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Human Rights and Drugs seeks to expand the current body of legal research and analysis on drug policy issues as they intersect with international human rights law, international humanitarian law and international criminal law. To this end, the Journal promotes and disseminates high quality, original research and analysis in the form of articles, commentaries, case summaries and other analysis relevant to its mandate.

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Introduction to Volume 2

Rick Lines & Damon Barrett
Editors-in-Chief

We are pleased to welcome you to the second volume of *Human Rights and Drugs*, the official journal of the International Centre on Human Rights and Drug Policy. Established in 2009, the Centre is dedicated to developing and promoting innovative and high quality legal and human rights research and teaching on issues related to drug laws, policy and enforcement.

There have been a number of exciting developments at the Centre since the first issue of the journal was released last year. The first is a change in the name of the journal itself to *Human Rights and Drugs*,¹ and an expansion of the publication schedule to two volumes annually. We will be publishing a second edition of the journal in the autumn of 2012, and are accepting submissions now.

The second development is the agreement of an academic partnership between the International Centre on Human Rights and Drug Policy and the Human Rights Centre at the University of Essex in the United Kingdom. Established in 1983, Essex is one of the oldest and most internationally-renowned academic human rights centres in the world. The International Centre on Human Rights and Drug Policy will now be formally housed at Essex, which creates a tremendous opportunity to expand the visibility of drug policy issues within human rights law community, as well as to engage undergraduate and postgraduate students through lectures and seminars. Although moving to Essex, we maintain a strong relationship with our original home at the Irish Centre for Human Rights at the National University of Ireland Galway, and will continue to be an active contributor to academic life at that institution.

¹ Formerly the *International Journal on Human Rights and Drug Policy*.

The timing of this new partnership with Essex could not be better, and clearly reflects the growing interest in engaging issues of drugs and drug policy through the lens of international human rights law. This edition of *Human Rights and Drugs* is a product of that growing interest, and we are pleased to present new research and analysis in a broad range of topic areas. Indeed, the content of this second issue of the journal could not be more timely and relevant, particularly as the contributions reflect on - and offer thoughtful contrasts to - the recent work of the International Narcotics Control Board (INCB), the treaty body established by the UN drug conventions to oversee their implementation. For example, the Board has recently refused to take a position on either the death penalty for drug offences or drug detention centres, putting it at odds with the clear positions on these issues expressed by UN human rights bodies, as explored in two articles in this journal.

The issue of compulsory detention of people who use (or are suspected of using) drugs for the purpose of 'drug treatment' is one that has received substantial attention in recent years from both the NGO community and from United Nations agencies. In his article, 'The ethics and effectiveness of coerced treatment of people who use drugs', Alex Stevens of the University of Kent uses established standards of human rights and medical ethics to judge whether it is ethical to apply two types of coerced treatment to three groups of drug users. Stevens argues that compulsory treatment is not ethical for any group of people who use drugs, as it breaches the standard of informed consent. Quasi-compulsory treatment (i.e. treatment that is offered as an alternative to a punishment that is itself ethically justified) may be ethical under specified conditions for drug dependent offenders who are facing a more restrictive penal sanction, but is not ethical for other people who use drugs.

Yingxi BI's article 'On the Death Penalty for Drug-Related Crime in China' continues and expands the journal's interest in the human rights implications of capital punishment for drug offences. Referencing a variety of Chinese and international sources, BI examines China's criminal justice legislation and explores the debates surrounding the death penalty for drug-related offences from the perspectives of penology and human rights. Building on this base, BI discusses strategies for the restricting and possible abolition of the death penalty for drugs in China.

The INCB has also publicly criticised the Supreme Court of Canada for its 2011 ruling on the INSITE safe injecting facility in Vancouver. Sandra Ka Hon Chu reviews the decision in the case of *Attorney General v. PHS Community Services Society*, in which the Court ruled unanimously that the Government's refusal to grant an exemption to INSITE from criminal prohibition for drug possession violated the Canadian Charter of Rights and Freedoms.

A critique of the Board's work on the issue of psychoactive plants is the subject of a specific contribution. In 'Plants, Psychoactive Substances and the International Narcotics Control Board: The Control of Nature and the Nature of Control', Kenneth Tupper and Beatriz Caiuby Labate examine the approach of the Board to the question of plant materials containing psychoactive substances, with specific reference to its work on contemporary practices of ayahuasca drinking. Tupper and Labate argue that the Board's recommendations against ayahuasca represent an attempt to extend the scope of its powers, while conflating and thus misrepresenting widely diverse plant materials and their effects.

We are also pleased to present two other contributions on issues of overall significance to human rights and drug control.

Efforts to control narcotic drugs are often legitimised as necessary to protect children and young people. In 'Article 33 of the Convention on the Rights of the Child: The Journey from Drafting History to the Concluding Observations of the Committee on the Rights of the Child', Dr Khadeija Mahgoub of the University of Khartoum explores the evolving interpretation of drug use issues within the Concluding Observations of the Committee. Her work reveals a clear connection between article 33 and the right to health as well as a dynamic interpretation of the article by the Committee. She recommends that the Committee develop a General Comment on article 33.

Finally, Tim Bingham summarises the decision of the Irish Press Ombudsman in the case of *International Harm Reduction Association and Others and The Irish Independent*, in which a number of drug services took a complaint against a major newspaper in Ireland for alleged prejudicial speech against people who use drugs.

Welcome to issue 2 of *Human Rights and Drugs*.

ORIGINAL ARTICLE

The ethics and effectiveness of coerced treatment of people who use drugs

Alex Stevens, PhD*

ABSTRACT

In the context of international debates about ways to reduce the harms related to the use of illicit drugs and their control, this article explores the specific issue of coerced treatment of people who use drugs. It uses established standards of human rights and medical ethics to judge whether it is ethical to apply either of two types of coerced treatment (compulsory treatment and quasi-compulsory treatment, or QCT) to any of three groups of drug users (non-problematic users, dependent drug users and drug dependent offenders). It argues that compulsory treatment is not ethical for any group, as it breaches the standard of informed consent. Quasi-compulsory treatment (i.e. treatment that is offered as an alternative to a punishment that is itself ethically justified) may be ethical (under specified conditions) for drug dependent offenders who are facing a more restrictive penal sanction, but is not ethical for other people who use drugs. The article also briefly reviews evidence which suggests that QCT may be as effective as voluntary treatment.

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Introduction

This article addresses the issues of ethics and effectiveness in coerced treatment for people who use drugs.¹ It is based on the existing evidence on coerced treatment,² as well as on considerations of the ethics of such treatment³ and my own research on quasi-compulsory treatment in Europe.⁴

The issue of effectiveness is secondary to the issue of ethics. If a treatment is unethical, it cannot be justified even if it is effective in meeting a certain aim. This article will therefore focus on ethics before effectiveness.

Before addressing these issues, it is necessary to clarify terms and principles. We can classify two forms of coerced treatment. We can also - for the purposes of this article at least - classify three types of person who uses drugs. It should be noted that, in practice, there are countries that are applying compulsory treatment across all three of the categories that are discussed in this article (e.g. China, Malaysia, Vietnam and Cambodia). There are also countries that are applying quasi-compulsory treatment to all three categories (e.g. the US drug court system).

Classifications

There are two types of coerced treatment. The first occurs when people who use drugs are ordered into treatment with no opportunity to provide informed consent to such treatment.

1 The article focuses on the coercion that is used in encouraging people who use drugs to enter treatment, and not on forms of coercion and punishment that are used *within* treatment. The use of coercion and punishment within treatment is fundamentally unethical, as has been highlighted by the United Nations Special Rapporteur on the right to the highest attainable standard of health, Arnand Grover (see note 3 below).

2 Alex Stevens and others, 'Quasi-Compulsory Treatment Of Drug Dependent Offenders: An International Literature Review', 40 *Substance Use and Misuse* 269.; David B. Wilson, Ojmarrah Mitchell and Doris L. MacKenzie, 'A Systematic Review of Drug Court Effects on Recidivism', 2 *Journal of Experimental Criminology* 459.; Eveline De Wree, Brice De Ruyver and Lieven Pauwels, 'Criminal justice responses to drug offences: Recidivism following the application of alternative sanctions in Belgium', 16 *Drugs: Education, Prevention and Policy* 550.; Community Justice Services, *Review of the Glasgow and Fife Drug Courts: Report*, The Scottish Government 2010.; James A Inciardi, 'Compulsory Treatment in New York: A Brief Narrative History of Misjudgement, Mismanagement, and Misrepresentation', 18 *Journal of Drug Issues* 547.; Steven Belenko, *Research on Drug Courts: A Critical Review 2001 Update*, The National Center on Addiction and Substance Abuse at Columbia University, 2001.; General Audit Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, GAO-05-219, 2005.

3 UN General Assembly, 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (6 August 2010) UN Doc. No. A/65/255.; Gilberto Gerra and Nicolas Clark (eds), *From coercion to cohesion: treating drug dependence through health care, not punishment. Discussion paper*, United Nations Office on Drugs and Crime, 2009; W.D. Hall, 'The role of legal coercion in the treatment of offenders with alcohol and heroin problems', 30 *Australian and New Zealand Journal of Criminology* 103.; L Porter, A Arif and W J Curran, *The Law and Treatment of Drug and Alcohol Dependent Persons - A Comparative Study of Existing Legislation*, World Health Organisation, 1986.; Lawrence O Gostin, 'Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency', 69 *The Milbank Quarterly* 561.

4 Tim McSweeney and others, 'Twisting arms or a helping hand? Assessing the impact of 'coerced' and comparable 'voluntary' drug treatment options', 47 *British Journal of Criminology* 470.; Michael Schaub and others, 'Comparing Outcomes of "Voluntary" and "Quasi-Compulsory" Treatment of Substance Dependence in Europe' 16 *European Addiction Research* 53.; Michael Schaub and others, 'Predictors of Retention in the "Voluntary" and "Quasi-Compulsory" Treatment of Substance Dependence in Europe', 17 *European Addiction Research* 97.; Alex Stevens and others, 'The Relationship between Legal Status, Perceived Pressure and Motivation in Treatment for Drug Dependence: Results from a European Study of Quasi-Compulsory Treatment', 12 *European Addiction Research* 197.; Alex Stevens, 'Quasi-compulsory treatment in Europe: An evidence-based response to drug-related crime?' in Alex Stevens (ed), *Crossing Frontiers: International Developments in the Treatment of Drug Dependence*, Pavilion Publishing, 2008.

This will be called compulsory treatment. The second type occurs when drug users are given a choice of going to treatment or facing a penal sanction that is justified on the basis of crimes for which they have been (or may be) convicted. This will be called quasi-compulsory treatment (QCT).

The first of the three types of person who uses drugs includes those who use drugs but who have not committed other crimes, and do not meet diagnostic criteria for drug dependence ('non-problematic drug users'). This group includes the majority of people who use illicit drugs. Most of them will discontinue drug use without any need for treatment. Only a small minority will go on to need treatment to help them give up drugs, or to reduce the harm that their drug use causes.

The second type is made up of people who use drugs who meet diagnostic criteria for dependence ('dependent drug users'). Some - but not all⁵ - of these people will need treatment to help them recover from dependence.

The third group is constituted by dependent drug users who have committed other crimes (including non-drug law offences) that would attract penal sanctions ('drug dependent offenders'). These people are usually considered responsible for a large proportion of the social and economic harms that are associated with drug use, although critics would argue that prohibition itself is responsible for a substantial proportion of drug-related harm. They are considered deserving of punishment for the crimes that they have committed, and may also be likely to benefit from treatment for drug dependence.

Principles

The purpose of making these necessarily but usefully simplistic classifications is to enable more precise discussion of ethics and effectiveness, as both issues vary across types of coercion and type of person who uses drugs. Before applying them to the ethics and effectiveness of treatment, we need also to specify what we mean by these terms.

For this article, treatment will mean any intervention by medical staff, a therapist or other practitioner that is intended to improve the health of the person with whom this practitioner is in contact. Ethical treatment will be considered to be treatment which complies with both international human rights law and leading codes of medical ethics

5 Griffith Edwards, 'Natural recovery is the only recovery' 95 *Addiction* 747.; Robert Granfield and William Cloud, 'Social context and "natural recovery": the role of social capital in the resolution of drug-associated problems', 36 *Substance Use and Misuse* 1543.; Linda C Sobell, Timothy P Ellingstad and Mark B Sobell, 'Natural recovery from alcohol and drug problems: methodological review of the research with suggestions for future directions', 95 *Addiction* 749.

(e.g. the World Health Organization *Declaration on the Promotion of Patients' Rights*,⁶ the UN *Principles of Medical Ethics*⁷ and the World Medical Association's *International Code of Medical Ethics*).⁸ These principles have been applied to drug treatment in a joint publication of the United Nations Office on Drugs and Crime (UNODC) and the World Health Organization,⁹

The ethical standards that apply include:

- Avoidance of the infliction of harm on the person being treated (guaranteed in all codes of medical ethics since the Hippocratic oath).
- Informed consent (guaranteed both by codes of medical ethics and by the International Covenant on Civil and Political Rights, article 7¹⁰)
- The prohibition of inhuman and degrading treatment or punishment (Universal Declaration of Human Rights, article 5;¹¹ the International Covenant on Civil and Political Rights, article 7;¹² and the Convention Against Torture,¹³ among others.)
- The right to freedom from arbitrary detention (International Covenant on Civil and Political Rights, article 9¹⁴)
- The right to freedom of movement (International Covenant on Civil and Political Rights, article 12¹⁵)
- Proportionality in sentencing. Classically, proportionality has been taken to mean that the harm caused by the punishment must be no greater than the harm that the offender has caused to other people. This principle is not yet included in UN instruments, but it is included in the European Charter of Fundamental Rights, article 49 of which states that '[t]he severity of penalties must not be disproportionate to the criminal offence'.¹⁶

Treatment of drug dependence can be effective in several ways. The aims that it can achieve include reduction or elimination of illicit drug use, reduction of the health damages

6 World Health Organization, 'Declaration on the Promotion of Patients' Rights in Europe', World Health Organization Regional Office for Europe, 1994.

7 UN General Assembly, 'Principles of Medical Ethics' (18 December 1982) UN Doc. No. A/RES/37/194.

8 World Medical Association, 'WMA International Code of Medical Ethics', WMA General Assembly, 2006.

9 UN Office on Drugs and Crime/World Health Organization, 'Principles of Drug Treatment. Discussion Paper', United Nations Office on Drugs and Crime, 2008. This document states '[o]nly in exceptional crisis situations of high risk to self or others, compulsory treatment should be mandated for specific conditions and periods of time as specified by the law', p. 10.

10 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 7.

11 Universal Declaration of Human Rights (10 December 1948) 217 A (III), art. 5.

12 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art. 7.

13 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS vol. 1465, p. 85.

14 Covenant (n 12) art. 9.

15 *ibid.*, art. 12.

16 Charter of Fundamental Rights of the European Union (18 December 2000) Official Journal of the European Communities C 364/1, art. 49(3).

associated with drug use (e.g. transmission of infectious diseases such as HIV and viral hepatitis, drug-related deaths by overdose and other causes) and reduction of the harms to society, principally in the form of crimes that drug users may commit while under the influence of drugs, in order to buy drugs, or in resolving conflicts in illicit drug markets.

While it is generally accepted that many forms of drug treatment provide these benefits for people who volunteer for treatment,¹⁷ the evidence on the effectiveness of treatment that involves coercion by the state is less well established.¹⁸

Non-problematic drug users

In applying the principles described above, we can first consider non-problematic drug users. Any coercion on them to enter treatment must be unethical. Ordering treatment for people who do not have a treatable condition can only be seen as the use of treatment as a form of punishment. As punishment is a harm on the individual and restricts their liberty, this practice would be forbidden by codes of medical ethics¹⁹ and by the Covenant on Civil and Political Rights.

Dependent drug users

Next we can consider coercion of dependent drug users, who may benefit from treatment, but who are not subject to penal sanctions for crimes other than drug possession. When considering compulsory treatment for this group, we see that it breaches the principle of informed consent. There is also little, if any, evidence to demonstrate that compulsory treatment of this nature is effective in meeting the aims of drug treatment. Indeed, there are studies that have demonstrated the failure of compulsory treatment to meet these aims in various countries, including the USA,²⁰ Sweden,²¹ and the Netherlands,²² as well as unconfirmed reports from China of relapse rates of 98% after compulsory treatment.²³

17 A Thomas McLellan and John Marsden, *Contemporary drug abuse treatment: A review of the evidence base*, United Nations Office on Drugs and Crime, 2003.; Alex Stevens, Christopher. Hallam and Mike Trace, *Treatment for Dependent Drug Use: A Guide For Policymakers*, Beckley Foundation, 2006.

18 Stevens, *et al* (n2).

19 Principle 5 of the UN Principles of Medical Ethics state that '[i]t is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria'. (n 7).

20 Inciardi (n 2).

21 Wolfgang Heckmann, 'Schwedische Gardinen': Zur Tradition der Zwangsbehandlung Suchtkranker und -gefährdeter in Schweden', 43 *Sucht Zeitschrift für Wissenschaft und Praxis*.

22 Hedda van 't Land and others, *Opgevangen onder dwang procesevaluatie strafrechtelijke opvang verslaafden*, Trimbos Institute, 2005.

23 It should be noted that the Dutch system of 'Strafrechtelijke Opvang Verslaafden' is a system of compulsory placement in a treatment institution, rather than compulsory treatment itself. The difference is that the sentenced persons may choose not to participate in treatment while they are in the institution. The results of the evaluation of SOV showed that it produced results that were no better than less coercive forms of treatment, and was ineffective for those who felt compelled and therefore did not participate in treatment .

When we consider quasi-compulsory treatment for this group of dependent drug users, we see that legal systems may provide for penal coercion of people possessing drugs. The availability of such sanctions may offer the opportunity to give people who are caught in possession of drugs a quasi-compulsory choice between treatment and a penal sanction. However, limitations also apply in such cases, particularly in relation to the proportionality of sentencing for drug possession.

There are two ethical limits to the severity of penal sanctions: (1) they should be no more severe than is justified by the harm caused by the offence, and (2) they should be no more severe than is necessary to achieve their intended purpose. In the case of the offence of drug possession, any harm that is caused is primarily harm to the individual in possession, so it is disproportionate to impose a harmful penal sanction on him or her.

In the case of drug law offences, the purpose of sentencing is laid out by the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, which states that the aim of drug law punishments should be ‘the eradication of illicit traffic.’²⁴ There is no convincing evidence to suggest that severe penalties for drug possessors (e.g. imprisonment, which is the most severe form of punishment that is internationally considered to be compatible with human rights²⁵) have any more effect on the scale of illicit traffic than do lighter (or even no) sanctions.²⁶ Therefore, it is difficult to justify penal sanctions for simple drug possession that are of more than minimal severity. Furthermore, it would be unethical to use the threat of penal sanction to encourage people who use drugs into treatment if the treatment is more restrictive of their liberty than would be the usual punishment for their offence.²⁷ It would therefore be possible to give dependent drug users a choice between a penal sanction for drug possession and a form of treatment, but such treatment would have to be only minimally restrictive of their liberty. The offence of drug possession would not justify, for example, compulsory placement in a residential institution (which is as restrictive of liberty as the severe punishment of imprisonment).

