

Is the decriminalisation of possession of controlled substances for personal use consistent with international law?

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Introduction

In a recent report to the United Nations General Assembly, the UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, found that

‘Criminalization and excessive law enforcement practices...undermine health promotion initiatives, perpetuate stigma and increase health risks to which entire populations — not only those who use drugs — may be exposed.’¹

...continuing imposition of criminal penalties for drug use and possession perpetuates many of the major risks associated with drug use’²

The Special Rapporteur called on UN member states to ‘Decriminalize or de-penalize possession and use of drugs’.³ It is a call that has been echoed by the UN Secretary-General,⁴ and the heads of UNAIDS⁵ and the Global Fund to Fight AIDS, Tuberculosis and Malaria⁶ in the context of HIV/AIDS, and by high profile politicians including ex-presidents in the context of human rights, security and development.⁷ The UN Office on Drugs and Crime (UNODC) has also raised concerns about the harmful consequences of criminalisation on the health and human rights of people who use drugs, and

¹ ; *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, UN Doc No A/65/255, 6 August 2010, Summary.*

² Ibid para 62.

³ Ibid, para 76.

⁴ Ban Ki-moon, Remarks on the handover of the report of the Commission on AIDS in Asia, 26 March 2008. “Legislation can also stand in the way scaling up towards universal access -- in cases where vulnerable groups are criminalized for their lifestyles. We have to find ways to reach out to sex workers, men who have sex with men and drug users -- ensuring that they have what they need to protect themselves”.

http://data.unaids.org/pub/Speech/2008/20080325_sg_asia_comission_report_speech_en.pdf

⁵ ‘Leaders against Criminalization of Sex Work, Sodomy, Drug Use or Possession, and HIV Transmission’ International AIDS Conference, Vienna, July 2010. During the session Michel Sidibe, Executive Director of UNAIDS, joined other leaders in ageing the following: “We Resolve: that harmful laws that criminalize sex work, drug use and drug possession, homosexuality and same-sex relationships, and HIV transmission must be repealed and must not be replaced by a regulatory system that is equally prejudicial. Not only do these laws lead to serious human rights abuses, but they grievously hamper access to HIV services.”

⁶ M. Kazatchkine ‘Harm Reduction: From Evidence to Action’, Keynote address at the 20th International Harm Reduction Conference, Bangkok, 20-23 April 2009.

⁷ “Drugs and Democracy: Towards and paradigm shift,” Final report of the Latin American Commission on Drugs and Democracy, 2008 http://www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf.

has encouraged the use of creative approaches to drug enforcement, including stopping the incarceration of petty offenders, and reforming performance indicators that currently promote high numbers of arrests (as compared to targeting violent criminals or high volume dealers).⁸

Concerns about the harmful effects of a criminal justice approach on the health and human rights of people who use drugs have prompted a number of governments to decriminalise possession of small quantities of drugs for personal use either in law or in practice. Spain, Portugal and Italy, for example, do not consider possession of drugs for personal use a punishable offence. In the Netherlands and Germany, possession for personal use is illegal, but guidelines are established for police and prosecutors to avoid imposing punishment. Some Latin American countries (including Brazil, Mexico and Argentina) have decriminalised possession for personal use, either by court decree or through legislative action.

Portugal decriminalised all possession for personal use as far back as 2001, and has seen important successes in terms of health and reduced numbers of people coming into contact with the criminal justice system.⁹

An important question, and one that is pertinent to the present case, is whether these policy changes are consistent with international law. This briefing focuses on the international drug conventions and the UN Convention on the Rights of the Child. They are treaties that are sometimes seen as precluding decriminalisation or moves away from 'restrictive' drug policies. Upon analysis, however, this is not the case. Four broad conclusions are drawn from the discussion that follows:

- There is nothing in international law to prohibit Colombia decriminalising possession of small quantities of drugs for personal use if it were found that to criminalise such possession would be unconstitutional.
- The UN Convention on the Rights of the Child does not require criminalisation and there is a question mark about whether criminalisation for personal possession is an 'appropriate measure' for the purposes of the Convention.
- Tests of proportionality and arbitrariness require scrutiny of criminal laws applied to drug use.
- The burden of proof is on the State to justify criminalisation.

1. International drug conventions of 1961 (as amended by the 1972 protocol), 1971 and 1988¹⁰

Colombia has ratified all three of the international drug conventions. These conventions grant some flexibility with respect to criminalisation of possession and use of controlled substances. They do so in two important ways. First, there is flexibility in relation to penalties, to which the principle of

⁸ UN Office on Drugs and Crime, 'World Drug Report 2009', Vienna, 2009, pp. 163ff.

