such provisions to defend more flexible, health-friendly interpretations.

Harm reduction and human rights

In one of the first articles to make a case for harm reduction based on human rights norms, Alex Wodak explored how prohibition leads to infringements of various rights and contributes to the harms suffered by drug users:

> Reliance on criminal sanctions as the major response to illicit drug use inevitably results in the denial of human rights of the IDU population as drug use remains defined as a law enforcement rather than a health problem. Poor health outcomes in this population then follow, because health promotion and health care services are more difficult to provide to a now stigmatized and underground population. Protection of human rights is an essential precondition to improving the health of individual drug users and improving the public health of the communities where they live.[13]

Despite the importance of human rights to harm-reduction efforts, Andrew Hathaway argues that the harm-reduction movement adopted a too strictly empirical focus and claimed to occupy the "middle-ground" on drug issues, articulating its principles as emerging from a "scientific public health model" and "unduly overlooking the deeper morality of the movement with its basis in concern for human rights."[14] Sam Friedman et al have pointed out that the harm-reduction movement formed during a period marked by a "political economy of scapegoating" that targeted drug users, among others, as responsible for social ills. They suggest that "this climate shaped and limited the perspectives, strategies, and tactics of harm reductionists almost everywhere."[15] In an environment hostile to the notion that drug users are entitled to universal human rights, a pragmatic response to the immediate harms caused by prohibitionist excesses is to cast the problem in the language and data of public health – recognizing, of course, that the need to defend human rights is even greater in such circumstances.

Hathaway's concern is expressed with a traditional libertarian emphasis on civil and political rights that governments should not infringe. Nadine Ezzard outlines the need to also address underlying "vulnerabilities," including various factors that "constrain choices and limit agency," thereby increasing the risks of drug-related harm.[16] As such, her call for linking harm reduction with human rights flags that governments must take positive measures to address economic, social, and cultural human rights in responding to drug use.

> In responding to drug use, governments must take positive measures to address economic, social, and cultural human rights.

How should we conceive of the relationship between human rights and harm reduction? There are at least four interconnected ways in which these concepts are, or can be, linked:

- The harm-reduction movement inherently reflects human rights principles, by insisting on the dignity of people who are often marginalized and vulnerable to the denial of human rights.
- From a purely pragmatic perspective, respect for human rights is necessary for harm-reduction interventions to be feasible and effective.
- Human rights norms point toward harm reduction, rather than prohibition, in our policy responses to drug use.
- Harm-reduction advocates can and should deploy human rights norms in making the case for drug-policy reform.

This last proposition warrants further explanation: What is the human rights–based case for harm reduction?

Harm reduction: a human rights–based approach to drug policy

An approach to drug policy based on human rights principles allows for – and indeed actively supports – harm-reduction measures. By way of brief example, consider two international sources of guidance.

First, states that are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[17] Furthermore, states are legally bound to take steps to realize this right over time, including steps "necessary for … the prevention, treatment and control of epidemic … diseases; [and] the creation of conditions which would assure to all medical service and medical attention in the event of sickness."[18] The UN committee tasked with monitoring state compliance with the ICESCR has clarified that states are obliged to *respect*, *protect*, and *fulfill* this right.[19] States are in breach of their obligation to respect the right to health through any actions, policies, or laws that "are likely to result in … unnecessary morbidity and preventable mortality."[20] Given the mounting evidence, when will a figure or body, with sufficient stature to have political impact, acknowledge that prohibition, at least as an isolated policy approach, amounts to a violation of

states' obligations with regard to the right to health?

Second, the International Guidelines on HIV/AIDS and Human Rights "translate international human rights norms into practical observance in the context of HIV/AIDS" and identify measures governments can take "to protect human rights and achieve HIV-related public health goals."[21] These should inform national policy on illicit drug control. For example, the Guidelines recommend that "Criminal law should not be an impediment to measures taken by States to reduce the risk of HIV transmission among injecting drug users and to provide HIV-related care and treatment for injecting drug users."[22]

Regime change: strategies for reforming global drug policy

How might the global drug-control regime be reformed to shift decisively away from prohibition as the dominant policy approach?

It has now been generally accepted that substitution therapy and needle exchange programs are permissible under international drug-control treaties. But other measures such as safer injection facilities remain contested, and the overall prohibitionist climate engendered by this legal regime creates a "chill" in relation to various measures. Furthermore, the 1988 Convention's requirement that states criminalize even possession for personal consumption – thereby rendering all drug users criminal offenders – leaves little interpretive wiggle room.

Even if states have some leeway in interpretation, and the political will can be mustered domestically to forge ahead with harm-reduction initiatives, the amount of "policy space" they can open up is limited by the larger political environment. The structural inertia of the CND, the internal division of the UNODC, and the ideological opposition of the INCB hardly make for a supportive global framework. Add to this the power of countries committed to the prohibitionist agenda, including the United States, and it becomes apparent that it is as much a question of politics as of law. As Robin Room puts it: "The impact of the system comes instead from the implementation of the treaties, and with the international politics that surrounds that." He describes "an international environment where states have been reluctant to break openly with a governing orthodoxy describing drug control in terms of a war on drugs."[23]

An increasing number of countries are shifting away from criminalization as their dominant approach to illicit drugs.