Drug dependent offenders

Turning now to the final category of drug user, the drug dependent offender, we find that compulsory treatment is also unethical in this case, for the same reason (stated above) as it is

²⁴ UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627, preamble.

²⁵ UN General Assembly, ‘Moratorium on the use of the death penalty’ (1 November 2007) UN Doc. No. A/C.3/62/L.29.

²⁶ Thomas Babor and others, *Drug Policy and the Public Good*, Oxford University Press, 2010.; Robert J. MacCoun and Peter Reuter, ‘Assessing Drug Prohibition and Its Alternatives: A Guide for Agnostics’ 7 *Annual Review of Law and Social Science* 61.; Alex Stevens, *Drugs, Crime and Public Health: The Political Economy of Drug Policy*, Routledge, 2011.

²⁷ Porter, *et al* (n 3).; Gostin (n 3).

unethical for any other dependent drug user.

The possibility of quasi-compulsory treatment is more likely to be ethical for drug dependent offenders who have committed more serious crimes than drug possession. This is because they may be facing penal sanctions for offences that cause direct harm to others, and so may be justifiably longer, in accordance with the principle of proportionality.

For example, in many countries we find that many people who are dependent on drugs also commit repeated crimes of acquisition (e.g. theft, burglary and fraud) as well as drug dealing. These offences carry longer sentences than simple drug possession, and so make it possible to offer a quasi-compulsory choice to enter treatment that is less restrictive of liberty than would be the usual penal sanction. But, as stated by previous reviews in this field,²⁸ this would still be subject to certain ethical conditions, including:

- That the person is offered the choice not to enter treatment (without being punished for taking this choice by facing a more severe penalty than he or she would otherwise have received).
- That the person is offered a choice between forms of treatment that are adequate and humane, according to his or her individual needs and wishes.
- That the constraint on the person is subject to due process (e.g. the right to know what he or she is accused of, and the right to challenge any such accusations).
- That the person is not punished for failing in treatment. Relapse is frequent among dependent drug users and is, indeed, one of the diagnostic indicators of dependence. It should not be used as a reason for punishment, although it may be the occasion to rescind the opportunity to enter treatment and implement the alternative penalty.
- That the treatment takes place in a setting that is the least restrictive of liberty that is necessary for the objectives of treatment (*not* for the objectives of punishment).
- That the period of any judicial order to remain in treatment is limited, subject to review and of no longer duration than the usual punishment for the offence.

Effectiveness of quasi-compulsory treatment

Given that all these conditions are met and are applied only to drug dependent offenders, then we can judge this form of quasi-compulsory treatment (QCT) to be ethical and can turn to the issue of effectiveness. Two arguments are often put forward on this issue.

²⁸ Hall (n 3); Porter, *et al* (n 3); Gostin (n 3).

One is that people who use drugs who face any form of legal coercion will be unmotivated to change, and are therefore unlikely to succeed in treatment. The second is that coercion can supplement initial motivation by keeping people in treatment for longer periods, and therefore increase the chances of the treatment succeeding.

On balance, the available research supports neither of these arguments. Rather it suggests that QCT can be as effective as treatment that is entered voluntarily, but is not generally more or less effective than such voluntary treatment. This general finding is suggested by research on drug courts in the USA, on drug treatment and testing orders in the United Kingdom and by systems of quasi-compulsory treatment in other European countries.²⁹

One reason why QCT seems to have similarly positive results to voluntary treatment is because, when ethically carried out, it is not necessarily damaging to the patient's motivation to change. Many drug dependent offenders want the opportunity to change their lives and to stop harming themselves and others. In our study of QCT in Europe, we found similar levels of motivation to change among legally coerced and voluntary patients.³⁰ These patients entered a variety of treatments, including residential abstinence-based treatment, out-patient abstinent and opiate substitution treatment. The level of legal pressure experienced by these patients was not a significant predictor of the length of retention in treatment.³¹ QCT and voluntary patients achieved, on average, similar reductions in drug use and offending (when controlling for higher levels at entry among the QCT group).³²

While the evidence on QCT is encouraging, it is necessary to note some reservations. QCT (and any form of drug treatment) is unlikely to have large effects on population levels of drug use and crime. This is because the group of drug dependent offenders who enter the criminal justice system is likely to remain a very small proportion of the overall group of drug users and offenders.³³ QCT is also unlikely to have much effect in reducing the prison population, unless it is specifically targeted at people who would otherwise be sent to prison. In many cases, even when this is the stated aim of introducing QCT, the phenomenon of 'net-widening'³⁴ occurs, and the QCT sentences replace less severe sentences, rather than

29 Belenko (n 2); GAO (n 2); Schaub, *et al* 2010 (n 2); Marianne van Ooyen-Houben, 'Quasi-compulsory treatment in the Netherlands: promising theory, problems in practice' in Alex Stevens (ed), *Crossing Frontiers: International Developments in the Treatment of Drug Dependence*, Pavilion Publishing, 2008.; Shelli B. Rossman and others, 'The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts', Urban Institute, 2011.

30 Stevens, *et al* 2006 (n 4).

31 Schaub, *et al* 2011 (n 4).

32 Schaub, *et al* 2010 (n 3)

33 Peter Reuter and Harold Pollack, 'How Much Can Treatment Reduce National Drug Problems?', 101 *Addiction* 341.; Peter Reuter and Alex Stevens, 'Assessing UK Drug Policy from a Crime Control Perspective', 8 *Criminology and Criminal Justice* 461.

34 Stanley Cohen, *Visions of Social Control*, Polity Press, 1985.

prison sentences. This has occurred in the UK and the USA in the past decade.³⁵

Finally, it should also be noted that the general level of methodological quality of studies on QCT is still less than is necessary to provide definitive meta-analysis of effects. More randomised experiments and detailed qualitative studies on the mechanisms and outcomes of QCT are needed.

Conclusion

This article has argued that it is very unlikely that compulsory treatment can be considered ethical for any category of person who uses drugs, outside of the ‘exceptional, crisis’ situations allowed for under the UN Office on Drugs and Crime/World Health Organization review.³⁶

It has been argued that quasi-compulsory treatment may be considered ethical (under some specific conditions) for drug dependent offenders who have committed criminal offences for whom the usual penal sanction would be more restrictive of liberty than the forms of treatment that they are offered as a constrained, quasi-compulsory choice. It has briefly reviewed research that suggests that QCT may be as effective as treatment that is entered into voluntarily. This may help individuals to reduce their drug use and offending and to improve their health, but it is unlikely to have large effects on population levels of drug use and crime.

Acknowledgements

This article was originally prepared for an EU-China Human Rights Seminar in Beijing, September 2011. It draws heavily from work undertaken for the QCT Europe project, and I thank my partners in that project and its funder, the European Commission.

³⁵ Stevens (n 26); Alex Stevens, ‘Alternatives to what? Drug treatment alternatives as a response to prison expansion and overcrowding’, Annual Conference of the International Society for the Study of Drug Policy, Lisbon, 2008.

³⁶ UNODC/WHO (n 9).

ORIGINAL ARTICLE

Plants, Psychoactive Substances and the International Narcotics Control Board: The Control of Nature and the Nature of Control

Kenneth W. Tupper, PhD* & Beatriz Caiuby Labate, PhD**

ABSTRACT

This article reviews and critiques the International Narcotic Control Board's (INCB) 2010 Annual Report's recommendation about plant materials containing psychoactive substances. It first provides an overview of the United Nations drug control system, then contextualises the INCB's role in the UN system. Through a reading of the text of the INCB's 2010 Report and references to contemporary practices of ayahuasca drinking based in fieldwork, the article shows how this Report fits into the international paradigm of the war on drugs and its conflicts with human rights. It is argued that the Board's recommendation demonstrates an unwarranted attempt to extend the scope of its powers, conflates and thus misrepresents widely diverse plant materials and their effects, fails to distinguish between 'use' and 'abuse' of psychoactive substances and appears to assume that particular elements of culture—specifically, traditions involving psychoactive substance use—are, or should be, static, eternally frozen in time and place.

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The use of psychoactive plants or fungi to alter consciousness is probably a nearly universal human cultural activity.¹ Ethological evidence of the consumption of psychoactive plants among a variety of animal species,² as well as archaeological evidence of early human substance use,³ suggests that the roots of such practices are a longstanding part of the cultural history of humanity and cannot be reduced to some degenerate or delinquent modern phenomenon.⁴ Among the varied reasons that humans have collected, cultivated, prepared, exchanged and consumed psychoactive plants and derived materials, religious or spiritual uses are at least as old and important as explicitly medical or other therapeutic uses.⁵ Furthermore, for centuries, such spiritual uses of psychoactive plants have typically been regulated by cultural and informal means of control, not by criminal law.

However, in the 20th century, an international consensus emerged to limit the consumption of certain objectionable psychoactive substances exclusively to medical or scientific uses, and to use criminal law to punish all other types of use. This consensus was achieved as part of a broader set of trends in modern global economics and politics in the 19th and 20th centuries, including the consolidation of the nation-state geopolitical system, the economic dominance of Euro-American industrial capitalism, the rise of professionalisation of medicine and policing and the epistemic hegemony of science as the sole source of authorised knowledge. In the realm of drug policy, these trends culminated in the establishment of the modern drug control regime, whose foundations are three treaties negotiated under the auspices of the United Nations,⁶ which consolidated, superseded and built upon a series of international drug control instruments from earlier in the 20th century.

The International Narcotics Control Board (INCB) was established under the terms of the 1961 Single Convention on Narcotic Drugs from an amalgamation of earlier administrative organs of international drug control into a unified supra-national regulatory body.⁷ Its role was to monitor the implementation of the treaty, and ensure that controlled substances were used only for medical or scientific purposes.⁸ The Board was later given mandates and

1 Andrew Weil, *The Natural Mind: A New Way of Looking at Drugs and the Higher Consciousness*, Houghton Mifflin, 1972.; see also, Russil Durrant and Jo Thakker, *Substance Use and Abuse: Cultural and Historical Perspectives*, Sage Publications, 2003.

2 Ronald K. Siegel, *Intoxication: The Universal Drive for Mind-altering Substances*, 2nd edn, Park Street Press, 2005.

3 Mark D. Merlin, 'Archaeological evidence for the tradition of psychoactive plant use in the old world', *Economic Botany*, vol. 57, no. 3, 2003, pp. 295–323.

4 Antonio Escohotado, *A Brief History of Drugs: From the Stone Age to the Stoned Age*, trans. K.A. Symington, Park Street Press, 1999.; Roger J. Sullivan and Edward H. Hagen, 'Psychotropic Substance-seeking: Evolutionary Pathology or Adaptation?' *Addiction*, vol. 97, no. 4, 2002, pp. 389–400.

5 Huston Smith, *Cleansing the Doors of Perception: The Religious Significance of Entheogenic Plants and Chemicals*, Tarcher-Putnam, 2000.; Michael J. Winkelman, *Shamanism: A Biopsychosocial Paradigm of Consciousness and Healing*, 2nd edn, Praeger, 2010.

6 Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515. [hereinafter '1961 Single Convention']; 1971 Convention on Psychotropic Substances (21 February 1971) UNTS vol. 1019 no. 14956. [hereinafter '1971 Convention']; UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627. [hereinafter '1988 Convention'].

7 William B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History*, Routledge, 2000.

8 1961 Single Convention (n 6) art. 9.

expanded monitoring functions under the drug conventions of 1971⁹ and 1988.¹⁰ Currently, the INCB is the *de facto*, although not uncontested, arbiter of legitimacy for policies and practices governing production, distribution and use of many psychoactive substances in the modern geopolitical context.¹¹

In its 2010 Annual Report, the INCB put forward a recommendation ‘that governments should consider controlling [psychoactive] plant material at the national level’.¹² In this article, we review and submit a critique of the INCB’s recommendation about plant materials containing psychoactive substances, contending that both its scope and nature are politically and philosophically problematic. As we will show, the Board’s recommendation demonstrates an unwarranted attempt to extend the scope of its powers, conflates and thus misrepresents widely diverse plant materials and their effects, fails to distinguish between ‘use’ and ‘abuse’ of psychoactive substances and appears to assume that cultural traditions involving substance use are—or ought to be—static, eternally frozen in time and place. Some of these considerations relate to the INCB’s statements in its 2010 Annual Report, while others are broader indictments of the ‘drug war’ paradigm that characterises the international drug control regime and the legal systems of many states.

For illustrative purposes, we will expand on these criticisms by considering the implications the INCB’s recommendation may have, in particular, for contemporary practices of ayahuasca drinking. Ayahuasca is a psychoactive brew generally made from two plants native to the Amazon, *Banisteriopsis caapi* (containing harmala alkaloids) and *Psychotria viridis* (containing dimethyltryptamine, or DMT). The consumption of this brew has been part of several Amazonian traditional indigenous, *mestizo* and urban cultural practices well established in South America.¹³ Ayahuasca is a notable example of how a traditionally-used plant substance has been dynamically adapted and reinvented in the modern world, as some of these traditions have been expanding globally since the late 20th century.¹⁴ Taking into account diverse contemporary transnational ayahuasca drinking practices, we will illustrate the shortcomings of the INCB’s recommendation with respect to this evolving set of traditions, and analyse the Board’s implicit underlying concept of culture.

9 1971 Convention (n 6) arts. 16, 18, 19,

10 1988 Convention (n 6) arts. 22, 23.

11 Damon Barrett, ‘Unique in International Relations? A comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies’, International Harm Reduction Association, 2008.; Joanne Csete and Daniel Wolfe, ‘Closed to Reason: The International Narcotics Control Board and HIV/AIDS’, Canadian HIV/AIDS Legal Network & Open Society Institute, 2007.

12 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2010* (January 2011) UN Doc. No. E/INCB/2010/1, para. 287.

13 Beatriz C. Labate and Wladimir S. Araújo, *O uso ritual da ayahuasca* [The ritual use of ayahuasca], 2nd ed., Mercado de Letras, 2004.

14 Beatriz C. Labate, *Ayahuasca Mamancuna merci beaucoup: Diversificação e internacionalização do vegetalismo ayahuasqueiro Peruano* (Ayahuasca Mamancuna merci beaucoup: Diversification and internationalization of Peruvian ayahuasca vegetalismo) [Unpublished doctoral dissertation], Universidade Estadual de Campinas, Campinas, Brazil, 2011.; Beatriz C. Labate and Henrik Jungaberle, eds., *The Internationalization of Ayahuasca*, Lit Verlag, Zurich, Switzerland, 2011.; Kenneth W. Tupper, ‘The globalization of ayahuasca: Harm reduction or benefit maximization?’, *International Journal of Drug Policy*, vol. 19, no. 4, 2008, pp. 297–303.

The international drug control regime includes several specialised bodies that are part of the United Nations, such as the Commission on Narcotic Drugs (CND), the UN Office on Drugs and Crime and the International Narcotics Control Board, as well as adjunct agencies such as the World Health Organization (WHO), which provides advice to the CND through its Expert Committee on Drug Dependence. Unlike its predecessor in the earlier part of the 20th century, the League of Nations, the UN did not make drug control a defining part of its mission. Rather, drug control within the UN system is technically subordinate to other higher order principles, such as the promotion of human rights, and only one of several mandates of the Economic and Social Council (ECOSOC).¹⁵

The INCB was created to combine the oversight responsibilities of two earlier drug control bodies, the Permanent Central Opium Board and Drug Supervisory Body, which had monitored compliance with earlier international drug control instruments that (as its name indicates) the 1961 ‘Single’ Convention was designed to amalgamate and replace.¹⁶ As such, the INCB became the ‘independent and quasi-judicial monitoring body’ for the UN’s international drug control system.¹⁷ The Board is made up of thirteen members who are responsible for monitoring compliance with the three UN narcotics control conventions. As part of its monitoring and reporting duties, the INCB issues an annual report that provides information about drug trends and makes recommendations to member states on treaty compliance.

The INCB’s functions are to ensure that adequate legitimate supplies of ‘narcotic drugs’ and ‘psychotropic substances’ (the terms used in the treaties) are available for medical and scientific uses, that the diversion of drugs from licit sources to illicit markets is prevented and that governments are complying with their drug control obligations under the treaties.¹⁸ The INCB’s annual report provides a survey of the current global drug control situation, with detailed data estimates and analyses of production, trade and consumption of controlled substances, and also ‘tries to identify and predict dangerous trends and suggests necessary measures to be taken.’¹⁹ The Board’s recommendations, while not binding, are strong signals to governments, and may be an incentive or justification for particular drug control actions. For this reason, the INCB recommendation to governments regarding certain unscheduled psychoactive plants or derivatives raises troubling questions about the scope of the INCB’s powers, and especially its influence on how states attempt to balance

¹⁵ Barrett (n 11) p. 29.

¹⁶ Adolf Lande, ‘The Single Convention on Narcotic Drugs, 1961’, *International Organization*, vol. 16, no. 4, 1962, pp. 776–797; see, in particular, pp. 792–3.

¹⁷ International Narcotics Control Board, ‘Mandate and functions’, available at <http://www.incb.org/incb/mandate.html> (date of last access 20 October 2011).

¹⁸ *ibid.*

¹⁹ *ibid.*

competing imperatives of drug control, crime reduction, public health and human rights.

In order to understand the contemporary international drug control system, it is useful to look at the scheduling of plants and substances in the 1961 Single Convention, which set the basis for future international conventions and defined the roles of institutional drug control bodies such as the INCB and the CND, as well as the advisory responsibilities of the WHO. From a scientific perspective, the 1961 Single Convention exhibits an incoherent and inconsistent attitude towards psychoactive plants by conflating and thus misrepresenting widely diverse plant materials, preparations, derivatives, and their effects. For example, it demands that governments restrict three specifically objectionable plants—the opium poppy (*Papaver somniferum*), the coca bush (*Erythroxylum coca*), and the cannabis plant (*Cannabis* sp.)—and thereby, at least in theory, limit their non-industrial cultivation and uses exclusively to medical or scientific purposes.²⁰ However, despite the significant pharmacological distinctions, differing risk profiles and different contexts of use among these various ‘narcotic drugs’, the international drug control system lumps together cannabis, opium poppy straw and heroin, and coca leaf and crack cocaine, all within the same schedule—Schedule I—and obliges governments to treat them similarly.²¹ In its 2010 Annual Report, the INCB continues this institutional tradition of associating pharmacologically disparate substances by representing a broad set of them in a homogenising characterisation—in this case, ‘plant materials containing psychoactive substances’²²—and thereby attempting generically to warrant their recommended ‘control’ (i.e., criminal or administrative sanctions) by individual states regardless of their unique properties, including both potential risks and benefits, and different contexts of use.