⁹ C. Hughes and A. Stevens 'What Can We Learn From The Portuguese Decriminalization of Illicit Drugs?' *British Journal of Criminology* (2010) 50 (6): 999-1022.

¹⁰ The treaty-based drug control system is based on three international drug conventions: Single Convention on Narcotic Drugs, 1961, New York, 30 March 1961, United Nations, Treaty Series, vol. 520, p. 151 and vol. 557 (corrigendum on vol. 520) p. 280; Convention Against Psychotropic Substances, 21 February 1971, United Nations, Treaty Series, vol. 1019, p. 175; Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, United Nations, Treaty Series, vol. 1582, p. 95.

proportionality must be applied. Second, the key provisions relating to personal possession contain important safeguard clauses giving priority to national constitutional principles.

1.a Flexibility with regard to penalties

The drug conventions are non-self executing and it is up to States parties to implement their terms in good faith. The broad obligation underpinning all three treaties is that States parties take measures to limit the use of controlled substances to medical and scientific purposes. None of the conventions, however, set out penalties to be applied to specific offences. As noted by the International Narcotics Control Board '[t]he international drug control treaties do grant some latitude with regard to the penalization of personal consumption-related offenses'¹¹

Indeed, the principle of proportionality – that the punishment fit the crime – is implicitly recognised. Article 36(1)(a) of the Single Convention on Narcotic Drugs 1961 refers to incarceration only in relation to 'serious offences'. It goes on to say that when 'drug abusers' have committed any of the offences referred to, States parties may provide that they undergo treatment and rehabilitation as an alternative to incarceration. Article 22(1)(a) of the 1971 Convention on Psychotropic Substances uses the same wording, while article 3(4)(a) of the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is slightly clearer, stating that

'Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation'

Paragraph 1, however, does not refer to personal possession, which arises later in paragraph 2. According to paragraph 4 of the same article:

'The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender'

As such, the application of criminal penalties is not required for personal possession. Indeed, alternatives are specifically provided for.

1.b Subject to constitutional limitations or principles

More importantly, the key provisions of the drug conventions relating to personal possession and penal provisions contain a deliberate safeguard clause. The most important in this regard are article 36 of the 1961 Single Convention on Narcotic Drugs and article 3 of the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Article 36(1)(a) of the Single Convention 1961 reads:

¹¹ INCB Annual Report for 2001 UN Doc No E/INCB/2001/1 (Vienna March 2001), para. 211.
http://www.incb.org/incb/en/annual_report_2001.html.

'Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention(...)' [emphasis added]

Article 36(4) goes on to state that:

'Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party'

Article 22(1)(a) of the 1971 Convention is similarly framed:

'Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention (...)' [emphasis added]

Article 3(2) of the 1988 Convention reads:

'Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention' [emphasis added]

Article 3(11) goes on to say

'Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law'

The official commentary on the 1961 Single Convention is clear that the issue of criminalisation of personal possession was an area of dispute among States in the negotiations, and that the convention does not explicitly require it.¹² The 1988 Convention is clearer on possession for personal consumption, but the safeguard clause nonetheless remains.

As such, the drug conventions cede authority on this aspect to the constitutional principles of the State party. As explicitly stated in the 1961 official commentary, this safeguard clause '*can free a Party from all obligation to punish an action mentioned in article 36, paragraph 1*'.¹³ The same can be said for article 3 of the 1988 treaty.¹⁴

The INCB has concluded that Portugal's 2001 decriminalisation of the possession of small amounts of controlled drugs for personal use and drug use itself was consistent with the international drug control

¹² 'Commentary on the Single Convention on Narcotic Drugs' Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962, paras 4.17 – 4.21.

¹³ Ibid para 4.21

¹⁴ Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ' (1988), UN Doc. E/CN.7/590 para 3.95

treaties.¹⁵ The Board has, however, been inconsistent on this point and has criticised what it saw as a 'growing movement to decriminalize the possession of controlled drugs, in particular cannabis, for personal use' in Latin America.¹⁶

This, however, is difficult to reconcile with the explicit provisions of the Conventions set out above.¹⁷ In the case of Argentina, the comment related to a Constitutional Court decision which found the prosecution of five young men for possession of small amounts of cannabis to be unconstitutional.¹⁸ While it was noted in the Commentary to the 1961 Convention that 'constitutional limitations...will generally not prevent the penalization of the unauthorized possession of drugs'¹⁹ it is clear that when this does occur (and it has in various countries), the drug conventions are no barrier to decriminalisation.

If, therefore, it is ruled that criminalisation of possession for personal use is unconstitutional (based on, for example, the right to privacy or personal liberty), then the state is not bound to establish it as a crime. The case at hand, being based on the Constitution of Colombia, is therefore the appropriate forum for determining the legality of decriminalisation.