It would appear, however, that "cracks in the consensus"[24] are emerging. An increasing number of countries are shifting away from, or at least tempering, criminalization as their dominant approach to illicit drugs. The UN General Assembly is expected to next debate global drug policy in 2008, meaning the next few years are a window of opportunity for pursuing strategies that could reform the current regime. What are the options?

In general, the chances of actual *amendments* to the existing conventions are slim at best, given the need for consensus. The long-term project of adopting a *new convention* on harm reduction faces the same challenge. The process could gradually shift political consciousness, but these options do not respond with adequate urgency to current health crises.

In theory, some states might be convinced to *denounce* (ie, withdraw from) one or more of the conventions, but this is unlikely. Aside from domestic political considerations, any single state taking such a step would be condemned as a "pariah narcostate" and "would have to be prepared to face not only US–UN condemnation but also the threat or application of some form of US sanctions."[25]

A more feasible approach might be to promote a strategy of *collective withdrawal*: a critical mass of like-minded states jointly stating, in some instrument introduced in relevant UN bodies, their interpretation as to which harm-reduction measures are permissible under the conventions and, if necessary, identifying those aspects of the treaties from which they are withdrawing, as well as proposing reforms. This would confer safety in numbers, and would be most likely to succeed if such a "coalition of the willing" included both developed and developing countries.

Such a step is unlikely without coordinated, transnational advocacy by civil society organizations. Laying some groundwork with documented support from relevant UN bodies would also be advisable.[26] For example:

- The governing boards of UNAIDS and the WHO could adopt policy encouraging states

to implement harm-reduction measures.

- The six UN human rights committees, the Office of the High Commissioner for Human Rights, and the special rapporteurs could incorporate concerns about the human rights impact of the "war on drugs" and the human rights benefits of harm-reduction measures into their work.
- Resolutions could be brought before the UN Commission on Human Rights and the World Health Assembly affirming the human rights of drug users and recognizing the right of sovereign states to implement harm-reduction measures.
- Several UN agencies could jointly submit a report to the CND for its "thematic debate" at its 2005 session, indicating strong support for harm-reduction measures on both public health and human rights grounds.
- Civil society advocates can directly or indirectly intervene in these various processes with evidence, arguments, and documentation that make the case for a more rational, human rights–friendly approach to drug policy.

Conclusion

The global drug-control regime must be of concern to all those who witness the human and economic devastation wreaked by the "war on drugs." Advocates must pursue more health-friendly interpretations and implementation of the existing drug-control treaties, as well as strategies for reforming them. The harm reduction and human rights movements enjoy a close kinship; each would benefit from exploring the relationship more fully. Collaboration will increase our chances of successfully seizing those opportunities to effect "regime change."

– Richard Elliott

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[1] The paper is entitled "Regime Change?: Drug Control, Human Rights and Harm Reduction in the Age of AIDS." It is available on the Legal Network's website (www.aidslaw.ca) in the section dealing with drug law and policy. This abridged version omits most references; the full paper includes extensive notes and a bibliography.

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[3] *Not Enough Graves: The war on drugs, HIV/AIDS, and violations of human rights in Thailand*. New York: Human Rights Watch, 2004.

[4] *Fanning the Flames: How human rights abuses are fueling the AIDS epidemic in Kazakhstan*. New York: Human Rights Watch, 2003; B Adams, J Csete: *Locked Doors: The human rights of people living with AIDS in China*. New York: Human Rights Watch, 2003.

[5] E Drucker. Drug prohibition and public health: 25 years of evidence. *Public Health Reports* 1999; 114(1): 14-29.

[6] *What Is Harm Reduction?* New York: International Harm Reduction Development Program, 2004.

[7] For more details regarding the benefits of each of these interventions, see the paper on which this article is based, via www.aidslaw.ca.

[8] Eg, see WHO/UNODC/UNAIDS Position Paper: Substitution maintenance therapy in the management of opioid dependence and HIV/AIDS prevention. Geneva, 2004.

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[16] N Ezzard. Public health, human rights and the harm reduction paradigm: from risk reduction to vulnerability reduction. *International Journal of Drug Policy* 2001; 12: 207-19 at 213.

[17] ICESR, Article 12.

[18] Ibid.

[19] UN Committee on Economic, Social and Cultural Rights. General Comment No 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4 (2000).

[20] Ibid at para 50.

[21] *HIV/AIDS and Human Rights: International Guidelines*. Geneva: UNAIDS and OHCHR, 1998, para 10.

[22] Ibid, Guideline 4 ("Criminal laws and correctional systems"), para 29(d).

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[26] For more discussion of such a proposal, see: D Spivack. Conclusions from Workshop III: International cooperation on drug policy, forming part of the 2002 Lisbon International Symposium on Drug Policy, 23-26 October 2003, available at www.senliscouncil.net/documents/Spivack_paper.