Yet despite the status of opium poppy, coca and cannabis as a uniquely tripartite axis of UN-anointed ‘evil’ in the plant kingdom,²³ they are only three of the scores of plants or fungi that peoples around the world have variously exploited to stimulate, sedate, palliate and elate themselves. According to some scholars, numerous other kinds of plants, many much more potent or toxic, have been used for both medical and non-medical purposes probably since pre-historic times.²⁴ However, unlike the three ‘narcotic drug’ plants mentioned above, none of the plants that may be sources for other psychoactive substances listed in the 1971 Convention and the 1988 Convention are explicitly identified as necessitating control.

20 David Bewley-Taylor and Martin Jelsma, ‘Fifty years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation’, Series on Legislative Reform of Drug Policies Nr. 12 Transnational Institute, Amsterdam, March 2011.

21 *ibid.*, p. 13. See also David Nutt, et al., ‘Development of a rational scale to assess the harm of drugs of potential misuse’, *The Lancet*, vol. 369, 2007, pp. 1047–53, for a critique of dominant drug policy classifications based on the UN system of control.

22 International Narcotics Control Board (n 12), p. 46.

23 Rick Lines, “‘Deliver us from evil’? – The Single Convention on Narcotic Drugs, 50 years on”, *International Journal on Human Rights and Drug Policy*, vol. 1, no. 1, 2010, pp. 3–14.

24 Escobedo (n 4); Richard E. Schultes, Albert Hofmann and Christian Rätsch, *Plants of the Gods: Their Sacred, Healing, and Hallucinogenic Powers*, 2nd edn, Healing Arts Press, Rochester, Vermont, 2001.

Rather, only specified psychoactive substances listed in the convention schedules are proscribed. As described in the Official Commentary to the 1971 Convention,

[T]he inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting the active principle....Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostilis* nor *Psilocybe* mushrooms themselves are included in Schedule I, but only their respective active principles, mescaline, DMT and psilocybine (psilocine, psilotsin) (*sic*).²⁵

In other words, the Official Commentary clarifies that it is the chemical constituents of plants or fungi that were intended for control, not the plant substances themselves. As recently as 2001, the INCB aligned itself with this interpretation in a statement it made that year to the Netherlands' Ministry of Public Health regarding the religious use of ayahuasca by a Dutch chapter of the Brazilian-based Santo Daime church. At that time, the INCB communicated that 'preparations (e.g. decoctions) made of these [*B. caapi* and *P. viridis*] plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention'.²⁶

In its 2010 Annual Report, however, the INCB gives governments quite a different signal with respect to plant materials containing psychoactive substances. Although it affirms that plants other than opium poppy, coca bush and cannabis are not explicitly controlled by any of the conventions, the Board identifies a number other plants that contain psychoactive substances, including khat (cathinone and cathine), ayahuasca (DMT), peyote (mescaline), *Psilocybe*, or 'magic' mushrooms (psilocybin and psilocin), ephedra (ephedrine), kratom (mitragynine), iboga (ibogaine), *Datura* species (hyoscyamine and scopolamine), and *Salvia divinorum* (salvinorin A).²⁷ Furthermore, it asserts that, increasingly, 'such plants are often used outside of their original socio-economic context to exploit substance abusers'²⁸ and are 'no longer limited to the regions where the plants grow, or to the communities that have traditionally used the plants'.²⁹ It submits that 'as a result, increased trade, use and

25 *Commentary on the Convention on Psychotropic Substances, done at Vienna on 21 February 1971*, United Nations, New York, UN Doc. No. E/CN.7/589, 1976, p. 387.

26 Herbert Schaepe, 'International control of the preparation "ayahuasca"' [Letter from H. Schaepe, Secretary of the United Nations International Narcotics Control Board to R. Lousberg, Inspectorate for Health Care of the Ministry of Public Health in the Netherlands], Vienna, Austria, 17 January 2001, available at http://www.bialabate.net/wp-content/uploads/2008/08/letter_official_position_incb_regarding_ayahuasca.pdf (date of last access 27 October 2011); See also Beatriz C. Labate and Kevin Feeney, 'Ayahuasca and the process of regulation in Brazil and internationally: Implications and challenges', *International Journal of Drug Policy*, Vol. 23, Issue 2, March 2012, pp. 154–161.

27 International Narcotics Control Board (n 12), para. 285.

28 *ibid.*, para. 286.

29 *ibid.*

abuse of such plant materials have been noted in many countries'.³⁰ These claims, although not backed by any supporting empirical evidence, led the INCB to recommend for the first time 'that governments should consider controlling such plant material at the national level where necessary'.³¹

Yet ayahuasca brews, khat quids, *Datura* seeds and *Salvia divinorum* leaf extracts are all very different kinds of substances. Their psychoactive chemical components, according to the classifications of modern Western medicine, range from diverse hallucinogenic, stimulant and deliriant alkaloids, to a novel consciousness-altering terpenoid potent in microscopic amounts. Furthermore, the health risks and/or benefits of such plant materials, as with other psychoactive substances, have to do not only with the unique pharmacological profile of each material, but also with the personal background of the individual user and the social and cultural context of consumption. For example, an adolescent with a history of mental illness smoking an *Acacia maidenii* extract (containing DMT) at a music festival for hedonic purposes is different from a healthy adult drinking ayahuasca for spiritual exploration in a ceremony conducted by an itinerant skilled *ayahuasquero* (the term used in South America for a person trained in leading indigenous- or *mestizo*-style ayahuasca ceremonies). Yet, following the INCB's recommendation, governmental 'control' (i.e., criminal or administrative sanctions) of non-medical, non-scientific uses of plant materials in many countries can be expected to cast a wide net, oblivious to distinctions between such types of use.

It is important to note that the INCB does not have the political authority (nor is it part of their competence) simply to add plants containing psychoactive substances to the lists of internationally controlled substances. A United Nations-led process to put any of the aforementioned plants under international control would need to be conducted by the Commission on Narcotic Drugs, but only after a WHO Expert Committee on Drug Dependence 'critical review' report were prepared on the issue and forwarded to the CND for its consideration. Under the 1971 Convention, the CND must accept such communication from the WHO on medical and scientific matters as determinative, but the CND may also bear in mind 'economic, social, legal, administrative and other factors it may consider relevant',³² and so reject a recommendation where it thinks fit. This in fact happened recently with dronabinol, or synthetic tetrahydrocannabinol (THC), which the WHO's Expert Committee recommended downgrading to a less restrictive schedule class. However, the CND rejected the WHO's advice, ostensibly on the basis of insufficient

³⁰ *ibid.*

³¹ *ibid.*, para. 287.

³² 1971 Convention (n 6) art. 3(4).

evidence of safety.³³ Regardless, without a CND directive on scheduling particular plants, individual states are expected to make national drug control decisions on plant materials for their own jurisdictions.

It is into this geopolitical terrain of relative political uncertainty about many psychoactive plants that the INCB has tread, proffering its recommendation for governments to consider controlling plant materials containing psychoactive substances. However, the INCB's overture oversteps the Board's mandate in the international drug control system.³⁴ The 2010 Annual Report affirms that plants containing controlled drugs are not under international control,³⁵ so the Board's recommendations on the topic of such uncontrolled materials are unwarranted and beyond the scope of its authority. As a point of comparison, alcohol and tobacco are also dangerous toxic substances derived from plants, typical uses of which pose enormous risks to human health and welfare around the world, but the INCB does not impart recommendations about these substances. Thus, to do so for other plant materials or derivatives not explicitly controlled by the international conventions is an improper attempt by the INCB to exceed its mandated powers.³⁶

Given that the INCB's actions in this context arguably exceed its mandate, and that promoting legitimate medical and scientific uses of controlled substances is a core element of the INCB's *raison d'être*, it should be questioned why the Board does not use its influence in this regard and recommend that governments investigate the medical or other therapeutic potential of plants containing psychoactive substances. Traditional indigenous healing practices suggest that plants such as peyote, ayahuasca, iboga, and 'magic' mushrooms may have valuable medical uses.³⁷ Pioneer clinical research using chemical constituents of some of these psychoactive substances has yielded positive results in treating substance dependence and certain mental illnesses such as anxiety and depression,³⁸ indicating a need for further research. Likewise, the potential of certain plant-based psychotropic substances to elicit powerful mystical-type or spiritual experiences of enduring

33 Danilo Ballotta, Henri Bergeron and Brendan Hughes, 'Cannabis control in Europe' in S. R. Sznitman, B. Olsson & R. Room (eds.) *A Cannabis Reader: Global Issues and Local Experiences*, European Monitoring Centre for Drugs and Drug Addiction, Lisbon, Portugal, 2008, pp. 99–117.

34 Martin Jelsma, 'Mixed thoughts about the INCB's latest report', Transnational Institute, Amsterdam, March 2011, available at <http://www.tni.org/article/mixed-thoughts-about-incbs-latest-report> (date of last access 30 October 2011); See also International Drug Policy Consortium, 'Response to the 2010 Annual Report of the International Narcotics Control Board', International Drug Policy Consortium, London, UK, July 2011, p. 6.

35 International Narcotics Control Board (n 12), para. 284.

36 Jelsma (n 34).

37 Peter Furst, ed., *Flesh of the Gods: The Ritual Use of Hallucinogens*, Praeger, New York, 1972.; Ross Coomber and Nigel South, eds., *Drug Use and Cultural Contexts 'Beyond the West': Tradition, Change and Post-colonialism*, Free Association Books, London, 2004.; See also Schultes, Hoffman & Rátsch (n 24).

38 Charles S. Grob, et al., 'Pilot study of psilocybin treatment for anxiety in patients with advanced-stage cancer', *Archives of General Psychiatry*, vol. 68, no. 1, 2011, pp. 71–78.; Deborah C. Mash, 'Ibogaine therapy for substance abuse disorders' in D.A. Brizer & R. Castaneda (eds.) *Clinical Addiction Psychiatry*, Cambridge University Press, Cambridge, 2010, pp. 50–60.; Franz X. Vollenweider and Michael Kometer, 'The neurobiology of psychedelic drugs: Implications for the treatment of mood disorders', *Nature Reviews Neuroscience*, vol. 11, 2010, pp. 642–651.; Michael J. Winkelman and Thomas B. Roberts, eds., *Psychedelic Medicine: New Evidence for Hallucinogenic Substances as Treatments*, Praeger, Westport, Connecticut, 2007.

significance raises intriguing questions about how biochemical and neural substrates may mediate both spirituality and health.³⁹ Investigating the potential medical and scientific applications of psychedelic substances was once a promising area of academic research, but it was prematurely terminated in the early 1970s due to political concerns about increasing non-medical uses of drugs among young people at the time.⁴⁰ However, research into psychedelic medicine is currently slowly re-emerging as a respectable academic pursuit and is producing empirical results that suggest authorities such as the INCB should take both earlier scientific findings and traditional indigenous knowledge claims more seriously. This point is not intended as an endorsement of the INCB's attempts to exceed its mandate, but rather to point out that it does so only in one particular direction. While the Board shows little compunction in calling for greater controls, it seems expressly to ignore the promise of therapeutic, spiritual or other benefits of psychoactive plants containing controlled substances.

Another questionable aspect of the INCB's 2010 Annual Report is its conflation of the concepts 'use' and 'abuse', terms deployed indiscriminately and apparently interchangeably in reference to plant materials containing psychoactive substances. For example, the report 'notes increased interest in the recreational use of such [psychoactive] plant materials'⁴¹ and that 'increased trade, use and abuse of such plant material have been noted in many countries'.⁴² However, the INCB presents no evidence on the magnitude of the alleged increase of the 'recreational use' or 'abuse' of substances such as ayahuasca. As far as we know, there is no population-level data collected anywhere in the world on the uses of ayahuasca, 'recreational' or otherwise. Furthermore, the assertion that 'the use of such plant material may have adverse effects on the abuser, including nausea, vomiting, drowsiness, poisoning and flashbacks'⁴³ demonstrates *a priori* presumptions that such effects are indeed 'adverse' and that the person who may experience them is, circularly, an 'abuser'. It must be noted that uncomfortable physiological effects like nausea, vomiting and diarrhoea are typical among *all* forms of ayahuasca drinking, and cannot necessarily be construed as signs of 'abuse'. Such effects do not seem to indicate any apparent toxicity, causing

39 Walter N. Pahnke, 'The contribution of the psychology of religion to the therapeutic use of the psychedelic substances' in H. A. Abramson (ed.) *The Use of LSD in Psychotherapy and Alcoholism*, The Bobbs-Merrill Company Inc., Indianapolis, 1967, pp. 629–649.; Rick Doblin, 'Pahnke's "Good Friday experiment": A long-term follow-up and methodological critique', *Journal of Transpersonal Psychology*, vol. 23, 1991, pp. 1–28.; Roland R. Griffiths, et al., 'Psilocybin can occasion mystical-type experiences having substantial and sustained personal meaning and spiritual significance', *Psychopharmacology*, vol. 187, no. 3, 2006, pp. 268–283.; Roland R. Griffiths, et al., 'Psilocybin occasioned mystical-type experiences: immediate and persisting dose-related effects', *Psychopharmacology*, vol. 8, no. 4, December 2011, pp. 649–65.

40 Erika Dyck, 'Flashback: Psychiatric experimentation with LSD in historical perspective', *Canadian Journal of Psychiatry*, vol. 50, no. 7, 2005, pp. 381–388.; Ben Sessa, 'Can psychedelics have a role in psychiatry once again?', *British Journal of Psychiatry*, vol. 186, 2005, pp. 457–458.; See also, Lester Grinspoon and James B. Bakalar, *Psychedelic Drugs Reconsidered*, Basic Books, New York, 1979.

41 International Narcotics Control Board (n 12), para. 286.

42 *ibid.*

43 *ibid.*

neither physical nor psychological harms in healthy people,⁴⁴ and in fact often come to be welcomed by regular drinkers of the brew in different contexts, who may regard them as a form of physical or psychospiritual purging.⁴⁵ None of this, of course, means that cautions do not need to be applied to the ceremonial uses of ayahuasca or other plant materials. Nevertheless, the INCB's tautological and homogenising characterization of such non-medical substance use practices as 'abuse' seems to be a legacy of a particular world view that guided the construction of the international drug conventions, based in an underlying moralism and pharmacological reductionism. Today, such a conceptual frame is of limited use in comprehending and respecting *bona fide* religious practices or equivalently sincere spiritual or self-actualisation pursuits involving psychoactive plants, which engage the fundamental rights of freedom of religion and thought.

Finally, the INCB expresses a concern that 'plants [containing psychoactive substances] are often used outside of their original socio-economic context to exploit substance abusers'.⁴⁶ However, with respect to the transnational expansion of ayahuasca drinking, there are no empirical grounds for the INCB's assertion that people engaging in such practices are often exploited 'substance abusers'. Moreover, this statement also seems indirectly to imply that the expansion of ayahuasca drinking beyond South America is illegitimate, apparently reflecting an assumption that there is only one original fixed and legitimate place of origin for ayahuasca use. This interpretation seems to follow a line of reasoning found in Article 32 of the 1971 Convention, in which states parties were allowed to make reservations for some 'plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites',⁴⁷ or Article 14.2 of the 1988 Convention, which talks about 'historic evidence' of certain uses,⁴⁸ a topic that unfortunately we cannot address in depth here.⁴⁹ However, establishing such an alleged point of origin for the use of ayahuasca is difficult, if not impossible, to do. Ayahuasca drinking has a multiplicity of traditional and historical modalities—ranging from a wide spectrum of Amerindian shamanic and healing

44 Charles S. Grob, et al., 'Human psychopharmacology of hoasca, a plant hallucinogen used in ritual context in Brazil', *The Journal of Nervous and Mental Disease*, vol. 184, no. 2, 1996, pp. 86–94.; Jordi Riba, et al., 'Subjective effects and tolerability of the South American psychoactive beverage Ayahuasca in healthy volunteers', *Psychopharmacology*, vol. 154, February 2001, pp. 85–95.; John H. Halpern, et al., 'Evidence of health and safety in American members of a religion who use a hallucinogenic sacrament', *Medical Science Monitor*, vol. 14, no. 8, 2008, pp. SR15–SR22.

45 Luis E. Luna, *Vegetalismo: Shamanism among the Mestizo Population of the Peruvian Amazon*, Acta Universitatis Stockholmiensis, Stockholm, 1986.; Benny Shanon, *The Antipodes of the Mind: Charting the Phenomenology of the Ayahuasca Experience*, Oxford University Press, 2002.

46 International Narcotics Control Board (n 12) para. 286.

47 1971 Convention (n 6) Article 32.

48 1988 Convention (n 6) Article 14.2.

49 The issue of indigenous peoples' rights to continue the traditional uses of plants has been a perennial concern—and ongoing source of inconsistency—in international drug control efforts, see Bewley-Taylor and Jelsma (n 20) pp. 10–14. Perhaps the most notorious aspect of this debate relates to the practice of coca leaf chewing among Andean and Amazonian peoples, which was explicitly banned by Article 49.1(c) and 49.2(e) of the 1961 Single Convention. This categorical ban against coca contradicts principles of indigenous rights affirmed in the subsequent 1971 Convention and 1988 Convention, and is in direct violation of the 2007 UN Declaration on the Rights of Indigenous Peoples. See Martin Jelsma, 'Lifting the ban on coca chewing: Bolivia's proposal to amend the 1961 Single Convention', Series on Legislative Reform of Drug Policies Nr. 11 Transnational Institute, Amsterdam, March 2011.; James Kirk, 'Coca, cocaine and the rights of indigenous peoples', *Trinity College Law Review*, vol. 10, 2007, pp. 77–97.

practices, to Amazonian *mestizo* therapeutic uses, to different syncretic Christian ayahuasca religions—from several different countries in South America.⁵⁰

The INCB's 2010 Report's recommendation thus opens the troubling possibility of criminalisation of legitimate cultural practices outside their alleged 'original socio-economic context'.⁵¹ This could potentially render, for example, rituals such as those of some Brazilian ayahuasca religions (e.g., the Santo Daime and the União do Vegetal) permissible only in Brazil, or the ceremonies of itinerant Amazonian *ayahuasqueros* practicing outside their homelands as equivalent to drug trafficking. This view displays no openness to the idea that cultural traditions could migrate to different countries, or could transform themselves in new contexts, nor that modern substance use practices exogenous to one's particular ethnic or cultural heritage could be legitimate in their own right. The INCB's assertions about plant materials, in light of the aforementioned articles of the 1971 and 1988 Conventions, seem to express the problematic idea that 'tradition' is associated with a specific geographic place and that only a particular ethnic or social group, or nation contains an 'authentic' culture. Indeed, the drafters of the 1988 Convention seem to have recognized the difficulties of such essentialist views on the dynamics of culture. The Official Commentary on the 1988 Convention notes that during negotiations on the text of Article 14.2, 'the reference to "traditions" was . . . criticized, as traditions could often be subject to change'.⁵² Whether or not the drafters explicitly recognised it, this comment anticipates that future drug control efforts might contribute to the stigmatisation and persecution of certain religious minorities and diaspora communities in a postmodern and transnational world, an outcome incompatible with the principles of the United Nations to uphold basic universal human rights.