2. The UN Convention on the Rights of the Child, 1989²⁰

It is clear that human rights protections are applicable in arguing against criminal laws and sentences relating to personal use and possession. Various rights are clearly engaged, such as freedom of religion (and in the case of some substances, religious practices) and the right to privacy. The UN Convention on the Rights of the Child (CRC), the only core UN human rights treaty to refer to drug use, however, requires specific mention.

Article 33 of the CRC reads:

'States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties(...)'

This is therefore very different from applying various rights and freedoms to criminalisation, as there is an explicit obligation to protect children from the illicit use of drugs. This echoes politicians' frequent resort to child protection in justifying current approaches to drug control.

The first point to note is that article 33 does not require the criminalisation of any behaviour. It is a very open provision without explicit measures being set out (Although it is qualified in an important way. This is discussed below). 'Legislative, administrative, social and educational measures' indicates a wide

¹⁵ INCB, Report of the International Narcotics Control Board for 2004, New York: 2005, para. 538.

¹⁶ INCB, Annual Report for 2009, UN Doc No E/INCB/2009/1, March 2010, para 453.

¹⁷ Similarly, while the object and purpose of the drug conventions may be to limit the use of controlled substances to medical and scientific purposes, given the explicit allowance for flexibility based on constitutional principles, it can hardly be argued that applying that safeguard runs contrary to that object and purpose, particularly if States parties continue to abide by their obligations in relation to supply reduction, demand reduction and ensuring access to and availability of essential controlled medicines.

¹⁸ Arriola, Sebastián y otros s/ causa n° 9080, A. 891. XLIV, 25 Agosto 2009.

¹⁹ Commentary to the Single Convention op.cit. para 4.21.

²⁰ Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3

range of measures. While the clause is very broad, however, it is notable as much for what is omitted as it is for what is included. The word 'including', indicates that the list is not exhaustive but certain measures are *de-emphasised*. Law enforcement or criminal measures are some of these, being absent from the text. Protection underpins article 33. Not punishment. The Committee on the Rights of the Child, which oversees implementation of the treaty and guides its interpretation, is consistent in its view that a child who is drug dependent should be seen as a victim, not a criminal.²¹ Additionally, well known juvenile justice standards establish the principle that the detention of juveniles should only be a measure of last resort, for the shortest possible time and promote diversion from the criminal justice system for such children.²² When it comes to those under eighteen, therefore, the CRC and the Committee on the Rights of the Child are fairly clear that criminalisation for drug use or possession is inconsistent with a child rights approach. According to UNICEF, applying harsh penalties to children who use drugs is a '*deeply ineffective form of protection*'.²³

It is not the case that anything is permissible under the CRC so long as it has the stated aim of protecting children from drugs. The question of 'appropriateness' frames the provision. Four principles may be identified to characterise this qualification:

1. Appropriate measures must be *read in the light of the remaining articles of the CRC*
2. Appropriate measures *must take into account other human rights protections more conducive to the realisation of the rights of the child*, brought into play explicitly by article 41(2) of the CRC (respect for existing standards, such as international conventions in force in the State party). This, in turn, draws in relevant human rights jurisprudence, and requires respect for the rights of others.
3. Appropriate measures must be *evidence-based*. In other words, they must be based on adequate data, targeted and effective. However, effectiveness is not enough. This leads to the fourth principle:
4. Appropriate measures must be *proportionate*. In drug control some rights will inevitably be restricted. Such measures must be prescribed by law, in pursuit of a legitimate aim and no more than necessary for the achievement of that aim.²⁴

It is clear that protecting children from the illicit use of narcotic drugs under the CRC also requires protecting children from parental use or use within the family, and also the use of drugs in the community. Again, however, this obligation is qualified by 'appropriateness'.

²¹ See for example, Committee on the Rights of the Child, Concluding Observations: Denmark, UN Doc No CRC/C/DNK/CO/3, 23 November 2005, para 55; and *Concluding Observations: Indonesia*, UN Doc No CRC/C/15/Add. 223, 26 February 2004, para 74.

²² United Nations Standard Minimum rules for the Administration of Juvenile Justice ("Beijing Rules"), GA Resolution 40/33 (29 November 1985).

²³ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, New York and Geneva, UNICEF, 2002.

²⁴ See for example *Handyside v UK*, Eur Ct HR, App No. 5493/72, 1976; and *Observer and Guardian v UK*, Eur Ct HR, App No. 13585/88. 1991.

The military campaign against the drug cartels in Mexico, for example, was framed by President Calderon as being '*necessary to keep drugs away from our children*'.²⁵ Bearing in mind the first two principles above, it is now well known that hundreds if not thousands of children are among the more than 30,000 that have lost their lives in drug related violence since 2006. These include children killed at military checkpoints. Tens of thousands of children have lost at least one parent. Complaints to national human rights mechanisms have increased by 900%. It cannot be argued convincingly, given these human rights consequences, that the military operation was an 'appropriate measure' to protect children and therefore compliant with the CRC. Note again the absence of 'military' in the list of the kinds of measures set out in the article. Such interventions are, like criminal measures, de-emphasised.