The new recommendation of the INCB will certainly not help in accommodating human rights protections for people engaged in these evolving traditions. It is important to remember that in most jurisdictions where ayahuasca drinking has been introduced in the last 20 years and has become a criminal legal matter, such as the Netherlands and the United States, it has typically been hard-fought jurisprudential decisions—not proactive government policies—that have recognised and protected the human rights (i.e., religious freedom) of ayahuasca drinkers.⁵³ In these cases, as well as in Ireland in 2008 and the United Kingdom in 2011, where religious freedom protections for ceremonial ayahuasca drinking had not yet been established, states have pursued criminal prosecution against members

50 Labate and Araújo (n 13); Labate and Jungaberle (n 14).

51 International Narcotics Control Board (n 12), para. 286.

52 *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, United Nations, New York, UN Doc. No. E/CN.7/590, 1998, p. 295.

53 Beatriz C. Labate, 'The paradoxes of ayahuasca expansion: The UDV-DEA agreement and the limits of freedom of religion', *Drugs: Education, Prevention & Policy*, vol. 19, no. 1, 2012, pp. 19–26; Labate and Feeney (n 26); Labate and Jungaberle (n 13).

of religious groups such as the Santo Daime,⁵⁴ who were sincerely following the liturgical and ritual traditions of their faiths. All this has happened despite the fact that the INCB had previously stated that ayahuasca brews were not covered under the 1971 Convention (although it must be noted that INCB rulings on drug control are meant to establish only a minimum standard of compliance, and sovereign governments are always at liberty to be stricter in their drug control efforts).⁵⁵

In conclusion, the 2010 INCB Annual Report's recommendation that governments consider controlling specific psychoactive plant materials at the national level is a manoeuvre that oversteps the INCB's mandate within the UN's drug control system. The Board's approach to plant materials containing psychoactive substances reproduces stereotypes based on unspecified alleged dangers of the use of hallucinogens, and it improperly homogenises different substances. Some of the psychoactive substances the INCB identifies, such as ayahuasca, have been traditionally revered as '*plantas maestras*' (plant teachers),⁵⁶ a conceptualisation that stands in stark contrast to the modern drive to eliminate all non-medical, non-scientific uses of such substances from the world.⁵⁷ Moreover, the Board's discussion illustrates a deeply flawed assumption underlying the logic of modern international drug control—namely, that cultural practices involving psychoactive substance use have an authentic and pure origin, and must remain static, isolated, limited and discrete. Indeed, today's international drug control regime can be characterised as anthropocentric and ethnocentric, a systemic legacy of the Euroamerican patriarchal and colonial attitude that undesirable things in the world, such as exotic psychoactive plants and the cultural beliefs that embrace them, can be subjugated, controlled or simply eradicated. Rather than perpetuating such ideological beliefs and reflexively exhorting governments to expand domestic 'control' (such as criminalisation) of unfamiliar plants used for spiritual, religious and therapeutic purposes, the INCB might better serve its duty to the public interest by promoting empirically grounded research, encouraging further investigation on these practices, and seeking scientific explanations for the value they have been accorded in traditional and contemporary cultural settings.

54 S. Peacock, 'Police quiz two following "sacred" drugs swoop in Dartington', *South Devon Herald Express*, 3 September 2010, available at <http://www.thisissouthdevon.co.uk/news/Police-quiz-following-sacred-drugs-swoop/article-2600610-detail/article.html> (date of last access 5 September 2010); Thomas St. John O'Dea, 'Legal update on the Santo Daime case in Ireland', unpublished document, 2008, available at http://www.bialabate.net/wp-content/uploads/2008/08/O_Dea_Legal_Update_Santo_Daime_Case_-Ireland.pdf (date of last access 26 October 2011).

55 Schaepe (n 26).

56 Luis E. Luna, 'The concept of plants as teachers among four mestizo shamans of Iquitos, northeastern Peru', *Journal of Ethnopharmacology*, vol. 11, no. 2, 1984, pp. 135–56.

57 Kenneth W. Tupper, *Ayahuasca, Entheogenic Education & Public Policy* [unpublished doctoral dissertation], University of British Columbia, Vancouver, BC, April 2011, available at [http://www.kentupper.com/resources/Ayahuasca+Entheogenic+Educ+\\$26+Public+Policy+--+Tupper+2011.pdf](http://www.kentupper.com/resources/Ayahuasca+Entheogenic+Educ+$26+Public+Policy+--+Tupper+2011.pdf) (date of last access 27 October 2011).

ORIGINAL ARTICLE

On the Death Penalty for Drug-Related Crime in China

Yingxi BI*

ABSTRACT

This article analyses the death penalty for drug-related crime in China. It considers the basis upon which China applies the death penalty for drug-related offences, and the debates surrounding the imposition of the death penalty for drug-related offences from the perspective of both penology and human rights. Based on the evidence discerned about China's current situation, the article discusses the possibility of China abolishing the death penalty for drug-related crime in the future.

I. Grounds for Imposing the Death Penalty to Drug Related Offences in China

This section will examine some of the main factors that have led to a large number of individuals charged with drug offenses being subjected to death penalty in China, including the criminal legislation, the criminal justice system and the situation of drug-related crime in China.

Criminal Legislation

The handing down of death sentences is made possible by the stringent criminal legislation which has been put in place to punish drug-related crimes, namely drug trafficking. Offences and sanctions related to drug offences are prescribed under Section Seven of the *Criminal Law of the People's Republic of China*, Article 347 of which states that,

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Whoever smuggles, traffics in, transports or manufactures narcotic drugs, and commits any of the following acts shall be sentenced to fixed-term imprisonment of fifteen years, life imprisonment or death, and concurrently be sentenced to confiscation of property:

- (1) smuggling, trafficking in, transporting or manufacturing opium of not less than 1,000 grams, or heroin or methyl Benzedrine of not less than 50 grams or other narcotic drugs of large quantities;*
- (2) being ringleaders of gangs engaged in smuggling, trafficking in, transporting or manufacturing of narcotic drugs;*
- (3) shielding with arms the smuggling, trafficking in, transporting or manufacturing of narcotic drugs;*
- (4) violently resisting inspection, detention or arrest with serious circumstances; or*
- (5) involved in organized international drug trafficking.¹*

According to the law, ‘persons who smuggle, traffic in, transport or manufacture opium of not less than 1,000 grams, heroin or methylaniline of not less than 50 grams or other narcotic drugs of large quantities’ can be sentenced to death.² Under the legislation, there are two specific elements that make a sentence of death more likely to be imposed for drug offences.

One of the elements of the legislation that prejudices the accused is that it employs a quantitative model when assessing whether the offence reaches the threshold of severity necessary to impose the death penalty. In practice, this means that the purity of the drug is not taken into consideration, but instead that all substances are treated the same regardless of their content or harmfulness. According the law,

The term ‘narcotic drugs’ as used in this Law means opium, heroin, methylaniline (ice), morphine, marijuana, cocaine and other narcotic and psychotropic substances that can make people addicted to their use and are controlled under State regulations.

The quantity of narcotic drugs smuggled, trafficked in, transported, manufactured or illegally possessed shall be calculated on the basis of the verified amount and shall not be converted according to its purity.³

¹ *Criminal Law of People’s Republic of China 1997*, (Adopted at the Second Session of the Fifth National People’s Congress on July 1, 1979; revised at the Fifth Session of the Eighth National People’s Congress on March 14, 1997 and promulgated by Order No.83 of the President of the People’s Republic of China on March 14, 1997), Section 7, art. (347), available online at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm (date of last access 29 January 2012).

² *ibid*, art. 347(1).

³ *ibid*, art. 357.

The second is that for the purposes of sentencing, penalties are calculated cumulatively. According to article 347:

*With respect to persons who have repeatedly smuggled, trafficked in, transported or manufactured narcotic drugs and have not been dealt with, the quantity of narcotic drugs thus involved shall be computed cumulatively.*⁴

This approach increases the possibility of the death penalty being imposed, as a series of minor drug convictions may together meet the quantity threshold necessary for capital punishment.

Further adding to the likelihood of a death sentence being imposed for drug crimes is the enacting of legislation that provides for the possibility of more severe punishment in the case of repeat offences. Article 65 of the *Criminal Law* already prescribes legislation allowing more severe punishment in cases of recidivism.⁵ However, Article 356 applies this concept specifically within the context of drug-related crimes, stating that,

*Any person who was punished for the crime of smuggling, trafficking in, transporting, manufacturing or illegally possessing narcotic drugs commits again any of the crimes mentioned in this Section shall be given a heavier punishment.*⁶

As a consequence of these factors, China's legislative framework creates comparatively high possibility for the imposition of the death penalty in cases of drug-related offenses. China's continuance of the policy is regressive in light of the fact that many countries whose legislation at one time provided for the death penalty for drug-related crimes have subsequently abolished it. In others, the legitimacy of applying the death penalty for drug offences is a topic of hot debate. For instance, in countries such as Viet Nam, Bahrain and Libya, official proposals to abolish death penalty for drug offences have been considered. The high courts of both Singapore and Indonesia have heard legal actions challenging the constitutionality of the death penalty in drug-related cases.⁷ Many other states whose legislation retains the death penalty for drug offences are either observing moratoria, decline to apply death penalty or seldom carry out executions.⁸ For example, in Cuba, 'there have been no reported executions for drug offences' since 2003.⁹ Also for some Asian county, like

4 *ibid*, art. 347.

5 *ibid*, art. 65.

6 *ibid*, art. 356.

7 Patrick Gallahue and Rick Lines, *The Death Penalty for Drug offenses Global Overview 2010*, International Harm Reduction Association, 2010, p. 8.

8 *ibid*, p. 18.

9 *ibid*, p. 39.

Sri Lanka, no judicial executions have been carried out since 1979.¹⁰

Criminal Justice System

In China, the Supreme Court's judicial interpretation plays a major role in guiding the District Court, which is usually the main court involved in the sentencing of drug-related crimes. For example, the Supreme Court has pronounced upon drug-related crimes in *The Seminar on Drug-related Crime for Part of the National Court (2008)*, the *National Court on the Seminar of Drug-related Crime (2000)* and *The Interpretation of the Standards Related to the Trial Issues for Conviction and Sentencing of Drug Cases (2000)*. In doing so, the Supreme Court has called upon the judicial system to adhere to a 'crackdown policy' on drug-related crimes. The Court has conveyed that the District Court should focus on combating the criminal 'kingpins' at the top of the drug trafficking industry. It has approved the sentencing to death of major drug traffickers, recidivists, repeat offenders, habitual offenders and those who were armed or whose offences included violence causing serious harm. All of these documents have paved the way for a system in favour of severe punishments of drug offenders.

In addition, some District Courts have developed their own standards for sentencing drug offenders, based on the local situation regarding drug crime. For example, one of the municipalities issued regulations imposing a sentence of death for the sale of 100 grams of ecstasy.¹¹ In addition, the District Court in the judicial process often functions in a dogmatic manner. For example, the judiciary has leaned towards applying the death penalty in cases in which the quantity of drugs has reached a level that has been determined to attract such a sentence, there are no mitigating circumstances and the defendant has not surrendered to the court. This problem has been further heightened by the fact that within the system, the judiciary has been quick to apply the death sentence to cases involving the smuggling, trafficking, transporting and manufacturing of drugs. For example, recent survey found that 89.5% of the judges among the respondents in a survey supported the imposition of the death penalty, 92.6% of prosecutors were in favor of it, 93.7% of policemen and 94.7% of lawyers.¹²

Since 1 January 2007 it has become mandatory for all death sentences to be reviewed by the Supreme People's Court. Namely, 'all the death penalty cases, which not sentenced by

10 Daniel Johnson D and Franklin Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia*, Oxford University Press, 2009, p. 323.

11 PENG Xuhui, LI Kun, 'On the death penalty application in drug crime cases', *Journal of Central South University of Technology*, Vol. 12, No. 2, April 2006.

12 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告 (Opinion survey report on China's death penalty). 中国台湾: 元照出版公司, 2010.6. p. 85.

the Supreme People's Court, should submit to Supreme People's Court for approval.¹³ This change was made in order to avoid inconsistent applications of the death penalty in various cases. This development is considered a major development towards securing procedural justice in death penalty cases and promoting human rights in China. One Chinese scholar has pointed that, '[A]fter the right reverted to the Supreme Court to approve the death penalty, the number of death penalty in China will be significantly decreased, a decline of at least 20%.¹⁴ It has been reported that Yunnan Province, well known for drug trafficking, had observed a one-third reduction in death sentences following the implementation of the judicial review by the Supreme Court of death penalty cases.¹⁵ However, the degree to which these developments have or will affect the death penalty for drug-related crime in China is difficult to ascertain because for the past four years, no accurate official statistical information on executions has been made available.

Drug-related Crime

Also contributing to the application of severe punishments for drug-related crimes in China, such as the death penalty, are the large number of drug cases, and the increased trend of drug-related crime. Drug-related crime is considered to be a threat not only to Chinese population, but also for the country's development and security. The belief that these threats are increasing has been used as the basis upon which to promote the 'crackdown' policy on drug-related crime. This policy is underpinned by the idea that the harsher the punishment for the crime, the more likely it is to deter individuals from engaging in it.

China also shares borders with two major areas of drug production, the so-called 'Golden Triangle' area in the southwest and Afghanistan. This results in multiple drug-related offenses, in particular smuggling and trafficking. Studies show that the Golden Triangle produces up to 70–80 tons of heroin each year, and that the annual opium production in Afghanistan is more than 3,600 tons, much of which comes into or through China.¹⁶ In addition to heroin, large amounts of methamphetamine are smuggled into China from the Golden Triangle area through the China-Burma border.¹⁷ In addition to smuggling and trafficking, the huge market for illicit drugs in China is also a source of a large number of drug-related offences. The number of people using drugs in China is very large, and in 2004 there were a reported 791,000 drug users in the country. According to the 2009 *Annual*

13 *Organic law of the People's Courts of the People's Republic of China*, Article 13.

14 死刑核准权自2007年1月1日起收归最高人民法院, Available online at http://news.xinhuanet.com/legal/2006-10/31/content_5272293.htm (date of last access 20 December 2011).

15 Johnson and Zimring (n 10) p. 281. For a discussion of the decrease of executions in China, see also Jim Yardley, 'With New Law, China Reports Drop in Executions', *New York Times*, 9 June 2007.

16 PENG and LI (n 11).

17 *ibid.*

Report on Drug Control in China, in 2008 there were 1,126,700 registered drug users, of whom 900,000 were using heroin or other opioids.¹⁸

Data from the country suggest that the number of drug-related crime is increasing dramatically every year. According to the 2011 *Annual Report on Drug Control in China*, in 2010 Chinese authorities investigated 89,000 drug-related crimes, arresting 101,000 suspects. This represents increases of 14.5% and 10.8% respectively over the previous year's figures.¹⁹ It should be noted that these statistics do not reflect an accurate picture of drug-related crimes in China, and that the actual figures are very likely to be higher.

II. Debate on Application of the Death Penalty for Drug-Related Offences

Despite the high rates of drug-related crime in China and the concerns this raises, the death penalty for drug-related crime is not justified. The following section will focus on debates both for and against the death penalty for drug-related offenses.

Retentionist arguments on the death penalty for drug-related offences

Those who support the use of death penalty for drug-related offences generally ground their position in consequentialist justifications.²⁰ This argument contends that drugs kill victims and cause unnecessary social harm that cannot be tolerated. In some communities, drugs are considered as one of the most dangerous threats to society. This is particularly true amongst the Chinese population who, as a result of historical events, view trafficking in drugs as a grave crime. Drug-related crime is seen as heinous, grievous and odious, disrupting traditional values, affecting social stability and consuming a large amount of social wealth. Thus, even though drug-related offences are often non violent crimes that do not result in direct death or severe injure, many still consider it appropriate to use death penalty in response.²¹

In this context, it is important to note that the application of the death penalty for nonviolent offences is not unusual. As compared with other retentionist jurisdictions where the death penalty is not applied for nonviolent crimes, in China there are many nonviolent crimes, separate and apart from those related to drug offences, also attracting the death

18 Available online at http://news.sina.com.cn/c/2009-05-31/100317919437_3.shtml, (date of last access 16 January 2011).

19 Available online at <http://wenku.baidu.com/view/63df90543c1ec5da50e270dd.html>, (date of last access 20 December 2011).

20 Griffith Edwards, et al. 'Drug Trafficking: Time to Abolish the Death Penalty', *International Journal of Mental Health and Addiction*, Vol. 8, No. 4, 616—619.

21 Griffith Edwards, et al. 'Drug Trafficking: Time to Abolish the Death Penalty', *International Journal of Mental Health and Addiction*, Vol. 8, No. 4, p. 617.; 莫关耀. 从死刑的存废谈毒品犯罪死刑的限制. 云南警官学院学报 2007年第一期.

penalty under the criminal law. Under the 1997 Criminal Code, which was in force prior to the abolition of capital punishment for thirteen nonviolent offences in 2011, there were as many as forty-four non violent crimes for which the statutory maximum penalty was death, accounting for 69% of all death penalty offences.²² These include provisions such as Article 170 (counterfeiting) and Article 383 (embezzlement).²³ Given this context, in which the law prescribes harsh punishments for even relatively minor offences, it is easy avoid debate on the abolition of the death penalty for drug offences, given the public perception of the harmfulness of drugs.

Opposition to the use of the death penalty for the punishment of drug-related crimes

Despite above, there are strong arguments in favour of abolishing the death penalty for drug-related crimes. These arguments derive largely from the perspectives of penology and of human rights.

Penology perspective

During the 20th century, many penology and criminology scholars have analysed the death penalty through the lens of both its effectiveness in preventing crime, and the notion of retribution in punishment. Therefore, to determine whether it is reasonable to apply the death penalty for a certain crime, one must determine whether this punishment best meets the demands of retribution and plays an effective role in the prevention and deterrence of future offenses.

In simple terms, the retribution perspective reflects the notion of ‘an eye for an eye’, or that ‘the punishment must fit the crime’, the central idea being that there should be an equivalence between the severity of the punishment and the harmfulness of criminal act. The penalty should adapt to the harm inflicted by the crime, but should not exceed it.²⁴ As stated in 2006 by the Malaysian Prime Minister, the death penalty is the ‘right kind of punishment’ for drug trafficking, as ‘It is a threat to the well-being of our society’.²⁵

From a criminal law perspective, drug-related crime in and of itself is non violent, and does not directly endanger human life or cause injury. Absent any specific violent act associated with the drug offence, drug-related crimes are therefore not on a par with murder, terrorism

22 死刑之争：“民众向左，专家向右”。京师刑事法治网。（2010-11-13），available online <http://www.deathpenalty.cn/criminal/Info/showpage.asp?showhead=S&ProgramID=1740&pkID=28863&keyword=> (date of last access 29 January 2012).

23 *Criminal Law of People's Republic of China* (n 1).

24 莫洪宪，陈金林，‘论毒品犯罪死刑限制适用’法学杂志，2010年第一期

25 ‘Abdullah Defends Death Penalty for Drug Traffickers’, *Bernama—Malaysian National News Agency*, 22 February 2006. Cited in Rick Lines, ‘The Death Penalty for Drug Offences: A Violation of International Human Rights Law’, *International Harm Reduction Association*, 2007, p. 12.

or other acts resulting in death or serious injury. Even within the Chinese *Criminal Law*, drug-related offences are categorised under Chapter VI, which are ‘Crimes of Obstructing the Administration of Public Order’. Also included in this category are the ‘Crimes of Impairing Judicial Activities’, ‘Crimes of Undermining Protection of Environmental Resources’, and six others that are all nonviolent.²⁶ Thus, it would seem that the punishment for drug-related crimes, if it is to reflect the gravity of the act, should be more lenient than that prescribed for crimes of murder or similar acts causing physical injury. To punish drug crimes with the deprivation of life is essentially to undermine the basic balance between crime and punishment. It does not meet the standards of equivalence and rationality.

Secondly, gravity is a necessary, but not sufficient condition for the application of the death penalty. Determinations as to whether to apply the death penalty must consider the purpose of the penalty and analyse the necessity of prevention. Therefore further analysis must be undertaken as to the preventative value of the death penalty. There are numerous arguments why the application of death penalty for drug-related crime in China is not an effective instrument in relation to general or special deterrence. For example, the application of the death penalty to drug-related crime is intended by lawmakers to have the effect of deterring potential offenders from engaging in the drug trade. However, it can be argued that such efforts, if successful, will result in the reduced availability of drugs in the community, with a resulting increase in sale price and related profit margins. This situation, in turn, would create greater financial incentives for people to engage in this activity. Rather than creating a situation of deterrence, it instead creates one of encouragement. As Beccaria stated in the 19th century, ‘[a] proper sentence is a sentence that is just sufficient enough to deter crime.’²⁷ It is only when the penalty for an offence is tailored to meet the needs of prevention that the deterrent effect will be maximised and be consistent with the rationality requirement of the penalty.

In addition, data on drugs offences in China in recent years hardly reveal the type of decline in crime one would expect if the death penalty policy was an effective deterrent. According to the *Annual Report on Drug Control in China* the number of criminal suspects in drug cases was 73,400 in 2008, which increased to 91,000 in 2009 and 101,000 in 2010.²⁸ Chinese authorities investigated 89,000 drug-related crimes in 2010, which represents an increase of 14.5% over the previous year’s figures.²⁹ Imposing death penalty to prevent and curb drug-

26 *Criminal Law of People’s Republic of China* (n 1).

27 Cesare Bonesana, Marchese Beccaria, *Of Crime and Punishments*, translated by Edward D Ingraham, 2nd edn., Philadelphia, 1819, p. 26.

28 *Annual Report on Drug Control in China* (2009, 2010, 2011), available at (in Chinese): <http://wenku.baidu.com/view/63df90543c1ec5da50e270dd.html>; (date of last access 20 April. 2012) <http://www.mps.gov.cn/n16/n983040/n1262289/n1262304/2453894.html>; (date of last access 20 April. 2012) <http://society.people.com.cn/GB/8217/156443/156445/9373888.html>; (date of last access 20 April. 2012)

29 *Annual Report on Drug Control in China*, 2011, Available online at <http://wenku.baidu.com/view/63df90543c1ec5da50e270dd.html>, (date of last access 20 December 2011).

related crime seems, in practice, to be ineffective.

Human rights perspective

There is a strong argument that judicial killings for drug-related crime violate international human rights law.³⁰ Although capital punishment is not absolutely prohibited under international law, its lawful application is limited under to Article 6(2) of the International Covenant on Civil and Political Rights to only ‘the most serious crimes.’³¹ The UN Human Rights Committee has noted in its General Comment on the Right to Life that ‘the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure.’³² There is little evidence to suggest that drug-related offences meet this threshold.

The jurisprudence of the UN Human Rights Committee indicates that only crimes which directly result in death could be considered as ‘most serious’,³³ and, as pointed out by Manfred Nowak in his commentary on the Covenant, ‘[I]n no event was the death penalty to be provided for crimes of property, economic crimes, political crimes or in general for offenses not involving the use of force.’³⁴ The UN High Commissioner for Human Rights noted in a March 2009 statement that, ‘[T]he application of the death penalty to those convicted solely of drug-related offenses raises serious human rights concerns.’³⁵ In his 2010 report to the General Assembly, the UN Special Rapporteur on the Right to Health also affirmed that the death penalty for drug-related offences violates international human rights law.³⁶ The United Nations Office on Drugs and Crime (UNODC) also acknowledged in a 2010 report that, ‘As an entity of the United Nations system, UNODC advocates the abolition of the death penalty and calls upon Member States to follow international standards concerning prohibition of the death penalty for offenses of a drug-related or purely economic nature.’³⁷

30 See, for example, Rick Lines, ‘A “Most Serious Crime”? – The Death Penalty for Drug Offences and International Human Rights Law’, *Amicus Law Journal* (2010) Issue 21, p 21–28.

31 International Covenant on Civil and Political Rights. art. 6 (2), Dec. 16, 1966, 999. U.N.T.S.171.

32 UN Human Rights Committee, ‘General Comment No. 06: The Right to Life (art.6)’ (30 April 1982) Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982, para. 7.

33 UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: Iran’ (29 July 1993) U.N. Doc. No. CCPR/C/79/Add.25, para. 8.

34 Manfred Nowak, *UN Covenant on Civil Political Rights: CCPR Commentary*, N.P. Engel Verlag, Germany, p. 141.

35 Office of the UN High Commissioner for Human Rights, ‘High Commissioner calls for focus on human rights and harm reduction in international drug policy’ (10 March 2009).

36 UN General Assembly, ‘Right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ (6 August 2010) UN Doc. No A/65/255, para. 17.

37 Commission on Narcotic Drugs, ‘Drug control, crime prevention and criminal justice: A human rights perspective. Note by the Executive Director’ (3 March 2010) UN Doc. E/CN.7/2010/CRP.6, para. 26.

III. The Way Forward

*Although drugs kill, I don't believe we need to kill because of drugs...[T]oday I propose that Member States...give serious consideration to whether the imposition of capital punishment for drug-related crimes is a best practice. The recent General Assembly moratorium [on the death penalty] suggests a way forward.*³⁸

Antonio Maria Costa, Executive Director, UNODC

The prospects for abolishing death penalty on drug related crimes in China

According to the 2011 Report from the Secretary-General of United Nations on the 'Question of the death penalty',³⁹ by June 2011, 140 of the 192 Members of the United Nations are believed to have abolished the death penalty or introduced a moratorium either legally or in practice. Among the countries that retain the death penalty, there are thirty-two jurisdictions (this figure includes Taiwan and the Hamas-led government in Gaza) that currently have legislation prescribing capital punishment in drug cases, including five countries considered abolitionist in practice.⁴⁰ At least twelve of the thirty-two jurisdictions are known to have carried out an execution for drug offenses in the past three years, and thirteen retain a mandatory death penalty for certain categories of drug offenses.⁴¹

With this worldwide trend towards the abolition the death penalty, and following the welcome news that China has abolished thirteen capital offences in 2011—nearly one in five of all death penalty offences in China—it would be convenient to argue that it is inevitable that the death penalty will be abolished for drug related crimes. However, this argument is undermined by the reality of the situation in China.

Typically, the abolition of the death penalty requires law reform, and/or changes in state practice. Law reform could include new legislation abolishing or restricting its scope, or the ratification of international instruments that provide for the abolition of the death penalty. Practical changes might include the introduction of a new non-legislative practice limiting the use of the death penalty, such as an announcement of a moratorium on executions even while the death penalty is retained in law. In the case of China, it is not unrealistic to hope for any or all of these achievements, but significant uncertainty exists regarding if or when such changes will take place.

³⁸ Antonio Maria Costa, 'Address to the 51st session of the Commission on Narcotic Drugs' (10 March 2008).

³⁹ Human Rights Council, 'Question of the death penalty: Report of the Secretary-General' (4 July 2011) UN Doc. No. A/HRC/18.20, para. 4.

⁴⁰ Gallahue and Lines (n 7) p. 7.

⁴¹ *ibid.*

First, it is necessary to look at the ratification of international instruments providing for the abolition of the death penalty, namely, the International Covenant on Civil and Political Rights. The government has made a public commitment that it intends ratify the Covenant, and therefore one can reasonably predict that China will become a party to the treaty in future.⁴² Such a move would also be advantageous to the government for other political reasons as well, such as staving off criticism and improving credibility within international human rights structures, particularly as the Chinese government seeks to increase public confidence in its understanding of, and interaction with, human rights issues. However, there are still significant obstacles both in law and practice that China must overcome before it can take this step.

One could argue that there is no country whose legal system is in complete conformity with the Covenant. In fact, among those States that have abolished the death penalty, only seventy-three have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which abolishes executions for all crimes.⁴³ It is hard to believe that a country like China would ratify the instrument easily when dramatic differences between its domestic legal system and the Covenant's provisions exist, include, Article 6(2) on 'most serious crimes', Article 9 on arbitrary arrest and detention and Article 14 on the right to a fair trial. Even with recent reforms, China's criminal legal system is far from being in compliance with the terms of the Covenant, which represents a significant hurdle to ratification.⁴⁴ Even if China were to ratify the Covenant, without the further ratification of Second Optional Protocol the death penalty for drug-related crime could still remain if such offences were interpreted to be 'most serious crimes'.

The recent abolition of the death penalty for thirteen offences may raise hope for the removal of the death penalty for drug-related crimes in the form of a criminal law amendment. The committees that supported abolishing these offences believed them to be non violent, economic-related crimes. In practice, most of them did not attract the death penalty as a sanction, therefore abolishing the death penalty for those offences would not affect social stability and social order.⁴⁵ Drug-related offences were in fact included among the original list of crimes for which it was recommended that capital punishment should

42 For example, statements by President Hu Jintao during his visit to France, 27 January 2004.; Prime Minister Wen Jiabao during a visit to the European Commission, Brussels, 6 May 2004.; Legal Affairs Chief, Luo Gan at the 22nd Congress on the Law of the World held in Beijing, September 2005.

43 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, UN Doc. No. A/RES/44/128.

44 Katie Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges', *Chinese Journal of International Law*, 2007, vol. 6, no. 2, p. 465.

45 全国人大常委会组成人员聚集消减死刑罪名, available online at <http://news.qq.com/a/20100825/002306.htm> (date of last access 24 January 2012).

be eliminated.⁴⁶ However, concerns about drug-related crime coupled with the belief in the deterrent effect of the death penalty resulted in capital punishment being retained for drug crimes, creating a serious question mark over whether this issue will ever be resolved. Unlike the thirteen offences for which the death penalty was eliminated, drug-related crime – in particular drug trafficking – is usually considered not only a severe crime but also a major threat to social stability and social order.

The judiciary also believes it important to ‘crackdown’ on cases involving drugs. For example, the Supreme Court’s 2010 publication, ‘Advice on the implementation of tempering justice with mercy (combining leniency with rigidity) Justice Policy’ stated that drug-related crime requires harsh punishment.⁴⁷ The document calls for the application of severe punishment to those serious crimes that pose great harm to society, and states that crimes which the criminal law provides death or severe punishment for should attract such severe sentences.⁴⁸

Given the current situation in China, it is unlikely the government will announce a moratorium application of death penalty, especially for drug-related offences. As Mou Xinheng, a member of the National People’s Congress Standing Committee, has said,

It is the international trend to abolish death penalty. China, as a developing country, is in the period of social conflict prominent, with intense criminal offence, and some are serious crimes. It is not reality for China to abolish death penalty now, but to reduce the number of death penalty offences is suitable.⁴⁹

During a seminar entitled ‘The strict application of death penalty to drug related crime’, held in China in March 2011, Ma Yukong, vice chairman of Intermediate People’s Court in Kunming, Yunnan province, stated that ‘[I]t is reckless to abolish death penalty for some drug-related crimes. Even though it is the international trend to abolish death penalty, China has to be cautious to take the step now, the reality of China should be considered.’⁵⁰ In addition, findings of ‘Professionals Attitude Towards Death Penalty’ in China shows significant

46 Southern Weekend Newspaper, ‘Interview with Tsinghua University Professor Zhou Guangquan’ (26 August 2010), Translated by the Dui Hua Foundation’s Blog (1 September 2010), available online at <http://www.duihuahrjournal.org/search?updated-min=2010-01-01T00:00:00-08:00&updated-max=2011-01-01T00:00:00-08:00&max-results=28> (date of last accessed 24 January 2012).

47 最高人民法院印发《关于贯彻宽严相济刑事政策的若干意见》的通知, available online at <http://www.chinalaw.gov.cn/article/fkgd/xf/sfwj/201012/20101200330552.shtml> (date of last access 8 January 2012).

48 *ibid.*

49 全国人大常委会组成人员聚集消减死刑罪名, available online at <http://news.qq.com/a/20100825/002306.htm> (date of last access 23 December 2011).

50 毒品犯罪死刑的限制适用. 马豫昆等, available online at <http://www.death-penalty.cn/criminal/Info/showpage.asp?showhead=S&pkID=30247> (date of last access 9 January 2012).

support for death penalty for drug-related offences amongst professional groups.⁵¹ In all, 75.7% of the respondents believed that the death penalty needed to be applied to drug trafficking. By way of comparison, 90.1% supported the application of the death penalty to intentional homicide.⁵²

Support for the death penalty for drug-related offences is found among the general public. In 1995, the Law Institute of Chinese Academy of Social Science and the National Bureau of Statistics of China conducted a public opinion survey in three Chinese provinces on attitudes toward death penalty. The survey found that over 95% of the respondents supported capital punishment.⁵³ A more recent survey conducted by the Research Center for Contemporary China at Peking University found that 57.8% of respondents were favour of death penalty.⁵⁴ Even though these figures suggest a decline in overall support for the death penalty, the support of death penalty for drug offences remains high, with 59.2% of respondents supporting the application of capital punishment for 'drug dealing'.⁵⁵ The survey found that the level of support for the death penalty for drug dealing was just below that for murder and for intentional injury resulting in death.⁵⁶

The widespread public support for capital punishment is one of the main barriers to abolishing the death penalty in China. For example, in response to the question, 'Which group's opinions mainly affect the death penalty system in China?', 62.6% considered public opinion to be a main reason for maintaining the death penalty.⁵⁷ Tian Wenchang, one of the most famous criminal defence lawyers in China, has also noted that the 'death penalty could play a role of balancing the mass emotion. Chinese people are not ready to tolerate murderers not be sentenced to death.'⁵⁸

Restricting the death penalty for drug-related offences

Although it is unlikely that China will abolish the death penalty for drug-related offences in the near future, there are possibilities for the continued restriction of its use in drug cases.

51 The professionals mentioned in the survey include judges, prosecutors, police, officers from legal departments and criminal defence lawyers whose work are related to death penalty cases. See 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告Opinion survey report on China's death penalty). 中国台湾: 元照出版公司 (2010), p. 63.

52 *ibid*, p. 70.

53 Dietrich Oberwittler and Shenghui Qi, 'Public opinion on the Death Penalty in China: Results from a general population survey conducted in three province in 2007/2008', Max Planck Institute for Foreign and International Criminal Law, 2009, p. 4

54 *ibid*, p. 10.

55 For the Chinese version of the survey, 'drug dealing' can be translated as 'drug trafficking' as well, which the author believes to be the more appropriate translation, as trafficking is considered more severe than drug dealing, which usually is used to describe the sale of small quantities by individuals. See 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告Opinion survey report on China's death penalty). 中国台湾: 元照出版公司 (2010), p. 13.

56 Oberwittler and Qi (n 52) p. 13.

57 武汉大学刑事法研究中心与德国马普外国刑法与国际刑法研究所编辑。中国死刑态度调查报告 (n 50) p. 63.

58 *ibid*.

If the trend towards restricting the use of the death penalty is to be continued, as evidenced by the recent removal of thirteen offences from the list of capital crimes, then safeguards for the protection of the rights of those facing the death penalty must be expanded and guaranteed.

As mentioned above, the judiciary often equates the degree of responsibility for a drug-related offence simply with the quantity of drugs seized, rather than the individual's involvement in the broader trafficking structure. In addition, the judicial system is both inclined to support 'crackdown' policies toward drug-related offences, as well as lean towards harsh punishments for drug offenders. This has resulted in an almost uniform application of the death penalty to drug-related offences. Yet this approach sits uneasily with Chinese justice policy, and is inconsistent with international safeguards.

According to Article (61) of the *Criminal Law of the People's Republic of China*, 'When sentencing a criminal, a punishment shall be imposed based on the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law.'⁵⁹ This provision offers scope for restricting the use of capital punishment, as under the law it is not only the social harm that should be considered in sentencing, but also the specific facts, nature and circumstances of the crime. In the case of drug offences, even though the quantity of drugs involved in the crime is one important manifestation of social harm, it should not be the sole basis for sentencing and should not be considered absent an analysis of other potentially mitigating factors.

Another option for limiting the application of the death penalty for drug offences can be found in Article 48 of *Criminal Law*,

*[T]he death penalty shall only be applied to criminals who have committed the most heinous crimes. If the immediate execution of a criminal punishable by death is not deemed necessary, a two-year suspension of execution may be pronounced simultaneously with the imposition of the death sentence.*⁶⁰

Article 48 provides an avenue pursuant to which the individual facing the death penalty may not be executed immediately. In the drug-related cases, this offers an important safeguard as it requires the judge to fully examine the evidence and situation of the offender when making a decision as to sentencing.

⁵⁹ *Criminal Law of the People's Republic of China* (n 1) art. 61.

⁶⁰ *ibid*, art. 48.

In death penalty cases, the strict application of fair trial guarantees is of the utmost importance. Adherence to fair trial rights is required not only by international standards, but also by China's own justice policy and regulations. The United Nations *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* state that, 'Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.'⁶¹ It further states that the death penalty,

*[M]ay only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 [of the Covenant on Civil and Political Rights], including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.*⁶²

Related to these international safeguards, China has adopted a policy of 'less kills, cautious kills', which requires the application of high evidentiary standards and fair trial guarantees in capital cases. The so-called 'less kills' provision applies specifically to reducing executions, while the notion of 'cautious kills' means that the death penalty must be carefully used, that stringent evidentiary standards must be applied and that mistakes must not be made.⁶³

In February 2011, the Supreme People's Court, the Ministry of Public Security, National Security, and the Ministry of Justice together issued further regulations *On Issues of the Review and Determine Evidence of Death Penalty Cases and Provisions of a number of issues on the Exclusion of Illegal Evidence in Criminal Cases*.⁶⁴ Both set stricter standards for death penalty cases. For example, *On Issues of the Review and Determine Evidence of Death Penalty Cases*, the aim of which is '[T]o punish crime while protect[ing] human rights, handling death penalty cases according to law, with fairness, accuracy and discretion', states that '[I]nvestigators, prosecutors, judges should strictly comply with the statutory procedures, a comprehensive, objective collection, review, verification and identification of evidence.'⁶⁵ Thus, in practice, the judicial system should apply fair trial guarantees and follow the rules of evidence provided for in the justice policy and procedures law in China.