As with all other measures, the criminalisation of possession for personal use (of children and adults) must pass this test of 'appropriateness'. For children the case seems clear that to criminalise and punish is not in keeping with a protective child rights approach. But what about criminalising adults? Take, for example, criminal penalties applied to a parent for drug use. Article 3 of the CRC requires that in all actions concerning the child, the child's best interests shall be a primary consideration. Indeed, this is a general principle of the Convention, through which all other article must be viewed. Are the child's best interests served by their parent having a criminal record for a minor, non-violent offence, which may impair access to employment or social services? Or by a mother being imprisoned for a similarly minor possession offence? The best interests of the child principle is applied to custody decisions, including in relation to drug or alcohol dependent parents, and to medical procedures worldwide. Why not to sentencing for non-violent drug offences where the defendant is a primary care-giver?

3. Proportionality and arbitrariness

It is, no doubt, a complex area. Two questions, however, serve as a window into this analysis and the broader question of the appropriateness of criminalisation models from a human rights perspective:

First, upon what evidence of success, and based on what indicators, is the criminalisation of personal possession maintained?

Given that this law inherently restricts various rights such as the right to privacy, personal liberty and for some, religious freedom, it is an important question. Crucially, the burden of proof must be on the State in this regard. Keeping with the example of children it is not enough that the desire to protect children from drugs is stated. Limited surveillance from many of the world's most populous nations makes it impossible to accurately estimate the total number of drug-involved young people. Much of the best available data is restricted to youth drug use in high income countries of Europe and North America.²⁶ That evidence suggests that in the many decades in which drug use and possession has been

²⁵ Redacción El Universal, 'Discurso de Felipe Calderón en el Palacio Nacional'. El Universal, 1 December 2007.

²⁶ C. Cook and A. Fletcher 'Youth drug use research and the missing pieces in the puzzle: How can researchers support the next generation of harm reduction approaches?' in D. Barrett (ed) *Children of the Drug War*, New York and Amsterdam, International Debate Education Association, 2011 (forthcoming). See also 'Trends in drug use among young people: What do we know?' UNODC 'World Drug Report 2009' op.cit pp 23-29

criminalised all over the world, there is little sign that drug use among children and young people has been stemmed. Indeed, it suggests that it has grown.

It should also be noted that even if criminalisation of personal possession could be effective, this may not be enough to save the provision if there is a less restrictive means of achieving the same aim. This leads us to the second question:

Accepting that the protection of children from drugs is a 'legitimate aim' for the purposes of the test of proportionality, is the criminalisation of personal possession necessary in a democratic society for the achievement of that aim (or no more than necessary for the achievement of that aim)?

The evidence for the potential of the measure to achieve its aim is instructive. Weighed against this must be the negative human rights consequences of the relevant law or policy. In this case, a clear example would be increased numbers of people in contact with the criminal justice system, imprisoned or receiving criminal records for minor drug offences. The scope of the infringement and its duration are of course also important. In the case of criminalisation of personal possession of drugs, the law applies to every person in the country and has no time limit. As noted above, it is also far from clear that it has had any positive effect on its stated aims.

As with the evidence to support the effectiveness of the law, it is for the state to show that it is proportionate to any purported legitimate aim.

Some rights, however, are not subject to this test as they do not permit proportionate restriction. The most closely associated with criminalisation of personal possession is freedom from arbitrary arrest and/or detention.²⁷ In this instance the question of 'arbitrariness' is key and, again, the two questions above may be of assistance. If a policy has been arbitrarily formulated (e.g. in a discriminatory manner, or without an evidence base), or if the policy cannot achieve its aim (i.e. has proven over time to be incapable of it), then it would appear that arrests and detention stemming from it may too be deemed arbitrary.

These tests apply, of course, not just to the CRC, but to the other international human rights treaties ratified by Colombia, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the case of the latter, the UN Committee on Economic Social and Cultural Rights recently recommended that Mauritius, in the context of the right to the highest attainable standard of health (article 12 of the Covenant) and the right to benefit from scientific progress and its applications (article 15.1(b)), '*consider decriminalization and public health-based measures*' to address the high rates of injecting drug use and related HIV in the country.²⁸

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²⁷ Article 9(1) International Covenant on Civil and Political Rights: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'.

²⁸ UN Committee on Economic Social and Cultural Rights, Concluding Observations: Mauritius UN Doc No E/C.12/MUS/CO/4, 8 June 2010, para 27(f).