61 Economic and Social Council of the United Nations, 'Safeguards guaranteeing protection of the rights of those facing the death penalty' (25 May 1984) res. 1984/50, para. 4.

62 *ibid*, para. 5.

63 袁林, 王力理, '毒品犯罪死刑配置的理性思考', 东岳论丛 (Dong Yue Tribune), Feb 2010, vol. 31, no. 2.

64 最高人民法院、最高人民检察院、公安部、国家安全部、司法部印发《关于办理死刑案件审查判断证据若干问题的规定》和《关于办理刑事案件排除非法证据若干问题的规定》的通知, available online at <http://www.chinalaw.gov.cn/article/fgkd/xfq/sfwj/201103/20110300336106.shtml> (In Chinese, date of last access 12 January 2012).

65 *ibid*.

One issue that emerges from this is the extent to which Supreme Court cases involving the death penalty are open to public scrutiny. It has been argued that review of death sentences by the People's Supreme Court is an important reform that must be introduced in order to avoid unfair judgments and to reduce the number of such sentences. As it stands, however, the procedure is not transparent. Without openness, fairness cannot be guaranteed to the defendant. In cases involving the death penalty, affording the defendant all possible safeguards at every stage of the trial is necessary to ensure that the proceedings are fair.

Finally, according to the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, 'Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.'⁶⁶ However, there is no system in China whereby people who face the death penalty may seek pardon. The legal basis for pardons exists under Articles 67(17) and 80 of the *Constitution of People's Republic of China*.⁶⁷ However, the *Criminal Procedure Law* does not provide regulation or mechanism for the procedure of pardon. Thus, in practice there is no channel for people who face death penalty to actually seek for pardon. Recently, proposals have been made by academic groups to the National People's Congress Standing Committee to amend the *Criminal Procedure Law* to 'add provisions in the draft amendment of the Criminal Procedure law, provide person sentenced to death has right to apply for pardon', in hopes that this will 'set the foundation and space for the further development of the pardon system in China.'⁶⁸

Before China abolishes the death penalty for drug offences, the trial process itself must scrupulously observe the international and domestic standards for the protection of the rights of people facing capital punishment. Proceedings leading to the imposition of death sentences must conform to the highest standards of independence, objectivity and impartiality. Competent defense counsel must be provided at every stage of the process. The gathering and assessment of evidence must meet the highest standards, and all mitigating factors must be taken into account in sentencing. Finally, it is necessary to work towards ensuring that people facing the death penalty are given the opportunity to seek pardons. Working to increase the human rights standards of the judicial system in death penalty cases is an important aspect of progress in restricting and abolishing capital punishment.

66 Economic and Social Council of the United Nations (n 60) para. 7.

67 Constitution of People's Republic of China, art. 67(17), art. 80. Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm (date of last access 20 April 2012)

68 刑事诉讼法应赋予死刑犯申请特赦权, 2011-12-1, 法制网, Available online at http://www.legaldaily.com.cn/index_article/content/2011-12/01/content_3146177.htm (date of last access 10 January 2012).

ORIGINAL ARTICLE

Article 33 of the Convention on the Rights of the Child: The Journey from Drafting History to the Concluding Observations of the Committee on the Rights of the Child

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ABSTRACT

Article 33 of the United Nations Convention on the Rights of the Child (CRC) is an important international legal instrument that obligates States Parties to protect children and youth from involvement with illicit drugs and the drug trade. This article provides an analysis of the drafting history of article 33 to the evolving interpretations of its terms in the Concluding Observations of the Committee on the Rights of the Child. It reveals a clear connection to the right to health as well as a dynamic interpretation of the article by the Committee. To improve the Committee's Concluding Observations moving forward, a General Comment on the article is recommended.

Introduction

Children may become involved with drugs and the drug trade for many reasons and in many different ways. For instance, they may be involved in production, trafficking or sale. They may be using drugs or may have parents with drug dependence problems. In this context, article 33 of the United Nations Convention on the Rights of the Child (CRC) is an important international legal instrument that obligates States Parties to protect children and youth from involvement with illicit drugs and the drug trade.

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Article 33 requires that:

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.¹

It has been more than twenty years since the adoption of the CRC. The following discussion, therefore, provides an analysis of the evolving interpretations of article 33 as understood by the Committee on the Rights of the Child. Under article 43(1) of the CRC, the Committee holds responsibility for ‘examining the progress made by States Parties in achieving the realization of the obligations undertaken in the...Convention’. Therefore, the Committee has a capacity to declare whether a State Party to the CRC has fulfilled its obligations.²

The discussion starts with the drafting of article 33 and proceeds to the recommendations of the Committee on the Rights of the Child, focusing on its Concluding Observations on States Parties’ periodic reports. This process should help in understanding article 33, which represents a current gap in the literature on the Convention.

The drafting history of article 33

The initial Polish draft for a Convention on the Rights of the Child, submitted in 1978, did not include an article on drug use or the drug trade.³ The issue did not appear until a later proposal came from China in 1982 for the addition of the phrase ‘(d) preventing and prohibiting the child from using drugs’ to article 12 of the revised Polish draft.⁴ Article 12 was concerned with infant mortality rate, medical assistance and health care of children, and some health rights of expectant and working mothers.

In 1984 the International Federation of Women in Legal Careers also proposed the inclusion of a new article concerned with ‘sources of serious damage to children’s health other than

¹ Convention on the Rights of the Child (20 November 1989) UNTS 1577, p.3, art. 33.

² The Committee on the Rights of the Child was established to monitor the implementation of the Convention and, later, the two Optional Protocols to the Convention: one on the involvement of children in armed conflict, and one on the sale of children, child prostitution and child pornography. A third has now been adopted on a communications procedure. It is among a group of treaty bodies established by human rights treaties within the United Nations system. For further reading see D. J. Harris, *Cases and Materials on International Law* (7th edition), Sweet and Maxwell, London, 2010, pp. 546–562.

³ Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Part II*, United Nations, 2007, p. 709.

⁴ ‘1982 report of the Working Group to the Commission on Human Rights’, UN Doc. No. E/CN.4/1983/30/Add.1, para. 118. Cited in *ibid*, p. 709.

disease and malnutrition.⁵ These sources included, among others, drugs. The proposal read:

The States Parties to the present Convention undertake: ...

3. To take all necessary scientific, technical, educational, and remedial measures for the national and international combating of drug abuse and, in particular, the use by children of drugs of whatever kind.⁶

Noticeably, none of the proposals submitted to the Working Group up to 1984 dealt with the problem of drug use in isolation. The issue entered into the CRC deliberations very much as a component of health concerns.

In 1985, however, China submitted a proposal for a new article that read: ‘The States Parties to the present Convention shall take measures to prevent and prohibit children from taking drugs.’⁷ This paved the way for a specific article on drugs.

The main breakthrough came in 1986, only three years before the adoption of the CRC by the United Nations General Assembly. The Working Group had before it a proposal for a separate article 18 *bis* on ‘drug abuse’, which was also submitted by China. The proposal read:

1. The States Parties to the Present Convention shall take all appropriate legislative, administrative, social and educational measures to prevent and prohibit a child from taking narcotic drugs as defined in the relevant international conventions. The competent national authorities should investigate cases of drug abuse by a child and timely medical treatment should be provided for the child so that he or she may be assured prompt rehabilitation and healthy growth.

2. The States Parties to the present Convention shall take legislative and administrative measures to prevent and prohibit trafficking in narcotic drugs by a child. The States Parties should, in accordance with their national legislation, apply sanctions, including appropriate criminal punishment, to anyone who uses or incites a child to become involved in various forms of drug trafficking.⁸

5 International Federation of Women in Legal Careers, UN Doc. No. E/CN.4/1984/WG.1/WP.4. Cited in Office of the High Commissioner for Human Rights (n 3) p. 709.

6 *ibid.*, p. 710.

7 ‘1985 report of the Working Group to the Commission on Human Rights’ UN Doc No E/CN.4/1985/64, annex II. Cited in Office of the High Commissioner for Human Rights (n 3) p. 710.

8 ‘1986 report of the Working Group to the Commission on Human Rights’, UN Doc. No. E/CN.4/1986/39, para. 77. Cited in Office of the High Commissioner for Human Rights (n 3) pp. 710–711.

The NGO Ad Hoc Group, set up to contribute to the negotiations, also submitted a proposal, but it was the Chinese version that was brought into consideration.⁹ It is worth mentioning at this stage that the Chinese proposal included a statement not on the *protection* of the child from illicit use of narcotic drugs, as found now in article 33, but on the *prevention* and *prohibition* of the child from taking narcotic drugs.

The Working Group's discussions on the Chinese proposal included, for instance, a requirement from the observer for the Netherlands that some clarifications be made to the term 'narcotic drugs' and whether it included all kinds of drugs.¹⁰ He also suggested that 'in the first sentence for paragraph 1, the phrase "to prevent and prohibit a child from *taking* narcotic drugs" should read: "to protect children from the *abuse* of narcotic and psychotropic substances"' (emphasis added).¹¹ Arguably, this implies that the observer for the Netherlands was of the view that taking illicit drugs was less of a concern than the 'abuse' of those drugs. Today, we might refer to this as the distinction between 'recreational' or 'experimental' and 'problematic' use.

The representative of the German Democratic Republic suggested the addition of the term 'dangerous' after the term 'abuse of', essentially proposing that the article should read 'to protect children from the *abuse of dangerous* narcotic and psychotropic substances' (emphasis added). An inevitable question in this regard would be whether the German representative was suggesting that States be more lenient to the use of non-dangerous narcotic and psychotropic substances, and that the child did not need to be prevented or prohibited from taking them (although which substances might be considered dangerous, and which might not, was not elaborated upon). In this context, the representative of the United States proposed that the article should include reference to alcohol, a suggestion which was not taken up.¹²

During the drafting of the CRC, and for the sake of obtaining a compromise text, sub-Working Groups were established.¹³ In the case of article 33, the small drafting party was constituted by the delegations of China, Canada, the German Democratic Republic, the

9 UN Doc. No. E/CN.4/1986/WG.1/WP.1, p. 31. Cited in Office of the High Commissioner for Human Rights (n 3) p. 710. The NGO Ad Hoc Group was an informal group of NGOs that came together during the drafting of the CRC to unify their efforts for the drafting and adoption of the CRC.

10 '1986 report of the Working Group to the Commission on Human Rights', UN Doc. No. E/CN.4/1986/39, para. 78. Cited in Office of the High Commissioner for Human Rights (n 3) p. 711.

11 *ibid.*

12 *ibid.*, para 81; see also G. Van Bueren, *The International Law on the Rights of the Child*, The Hague, Martinus Nijhoff, 1998, p. 313.

13 As Cohen puts it in her writing about the drafting process of the CRC, 'As the Convention was being drafted and there appeared to be serious disagreements over the text of an article, it was the practice of the Chairman of the Working Group to assign the problem text to a small drafting party... Usually they were successful in hammering out a compromise text and it would be quickly adopted by the Working Group. This was not true during the "second reading," which gave rise to many disputes'. C. Cohen, 'Drafting of the United Nations Convention on the Rights of the Child: Challenges and Achievements', in E. Verhellen (ed.), *Understanding Children's Rights*, Ghent Papers on Children's Rights, University of Ghent, 1996, pp. 343–344.

Netherlands and the United Kingdom. The group came up with the following consolidated text,

States Parties to the Present Convention shall take all appropriate measures, including legislative, social and educational measures, to *protect* children from the illegal use of narcotic and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illegal production and trafficking of such substances.¹⁴ (Emphasis added.)

This version is close to the wording of the current article 33 and, unlike the original Chinese proposal, which focused solely on preventing and prohibiting children from taking narcotic drugs, the new text clearly adopted a protective approach towards children. This was a step towards a broader approach to dealing with the matter.

During the technical review in 1988 and the second reading of the Convention, the revision of article 18 *bis* required the replacement of some words and the deletion of others. For example, the term ‘illegal’ was replaced with ‘illicit’ to reflect the wording of the UN drugs conventions. This led to the adoption of the present article 33.

The proposal and the adoption of article 33 came at a very late stage in the drafting of the CRC, which took ten years to complete. Given that the Convention was adopted in 1989, and the main proposal from China arrived only in 1986, it is likely that the drafters did not spend much time on article 33 as compared with some other provisions.

We may conclude this section with some observations. First, it should be noted that the drafting history of article 33 reveals a close relationship with the right of the child to health. This is represented by the nature of the proposals submitted to the Working Group before the adoption of the final text. The 1986 Chinese proposal also included the suggestion that ‘timely medical treatment should be provided for the child so that he or she may be assured prompt rehabilitation and healthy growth.’¹⁵

Second, as regards the nature of the ‘illicit drugs and psychotropic substances’, the comments made by the observer of the Netherlands and the representative of the United States, as noted above, were significant. The drafting history also reveals that no precise definition was given for ‘illicit drugs and psychotropic substances’, and that reference was

¹⁴ ‘1986 report of the Working Group to the Commission on Human Rights’, UN Doc. No. E/CN.4/1986/39, para. 82. Cited in Office of the High Commissioner for Human Rights (n 3) p. 711.

¹⁵ *ibid*, para 77.

made only to the ‘relevant international treaties’.

Third, it is possible to argue that the discussions and suggestions during the drafting of the article opened the door for broader, more holistic interpretations of the concept of ‘protection’. As noted above, the Netherlands argued for the replacement of both the words ‘prevent’ and ‘prohibit’ with the word ‘protect’. A logical question in this context would be, ‘How did the Committee interpret the concept of protection under article 33?’ The following discussion will focus on the interpretations of the Committee on the Rights of the Child and examines whether the Committee has departed from the understandings that were dominant during the drafting of article 33.

The Committee on the Rights of the Child and article 33

Article 43(1) of the CRC establishes the Committee on the Rights of the Child to supervise and monitor its implementation.¹⁶ The Committee also plays a role in the development of normative guidance and interpretation of the CRC. Its interpretations and recommendations can be found in two types of documents.¹⁷ The first are the documents that the Committee specifically issues for explanation and interpretation, such as ‘General Comments’ or the ‘Report and Recommendations’ that are based on the days of general discussion. Second are the ‘Concluding Observations’ made in response to State Parties’ periodic reports.¹⁸

The Committee has not issued a specific General Comment nor held a general day of discussion on article 33. It has referred to the issue of children and drugs in other General Comments, for example those on adolescent health¹⁹ and on HIV/AIDS,²⁰ again rooting the issue of drugs in a health context. Discussion of those General Comments is available elsewhere.²¹ The present discussion focuses on the Concluding Observations of the Committee, in order to provide analysis of the Committee’s views over time in response to State reports.

16 The first members of the Committee were elected in 1991. They are elected ‘for a term of four years by States Parties in accordance with article 43 of the Convention on the Rights of the Child. Members serve in their personal capacity and may be re-elected if nominated.’

17 The UN General Assembly adopted on 19 December 2011 the Optional Protocol to the Convention on the Rights of the Child on a complaints mechanism for violations of children’s rights. The optional protocol opened for signature on 28 February 2012. The coming into force of the protocol should provide more sources for finding the Committee’s interpretations.

18 D. Weissbrodt, J. C. Hansen and N. H. Nesbitt, ‘The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law’, *Harvard Human Rights Journal*, 2011, vol. 24, p. 147.

19 Committee on the Rights of the Child, ‘General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child’ (1 July 2003) UN Doc. No. CRC/GC/2003/4.

20 Committee on the Rights of the Child, ‘General Comment No. 3: HIV/AIDS and the rights of the child’ (17 March 2003) UN Doc. No. CRC/GC/2003/3.

21 See Damon Barrett and Philip E. Veerman, *A Commentary on the UN Convention on the Rights of the Child - Article 33: Protection from Narcotic Drugs and Psychotropic Substances*, Martinus Nijhoff, 2012.

Special protection rights and article 33

Under article 44 of the Convention, States Parties accept the duty to submit regular reports to the Committee on the steps they have taken to put the Convention into effect, and on the progress in the enjoyment of children's rights in their jurisdictions. The first initial reports were due in September 1992. Prior to this, the Committee adopted guidelines to help States Parties in writing and structuring their reports.²² Governments are recommended to prepare their reports according to these guidelines. The first guidelines recommended that the report should indicate 'factors and difficulties' encountered by the State in the implementation of the Convention, in other words, that the report should be problem-oriented and self-critical.²³

In 2005, when the Committee issued its guidelines on the form and content of periodic reports, article 33 was classified under the heading 'special protection measures', alongside other issues including child labour and economic exploitation.²⁴ The Committee requested that States Parties 'provide relevant information on measures taken to protect...Children in situations of...Drug abuse (art. 33)'.²⁵ However, in its new 2010 guidelines, the Committee puts only the aspects of article 33 dealing with the prevention of the use of children in the illicit production and trafficking of substances under this sub-heading.²⁶ Under this 'cluster' of rights – which includes articles 22, 30, 32-36, 37 (b)-(d), 38, 39 and 40 – the Committee requests States Parties

to provide relevant information on measures taken to protect:

(c) Children in situations of exploitation, including physical and psychological recovery and social reintegration:

(ii) Use of children in the illicit production and trafficking of narcotic drugs and psychotropic substances (art. 33)²⁷

22 The Committee adopted the first general guidelines regarding the form and content of initial reports to be submitted by States parties under article 44, paragraph 1 (a), of the Convention on 15 October 1991. In 1996 the Committee adopted general guidelines regarding the form and contents of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b), of the Convention. These were updated in 2005 and again in 2010.

23 The Committee has been very strict in requiring the States Parties to follow the guidelines. For instance, after the submission of its initial report, the Committee asked the Republic of Tanzania to resubmit a comprehensive revised initial report following the guidelines for the submission of State Party reports. The revised initial report was resubmitted five years after the original report. Committee on the Rights of the Child, 'Concluding Observations: United Republic of Tanzania' (9 July 2001) UN Doc. No. CRC/C/15/Add.156.

24 Committee on the Rights of the Child, 'General guidelines regarding the form and content of periodic reports' (29 November 2005) UN Doc. No. CRC/C/58/Rev.1, p. 8.

25 *ibid.*, para. 38 (C) (ii).

26 Committee on the Rights of the Child, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' (23 November 2010) UN Doc. No. UN/CRC/58/Rev.2, para. 39(c).

27 *ibid.*

Under this sub-heading, half of article 33 has been grouped with the rights of refugee children, the rights of indigenous children, the protection of children from economic and sexual exploitation, and the prevention of the abduction of, the sale of or traffic in children. It is clear, therefore, that the Committee views the use of children in illicit production and trafficking of narcotic drugs and psychotropic substances as a form of exploitation.

The Committee explains that the clustering approach is taken with ‘a view to assisting States parties in the preparation of their reports’.²⁸ Importantly, the Committee also adds that the clustering approach ‘reflects the holistic perspective on children’s rights taken by the Convention: i.e. that they are indivisible and interrelated, and that equal importance should be attached to each and every right recognized therein’.²⁹

For example, the Committee links the rights of children deprived of their liberty with their rights under article 33. Article 37(c) on the deprivation of children of their liberty makes explicit reference to the child’s dignity and reads, ‘Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age’.³⁰ In its Concluding Observations on Cambodia in 2011, the Committee speaks about the inhumane treatment of children in drug rehabilitation centres, where the human dignity of the child has been infringed.

38. The Committee expresses deep concern about allegations that children and adolescent addicted to drugs, children with mental disabilities and children in street situations have been subjected to torture and ill-treatment, including widespread beatings, whippings and administration of electric shock in drug rehabilitation and youth centres where some of them had been forcibly placed.

39. The Committee urges the State party to:

- a) Ensure that children in any form of arbitrary detention, whether in drug treatment and rehabilitation, social rehabilitation or any other type of Government-run centre are released without delay
- b) Ensure prompt investigation into allegations of ill treatment and torture of children in those centers and that perpetrators are brought to justice.³¹

²⁸ Committee on the Rights of the Child, (n 24) para. 3.

²⁹ *ibid.*

³⁰ Convention on the Rights of the Child (n 1) art. 37(c).

³¹ Committee on the Rights of the Child, ‘Concluding Observations: Cambodia’ (20 June 2011) UN Doc. No. CRC/C/KHM/CO/2, para. 39.

The ‘special protection measures’ in this context means that any form of arbitrary detention – whether in drug treatment and rehabilitation, social rehabilitation or other types of government-run centre – should not be allowed. Furthermore, the ‘special protection measures’ also mean that children who are already in arbitrary detention should be ‘released without delay’.³² The ‘special protection measures’ also refuse any infringement to the child’s dignity. Barrett and Veerman point out that this is the Committee on the Rights of the Child’s ‘strongest statement yet on the abuse of children in the name of drug treatment’.³³ Another example for linking the articles under the ‘special protection measures’ can be found in the link between article 33 and the article on the prevention of trafficking in children, as in the Committee’s Concluding Observations on Aruba when it noted its concern ‘that children are vulnerable to trafficking for the purposes of drug trafficking or sexual exploitation, including through tourism.’³⁴

According to the Committee, the concept of ‘special protection’ is broad. It includes for example, that States Parties are expected to provide information ‘including physical and psychological recovery and social reintegration’.³⁵ Provision of specific information requires the State Party to focus on the child’s environment and his or her family, which plays an important role in the child’s life. In its Concluding Observations to the initial report of Nicaragua for instance, the Committee pointed out the importance of strengthening and supporting ‘the vital role of the family and community in order to help eliminate the social conditions leading to such problems as delinquency, crime and drug addiction and to assist the families and communities facing such problems’.³⁶

Article 33 as a basic health and welfare right: the obligation to provide

In the 2010 guidelines for periodic reporting, the first part of article 33 dealing with protection from illicit drug use appears under the heading ‘Disability, basic health and welfare (alongside articles 6, 18 (para. 3), 23, 24, 26, 27 (paras. 1-3) and 33)’, as opposed to special protection measures.³⁷ As such, it has been grouped with the right to life, survival and development; to an adequate standard of living; to benefit from social security and, of course, the right to health and health services (article 24). The guidelines require that

³² *ibid.*

³³ Barrett and Veerman (n 21), para. 27.

³⁴ Committee on the Rights of the Child ‘Concluding Observations: Netherlands and Aruba’ (26 February 2004) UN Doc. No. CRC/C/15/Add.227, para. 56.

³⁵ Committee on the Rights of the Child (n 26) para. 39(c).

³⁶ Committee on the Rights of the Child, ‘Concluding Observations: Nicaragua’ (20 June 1995) UN Doc. No. CRC/C/15/Add.36, para. 39.

³⁷ Committee on the Rights of the Child (n 26) p. 7.

34. States parties should provide relevant and updated information in respect of:

(f) Measures to protect children from substance abuse (art. 33).³⁸

With the partial exclusion of article 6 (the right to life, survival and development), provision is an important feature of this group of articles. This means that the Committee interprets the obligation of the State Party to protect children from the illicit use of narcotic drugs and psychotropic substances as an obligation to *provide* related health and social services. From these observations, one can conclude that the Committee regards provision as a major factor in the protection of children from the illicit use of narcotic drugs.

The Committee has advised States Parties to provide ‘specialized and youth-friendly drug-dependence treatment and harm-reduction services for children and young people’.³⁹ The Committee has also supported educational measures to protect children, noting that ‘it is further recommended that programmes be introduced within the school environment to educate children about the harmful effects of narcotic drugs and psychotropic substances.’⁴⁰ The Committee also speaks about ‘Providing children with accurate and objective information about the harmful consequences of substance abuse’,⁴¹ and ‘Considering children and adolescents affected by the use of drugs and harmful substances, as victims, including by providing them with easily accessible drug abuse treatment and social reintegration.’⁴²

The Committee is clear that such services should be free of charge to make them accessible.

While noting...the increased number of treatment and social reintegration services for children, the Committee...is concerned about the fact that children, who voluntarily seek treatment in drug recovery and reintegration centres, are often asked to pay for treatment causing insurmountable obstacles to children of limited means and denying their access to treatment and reintegration.⁴³

Such services should also be acceptable, with the Committee emphasising ‘community-based drug treatment’ as opposed to closed institutional settings.⁴⁴

38 *ibid.*, paras. 33 and 34(f).

39 Committee on the Rights of the Child, ‘Concluding Observations: Ukraine’ (21 April 2011) UN Doc. No. CRC/C/UKR/CO/3-4, para. 61(a).

40 Committee on the Rights of the Child, ‘Concluding Observations: Mali’ (2 November 1999) UN Doc. No. CRC/C/15/Add.113, para. 34.

41 Committee on the Rights of the Child, ‘Concluding Observations: Mexico’ (2 June 2006) UN Doc. No. CRC/C/MEX/CO/3, para. 67(b).

42 *ibid.*, para. 67(c).

43 Committee on the Rights of the Child, ‘Concluding Observations: Philippines’ (21 September 2005) UN Doc. No. CRC/C/15/Add.259, para. 81.; See also R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 2007, p. 509.

44 ‘Concluding Observations: Cambodia’ (n 34) para. 56(b); see also Committee on the Rights of the Child, ‘Concluding Observations: Nepal’ (21 September 2005) UN Doc. No. CRC/C/15/Add.261, para. 63.; ‘Concluding Observations: Mexico’ (n 41) para. 67(d).

While these examples speak about the provision of a particular form of service, effective protection also requires systematic actions (policy responses). ‘The Committee has urged many countries to take systematic action to protect children from drugs, including developing action plans in cooperation with the United Nations Office of Drugs and Crime (UNODC)...and other international organizations.’⁴⁵ In this context the protection of children from the effects of parental drug use have also been stressed by the Committee.⁴⁶

The obligation to protect

Protection includes various elements which can be discerned from the Concluding Observations of the Committee.

Efforts to prevent children from using drugs should start at an early age. As noted by Hodgkin and Newell, ‘The early identification of drug abuse and early intervention is essential to prevent youth to progress from occasional to dependent or more harmful forms of drug abuse.’⁴⁷ The obligation to prevent initiation of drug use has been recognised in multiple Concluding Observations.⁴⁸

Indeed, the Committee’s recommendations reveal that prevention as a step towards protection is a concept that it has used not only in relation to article 33, but also separately with regard to other articles, such as article 19 (concerned with the freedom of children from all forms of violence): Emphasis on general (primary) and targeted (secondary) prevention must remain paramount at all times in the development and implementation of child protection systems. Preventive measures offer the greatest return in the long term.⁴⁹

The Committee has been less clear on effective forms of prevention, but is consistent that States should protect children at school. This is based on the understanding that sometimes schools represent a place where the early initiation into drug use starts,⁵⁰ on the prominence of school-based drugs education and prevention programmes and on the preventive role of school retention (in terms of initiation into drug use and other issues such as early pregnancies).

45 Hodgkin and Newell (n 43) p. 506.

46 See Committee on the Rights of the Child, ‘General Comment No. 7, Implementing child rights in early childhood’ (20 September 2006) UN Doc. No. CRC/C/GC/7/Rev.1, para. 36(f).; ‘Concluding Observations: Norway’ (21 September 2005) UN Doc. No. CRC/C/15/Add.263, para. 43.

47 Hodgkin and Newell (n 43) p. 505.

48 For example, Committee on the Rights of the Child, ‘Concluding Observations: Papua New Guinea’ (26 February 2004) UN Doc. No. CRC/C/15/ADD.229, para. 62.; ‘Concluding Observations: Nigeria’ (13 April 2005) UN Doc. No. CRC/C/15/Add.257, para. 68.

49 Committee on the Rights of the Child, ‘General Comment No. 13, The right of the child to freedom from all forms of violence’ (18 April 2011) UN Doc. No. CRC/C/GC/13, para. 46.

50 Committee on the Rights of the Child, ‘Concluding Observations: Brazil’ (3 November 2004) UN Doc. No. CRC/C/15/Add.241, para. 66.

In addition, the Committee suggests that State Parties could improve their efforts on the protection of children from using drugs via awareness-raising. States Parties should provide children with accurate and objective information about the harmful consequences of substance abuse.⁵¹ In this context, the Committee could also encourage States Parties to assess the effectiveness of the population-wide awareness campaigns and whether such awareness-raising campaigns should be targeted.

Discussion on the actual substances covered by article 33 will be dealt with later. For now it is sufficient to note that prevention of alcohol and tobacco use has been a consistent feature of the Committee's recommendations. For example, the Committee considers that the early initiation in cigarette and alcohol consumption can, in part, be attributed to the ineffectiveness and weak enforcement of existing legislation prohibiting the sale of cigarettes and alcohol to children. As the Committee has pointed out, it 'is deeply concerned at the very high proportion of and early initiation age of tobacco and alcohol use among children, related in part to the ineffectiveness and weak enforcement of existing legislation prohibiting the sale of cigarettes and alcohol to children'.⁵²

The Committee also takes into account cultural factors and prevailing views in society and the need for community-based awareness-raising. For instance, in its Concluding Observation to the second periodic report of Spain, the Committee noted 'with concern the number of children and adolescents addicted to drugs, in particular synthetic drugs, alcohol and smoking, and the fact that consumption of alcohol and tobacco is socially accepted and not perceived as a risk'.⁵³ Accordingly, the Committee recommended that the State Party 'Enforce existing programmes, such as the National Drug Plan for 2002-2008 and those at Autonomous Community level, with a focus on preventive action and awareness raising on the danger of synthetic drugs, alcohol and tobacco'.⁵⁴

The Committee makes it clear that the State Party should ensure that the preventive law is effective. In its Concluding Observations to Nepal, for example, the Committee stated, 'While noting that the Alcohol Act prohibits the selling of alcohol to children aged 16 years or below, the Committee expresses concern that the Act carries no penalty in case of violation, and that legislation prohibiting the use of alcohol by minors is generally ineffectively implemented'.⁵⁵ It also expressed concern at the absence of specific legislation

51 'Concluding Observations: Ukraine' (n 39) para. 67(b).; See also 'Concluding Observations: Lao People's Democratic Republic' (8 April 2011) UN Doc. No. CRC/C/LAO/CO/2, para. 59.

52 'Concluding Observations: Ukraine' (n 39) para. 60.

53 Committee on the Rights of the Child, 'Concluding Observations: Spain' (13 June 2002) UN Doc. No. CRC/C/15/Add.185, para. 38.

54 *ibid.*, para. 39(a).

55 'Concluding Observations: Nepal' (n 44) para. 83.

prohibiting the 'sale, use and trafficking of controlled substances by children',⁵⁶ urging the State Party 'to ensure effective implementation of all legislation prohibiting alcohol and substance use by children.'⁵⁷ The question in this context should be how would such laws be evaluated for their effectiveness?

The Committee has asked States Parties to make sure that their criminal laws do not impede access to specialised and youth-friendly drug-dependence treatment and harm-reduction services, including that States amend their laws that criminalise children for possession of drugs.⁵⁸ According to the Committee, mere possession of drugs should not lead to the criminalisation of children.⁵⁹ For the Committee, the decriminalisation of children, who are 'drug abusers' is a step towards their protection.⁶⁰

Protection of children from substance use requires the adoption of preventive measures at the home level as well. Parties involved with children's rights should be 'concerned about the harmful effects of alcohol and substance consumption by parents on the physical, emotional and psychological development and well-being of children in the State Party'.⁶¹ In this regard, the Committee points out that the awareness-raising step could be directed at the parents and carers as well as the children. The State Party is expected to ensure 'that parents are educated, through, inter alia, awareness-raising campaigns, on the harmful effects of parents' use of alcohol and controlled substances on the development and well-being of children'.⁶² Barrett and Veerman point out that

[I]nformation on drugs should be 'accurate and objective'...This is not just about prevention, but also young people currently using drugs, or currently in possession of them. The right information about a certain drug or psychotropic substance can prevent a lot of harm. The CRC Committee recently recommended that Finland work with mass media to 'ensure their contribution to healthy lifestyles and consumption patterns by children and adolescents'.(footnotes omitted)⁶³

While the Committee has had fewer occasions to address the drug trade, it is clear that protection also requires the strengthening of existing measures to prevent drugs and other

56 *ibid*, para 84.

57 *ibid*.

58 'Concluding Observations: Ukraine' (n 39) para. 61(a) and (b).

59 *ibid*, para. 61(b).

60 See Committee on the Rights of the Child, 'Concluding Observations: Armenia' (26 February 2004) UN Doc. No. CRC/C/15/Add.225, paras. 62–63.

61 'Concluding Observations: Nepal' (n 44) para. 83.

62 *ibid*, para. 84.

63 Barrett and Veerman (n 21) para. 47.

substances from being produced in the State Party and from entering it.⁶⁴

The holistic approach

The Committee on the Rights of the Child has identified the ‘holistic approach’ as being essential in the implementation of the entire Convention. As noted in its Concluding Observations on Cuba in 1997,

The Committee encourages the State party to pursue the efforts required to ensure a holistic approach to the implementation of the Convention, which reaffirms that the rights of the child are indivisible, interdependent and interrelated and that the rights of the child should be addressed in an integrated manner.⁶⁵

The holistic approach requires that the articles of the Convention are not to be treated individually. This applies equally to article 33. For instance, the holistic approach obligates the State Parties to the CRC to use the support of the media in providing information for children on the dangers of drugs. As pointed out by Van Bueren,

Article 17 provides that States Parties should ensure that children have access to information and material from the mass media aimed at the promotion of the child’s physical and mental health. This is a sufficiently broad provision to incorporate the use of the media for providing information for children on the dangers inherent in substance abuse.⁶⁶

This approach applies to article 33 in its capacity as both a basic health and welfare right and as a special protection right (i.e. both drug use and the drug trade). Indeed, the Committee on the Rights of the Child uses the concept of the holistic approach to protect several categories of children from drug-related harm. For example, street children who are involved with drugs may be addressed under a number of articles of the CRC, such as article 27 and article 33. It is worth noting that a holistic approach towards the problem of street children has also been supported by the Human Rights Council, which urged States

[T]o ensure a holistic child rights ... response to the phenomenon of children working and/or living on the street, within the context of comprehensive

64 ‘Concluding Observations: Mexico’ (n 41) para. 67(a).

65 Committee on the Rights of the Child, ‘Concluding Observations: Cuba’ (18 June 1997) UN Doc. No. CRC/C/15/Add.72, para. 34.

66 Van Bueren (n 12) p. 313.

domestic child protection strategies, with realistic and time-bound targets and sufficient financial and human resources for their implementation, including arrangements for the monitoring and regular review of action taken.⁶⁷

The Committee has made clear the requirement for State Parties to spot and predict the dangers to the lives of street children, including the ways in which drug use can contribute to street involvement (and vice versa),⁶⁸ street children's involvement in the drug trade⁶⁹ and conflict with the law.⁷⁰ In the context of Ukraine, the Committee expressed its concerns.

The Committee is deeply concerned at the high number of children in street situations, which the State party acknowledges as an 'acute' problem...It is seriously concerned at reports of their vulnerability to health-related risks, including in relation to substance and drug abuse, such as HIV/AIDS and police violence. In this respect, the Committee is concerned at the limited availability and accessibility of social services for the protection and social reintegration of children in street situations, including the...information that no full-fledged network of rehabilitation centres for children abusing drugs exists.⁷¹

Obviously, the holistic approach also applies to illicit drug use, production and trafficking among other categories of children as well, and not only street children. Examples include 'children in prison, children left behind by migrating parents'.⁷² The Committee also links article 33 with the rights of former combatant children.⁷³ However, the question remains as to whether other examples could also include children who are not necessarily at risk, but the majority of children who experiment or use drugs recreationally.

The holistic approach aims at effectiveness in the implementation of the Convention. However, one could inquire as to whether the rights of the child included in the Convention are in danger of losing their individuality through the holistic approach. Whatever the article, however, it is clear from the Committee's jurisprudence that all must be read in the context of the general principles of the CRC: best interest of the child, non-discrimination,

67 UN General Assembly, 'Rights of the child: a holistic approach to the protection and promotion of the rights of children working and/or living on the street' (22 March 2011) UN Doc. No. A/HRC/16/L.13/Rev.1, para. 2.

68 Committee on the Rights of the Child, 'Concluding Observations: Afghanistan' (8 April 2011) UN Doc. No. CRC/C/AFG/CO/1, para. 68.; See also 'Concluding Observations: Ukraine' (n 39) para. 60.

69 'Concluding Observations: Afghanistan' (n 68) para. 72.

70 *ibid*, para. 68.

71 'Concluding Observations: Ukraine' (n 39) para. 76.

72 *Ibid*, para 60. See also Committee on the Rights of the Child, 'Concluding Observations: Sweden' (12 June 2009) UN Doc. No. CRC/C/SWE/CO/4, para. 49.

73 Committee on the Rights of the Child, 'Concluding Observations: Sierra Leone' (24 February 2000) UN Doc. No. CRC/C/15/Add.116, paras. 83–84.

the right to be heard and life, survival and development.⁷⁴

The substances covered by article 33

Another important point that was raised during the drafting history was the definition of the substances covered by article 33. Initially, article 33 makes reference to ‘the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties’. The article does not specify or name any particular item. The important treaties in this regard⁷⁵ are the 1961 Single Convention on Narcotic Drugs⁷⁶ and the 1971 Convention on Psychotropic Substances.⁷⁷ One can also add the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁷⁸ and the Framework Convention on Tobacco Control.⁷⁹ In 1998, before the existence of a considerable amount of literature by the Committee on article 33, Van Bueren argued that with regard to the first two conventions, ‘Article 33 of the Convention on the Rights of the Child does not add significantly to these treaty provisions.’⁸⁰ She continues: ‘Substance abuse refers to the misuse of a number of substances, principally tobacco, alcohol, glue and drugs. Of these substances, it is only narcotic drugs and psychotropic substances which are the express subject of a number of global treaties.’⁸¹

In their reading of article 33, Barrett and Veerman explain that the relevant international treaties refer to the subject matter from which the child should be protected. The relevant treaties are the reference point for the substances being referred to and what qualifies as an ‘illicit use’ or ‘illicit production and trafficking’ of those substances.⁸² Barrett and Veerman explain that ‘the CRC as framed permits the inclusion of new “relevant international treaties” as they are adopted or the removal of such treaties as the scope of international drug control may change.’⁸³

However, the Concluding Observations of the Committee on the Rights of the Child reveal that it adopts a dynamic interpretation of article 33, which leads to a broader understanding. Dynamic interpretation aims at expanding the scope of the interpretation and inclusion

74 Committee on the Rights of the Child, ‘General Comment No. 5 General Measures of Implementation of the Convention on the Rights of the Child’ (27 November 2003) UN Doc. No. CRC/GC/2003/5, para. 7.

75 V. Staelens, ‘Participation and Protection of Children against Substance Abuse and Trafficking and Production by Children’, in Ang F. and Others (eds.), *Participation Rights of Children*, Intersentia, Antwerp, 2006, p. 111.

76 Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515.

77 Convention on Psychotropic Substances (21 February 1971) UNTS vol. 1019 no. 14956.

78 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627.

79 Framework Convention on Tobacco Control (Adopted unanimously by the 56th World Health Assembly on 21 May 2003). The final text is contained in World Health Assembly Resolution 56.1.

80 Van Bueren (n 12) p. 313.

81 *ibid.*

82 Barrett and Veerman (n 21) para. 93.

83 *ibid.*, para. 96.

of societal changes.⁸⁴ The practice of the Committee has shown that article 33 is flexible enough to include other kinds of substances as well. The Committee on the Rights of the Child and the application of the CRC by States Parties has proved that other substances, such as alcohol and tobacco, are also included in article 33.⁸⁵ The Committee includes alcohol because it can alter children's State of mind and can also 'be prejudicial to health or can be addictive'.⁸⁶ For instance, in its concluding observations on Nepal's periodic report, the Committee made reference to alcohol.

The Committee recommends that the State party take initiatives to combat drug and alcohol abuse by children, including through public education awareness campaigns and ensure that children who abuse alcohol and/or use drugs and other harmful substances have access to effective structures and procedures for treatment, counselling, recovery and reintegration.⁸⁷

As article 33 refers to 'illicit use', it raises important definitional questions. For example, if in a State the age at which alcohol and tobacco may be legally consumed is 16 years, is the tobacco and alcohol use of 16 and 17 year-olds then 'licit'? This question reflects the subjective and individualistic aspects for the implementation of article 33 by States Parties, which should be governed by the general principles of the Convention.⁸⁸ Barrett and Veerman, however, argue that alcohol is not captured by article 33, stating: 'As noted...the US suggested its inclusion during the drafting process and this was not taken up. This does not mean it could not in future come under article 33. But it requires an international treaty on alcohol which at present does not exist.'⁸⁹

Barrett and Veerman also add that the Committee regularly deals with alcohol in its Concluding Observations in the context of adolescent health,⁹⁰ with the important implication that it may not be 'illicit' as such. But the Committee, in its Concluding Observations to Iceland's third and fourth periodic reports, dealt with alcohol under the heading 'Drug and substance abuse'.⁹¹ Arguably, it is the dynamic interpretation of the Convention that encouraged the Committee to take this step and not the 'relevant international treaties'. In addition, it is probably also worth highlighting the holistic approach, whereby article 33 must be read alongside, for example, article 24 on the right to health.

84 See, for instance, European Court of Human Rights, Information Note on the Case-Law of the Court, August–September 2007, N° 100, Foreword by the Registrar.

85 Staelens (n 75) p. III.

86 Hodgkin and Newell (n 43) p. 503.

87 'Concluding Observations, Nepal' (n 44) para 84.

88 Hodgkin and Newell (n 43), pp. 506–507, 511.

89 Barrett and Veerman (n 21) para. 167.

90 *ibid.*, para 170.

91 Committee on the Rights of the Child, 'Concluding Observations: Iceland' (23 January 2012) UN Doc. No. CRC/C/ISL/CO/3-4, paras. 44–45.

Dynamic interpretation has, arguably, encouraged the Committee to include glue and solvents as well under article 33. For instance, in its Concluding Observations to Philippines second periodic report, the Committee expressed its deep concern ‘at the massive narcotic trade in the Philippines and its adverse effects on children and adolescents. It shares the State party’s concern about the high incidence of drug and substance abuse, including glue and solvent sniffing among street children.’⁹² Finally, it is notable that the Committee has on occasion made reference to drugs that ‘are not recognized by the society as harmful – for example quat consumption in Yemen, alcohol and tobacco in Spain or the use of drugs to control hyperactivity in Finland’.⁹³

Conclusion

It is important to study the drafting history of article 33 and the recommendations of the Committee on the Rights of the Child in order to understand and assess the progress in the interpretation of article 33 during the years that followed the adoption of the CRC and its coming into force.

Initially, the drafting history of article 33 reveals that, before the Chinese proposal on a separate article on ‘drug abuse’, the article had been connected to the right to health. Until 2005, when the Committee issued its guidelines for periodic reporting, the Committee classified the entirety of article 33 as a special protection right. In its 2010 guidelines for States Parties periodic reports, however, the Committee split the article and placed the part of article 33 that is concerned with the protection of children from illicit trafficking in drugs under the heading of ‘Special protection measures’. The concept of special protection is broad, and the Committee adopts it in order to achieve effectiveness in the implementation of the article. The identification of the special measures involved varies from one case to another. The Committee also strengthens the special protection measures through the adoption of the concept of the holistic approach, which means that the articles of the Convention are not to be individually implemented.

As for the first part of article 33, which is concerned with the illicit use of drugs, the Committee now groups that aspect with the rights of disabled children and health and welfare rights. The Committee therefore reconnected half of article 33 again with the right to health, a reminder of the historical ties between the two rights. In this context the Committee requires the State Party to adopt preventive measures and to provide services in

⁹² See ‘Concluding Observations: Philippines’ (n 43) paras. 81–82.

⁹³ Hodgkin and Newell (n 43) p. 504.; See also Committee on the Rights of the Child, ‘Concluding Observations: Yemen’ (21 September 2005) UN Doc. No. CRC/C/15/Add.267, para. 70, where the Committee recommended that the State Party prohibit access to quat by children.

order to obtain effective and broad protection of children from the illicit use of drugs.

On the basis of the dynamic interpretation and the holistic approach to the articles of the Convention, the Concluding Observations also reveal that the Committee is gradually broadening the list of substances that are included in the context of article 33. This includes alcohol, tobacco and solvents, which according to the drafting history of the article were not included. The link that the Committee made between children's drug use and the right to health has probably prompted the Committee to deal with alcohol under adolescents' right to health. However, the dynamic interpretation and the holistic approach have also encouraged the Committee to clearly consider such substances in the context of article 33, alongside article 24.

However, despite some positive aspects in the interpretations and recommendations of the Committee on the Rights of the Child with regard to article 33, more work is needed. In their commentary on article 33, Barrett and Veerman point out a number of criticisms of the work of the Committee on the Rights of the Child.

The Committee on the Rights of the Child has never held a day of general discussion on drugs or drug policies and has not adopted a General Comment on the article (various General Comments do refer to drug use ... but none on drug trafficking). The Committee's Concluding Observations on States parties' initial and periodic reports and the 'constructive dialogues' with the delegations of States parties have been inconsistent on these issues. Some Concluding Observations have been very helpful, some either very general or a simple restatement of article 33. On occasion, the Committee's recommendations have, in our opinion, been problematic.⁹⁴

It is more than twenty years since the Convention on the Rights of the Child came into force, and illicit drugs and substances are seriously affecting children. In this regard, it is high time the Committee issued a General Comment or held a day of general discussion on article 33. A clear advantage would be uniformed quality Concluding Observations from the Committee moving forward.

94 Barrett and Veerman (n 21) para. 4.

CASE SUMMARY

Supreme Court of Canada orders Minister of Health to exempt supervised injection site from criminal prohibition on drug possession

Attorney General v. PHS Community Services Society, 2011 SCC 44 (Supreme Court of Canada)

Sandra Ka Hon Chu*

In a unanimous decision, the Supreme Court of Canada ordered Canada's federal Minister of Health to grant Insite, North America's first supervised injection site, an extended exemption from the criminal prohibition on drug possession in the *Controlled Drugs and Substances Act* (CDSA), thus permitting the health facility to continue to operate. In its September 2011 decision, the Court held that while the CDSA provisions were applicable to Insite as valid exercises of the federal government's criminal law power, the Minister's refusal to extend Insite's CDSA exemption violated the Canadian constitution.¹

In September 2003, the Vancouver Coastal Health Authority, in partnership with PHS Community Services Society, opened Insite in response to epidemic levels of infectious diseases and drug overdoses among people who inject drugs in the Downtown Eastside of Vancouver, British Columbia. Recognising the limitations of abstinence-based approaches in dealing with a street-entrenched open drug scene, Insite was part of a larger strategy to minimise the negative consequences of drug use for communities and individuals by facilitating contact between health workers and people who inject drugs, thereby providing means to reduce those individuals' risk of injecting drug use-related health complications and death and assisting them to access other health and social services.²

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¹ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (Supreme Court of Canada).

² *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 (B.C. Supreme Court).

Section 56 of the *CDSA* permits the federal Minister of Health to issue exemptions from the application of all or any of the provisions of the *CDSA* if the exemption ‘is necessary for a medical or scientific purpose or is otherwise in the public interest.’³ Insite operated under the purview of an exemption from prosecution for possession and trafficking of a controlled substance contrary to Sections 4(1) and 5(1) of the *CDSA*. As a result, clients of Insite could inject drugs within the facility under medical supervision without fear of arrest and prosecution. The exemption was originally granted by the federal Minister of Health in 2003, and was subsequently extended to June 2008.

During its operation, extensive research indicated that Insite was an effective response to the catastrophic spread of infectious diseases such as HIV and hepatitis C virus, and the high rate of deaths from drug overdoses in Vancouver’s Downtown Eastside.⁴ When no further extensions appeared to be forthcoming, two separate actions were commenced before B.C.’s superior trial court, the B.C. Supreme Court, one by PHS and two of its clients, and the other by the Vancouver Area Network of Drug Users (VANDU).

In its action, PHS claimed that Insite is a health care undertaking, authority for the operation of which lies with the province. Therefore, the federal constitutional power to legislate with respect to criminal law cannot interfere with the provincial constitutional power with respect to health care because of the doctrine of inter-jurisdictional immunity.

The B.C. Supreme Court rejected this argument, but accepted PHS’s alternative claim, which was that Sections 4(1) and 5(1) of the *CDSA* are unconstitutional and should be struck down because they deprived persons dependent on one or more controlled substances access to health care at Insite and, therefore, violated the right conferred by Section 7 of the *Canadian Charter of Rights and Freedoms* to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.⁵

Accordingly, the B.C. Supreme Court declared those sections of the *CDSA* inconsistent with the *Charter* and of no force and effect, and granted Insite an ongoing, constitutional exemption to permit its continued operation without fear of criminal prosecution of its users or staff. The Attorney General of Canada (Canada) appealed this order and PHS cross-appealed the dismissal of its application for a declaration that Sections 4(1) and 5(1) of the *CDSA* did not apply to Insite because of the doctrine of inter-jurisdictional immunity.

³ *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).

⁴ See, for example, the studies of Insite conducted by the British Columbia Centre for Excellence in HIV/AIDS, available via www.cfenet.ubc.ca.

⁵ *PHS Community Services Society v. Attorney General of Canada* (n 2).

The B.C. Court of Appeal, the province's highest appellate court, agreed with PHS and held that the effect of the application of the doctrine of inter-jurisdictional immunity was to limit the federal enforcement power sufficiently to protect the exercise of an exclusive provincial power — namely, the provision of a health care service.⁶ In the Court's view, Insite was a health care facility that did not undermine the federal goals of protecting health or eliminating the market that drove the more serious drug-related offences of import, production and trafficking. As such, the Court dismissed Canada's appeal and allowed the cross-appeal of PHS, holding that Sections 4(1) and 5(1) of the *CDSA* were inapplicable to Insite, a decision the federal Justice Minister promptly appealed.⁷

The case was heard before the Supreme Court of Canada in May 2011. Among the many interveners before the Court was a coalition of the Canadian HIV/AIDS Legal Network, Harm Reduction International and Cactus Montréal, who argued that (1) blanket prohibitions on drug possession and trafficking effectively outlawed Insite, and thereby deprived people who would otherwise use Insite of their *Charter* rights to life, liberty and security of the person because of the increased risks to life and health faced by those denied access to Insite, (2) the deprivations were arbitrary when applied in the context of Insite because the B.C. Supreme Court found that the *CDSA* had been ineffective to prevent trafficking, let alone use, of drugs in the neighbourhood surrounding Insite, and (3) the arbitrariness of the *CDSA* prohibitions was confirmed by reference to international law and practice, which affirm the effectiveness of harm reduction services such as those offered by Insite and recognize access to those services as an integral part of the right to health.

In its decision, the Court recognised that 'Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area.'⁸ Significantly, it rejected Canada's argument that any negative health risks drug users may suffer from Insite's closure was not caused by the *CDSA*, but rather were the consequence of their personal choice to use illegal drugs, and affirmed the B.C. Supreme Court's finding that drug dependency is an illness, in which the central feature is impaired control over the use of the substance in question.

The Court considered whether, as a result of the division of powers between Canada's federal government and its provinces, Insite was not bound by the *CDSA* prohibitions on possession and trafficking of controlled substances. It held that the *CDSA*'s criminal prohibitions were constitutionally valid exercises of the federal criminal law power and

6 *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).

7 'Ottawa to appeal injection site ruling', (9 February 2010) *CBC News*.

8 *Canada (Attorney General) v. PHS Community Services Society* (n 1) para. 19.

applicable to Insite. The fact that those provisions had the incidental effect of regulating provincial health institutions did not mean that they were constitutionally invalid, and the mere fact that a province established that a particular activity served the public interest did not exempt that activity from the operation of federal criminal laws. Moreover, the doctrine of interjurisdictional immunity — which was already narrow — did not resolve the contest between the federal government and the provincial government because the delivery of health care services did not constitute a ‘protected core’ of the provincial power over health care in Canada’s Constitution.

With respect to the validity of the legislation under Section 7 of the *Charter*, the Court recognised that without an exemption from the *CDSA*’s prohibition on drug possession, health professionals working at Insite would (1) have their liberty interests engaged because their actions could be construed as the offence of possession, thus exposing them to the threat of being imprisoned for carrying out their duties and (2) be unable to offer medical supervision and counselling to Insite’s clients, thus depriving those clients of potentially lifesaving medical care and engaging their rights to life and security of the person. The Court also recognised that the prohibition on drug possession directly engaged the rights to liberty, life and security of the person of Insite’s clients. The Court did not find the *CDSA*’s prohibition on trafficking constituted a constitutional deprivation, since Insite’s staff and clients were not involved in trafficking, and clients in particular did not obtain their drugs at the facility and were not permitted to engage in activities that could be construed as trafficking while they are on the premises.

The Court proceeded to review the *CDSA* and found that general criminal prohibitions, subject to targeted ministerial exemptions, reflected the ‘dual purpose’ of the *CDSA* – the protection of both public safety and public health.⁹ Despite finding the criminal prohibition on drug possession violated the claimants’ Section 7 rights, the Court held that, because the *CDSA* conferred on the Minister the power to grant exemptions, it did so in accordance with the principles of fundamental justice. The Minister’s discretionary power to grant an exemption acted as a ‘safety valve’ that prevented the *CDSA* from applying where it would be arbitrary, overbroad or grossly disproportionate in its effects.¹⁰

However, the discretion vested in the Minister of Health was not absolute and he had to exercise that power in conformity with the *Charter*. The Court held that the Minister’s decision not to provide an exemption violated the claimants’ constitutional rights because it would have prevented people who inject drugs from accessing the health services offered by

⁹ *ibid.*, para. 41.

¹⁰ *ibid.*, para. 113.

Insite, threatening their health and their lives. Since exempting Insite from the application of the prohibition on drug possession furthered the objectives of public health and safety, the government action qualified as arbitrary. Furthermore, the effect of denying the services of Insite to the population it served was grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics, since the facility had been proven to save lives with no discernable negative impact on Canada's public safety and health objectives.

Thus, the Minister's refusal to grant Insite an exemption was not in accordance with the principles of fundamental justice and unconstitutional. The Court ordered the Minister of Health to grant an exemption to Insite pursuant to Section 56 of the *CDSA* and held that, on future applications for such exemptions, the Minister must exercise that discretion within the constraints imposed by the law and the *Charter*. This meant striking the appropriate balance between achieving public health and public safety, and considering whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice.

CASE SUMMARY

Irish Press Ombudsman upholds complaint from coalition of drug services

International Harm Reduction Association and Others and The Irish Independent

Tim Bingham*

On 23 May 2011, the Press Ombudsman of Ireland upheld a complaint lodged by a coalition of national and international drug services against the Irish Independent, the country's largest circulation broadsheet. The complaint was filed by the International Harm Reduction Association, the Irish Needle Exchange Forum and the CityWide Drugs Crisis Campaign, with the support of approximately thirty Irish drugs services and professionals.

The complaint was lodged following an 18 February 2011 column by Ian O'Doherty entitled 'Sterilising junkies may seem harsh, but it does make sense'. In the column, O'Doherty, a regular opinion writer for the newspaper, described people who use drugs as 'vermin' and as 'feral, worthless scumbags'. He wrote, 'Let's get a few things straight – I hate junkies more than anything else. I hate their greed, their stupidity, their constant sense of self pity, the way they can justify their behaviour, the damage they do to their own family and to others.' He added that, 'If every junkie in this country were to die tomorrow I would cheer.'¹

The complainants claimed that the column violated two principles of the Code of Conduct of the Irish Press Council.² Under Principle 1.1 on 'Truth and Accuracy', which affirms that 'In reporting news and information, newspapers and periodicals shall strive at all times for truth and accuracy',³ the complainants alleged that the column made factually incorrect claims about drug use.

* Tim Bingham is the Chairperson of the Irish Needle Exchange Forum (tim@inef.ie).

¹ Ian O'Doherty, 'Sterilising junkies may seem harsh, but it does make sense', *Irish Independent*, 18 February 2011.

² Press Council of Ireland, 'Code of Practice', available online at <http://www.pressombudsman.ie/code-of-practice.150.html> (date of last access 27 February 2012).

³ *ibid.*

However, the more serious claim was made under Principle 8 on ‘Prejudice’, which states:

*Newspapers and periodicals shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.*⁴

In essence, the complainants were asking that the Press Ombudsman recognise people who use drugs as an identifiable group, entitled to protections against hate-type speech in the press. In particular, the complaints argued that because drug dependency is recognised as a chronic and relapsing disease by many authorities, including the World Health Organization and the United Nations Office on Drugs and Crime, that O’Doherty’s column ‘is not only a hateful attack a vulnerable population with a recognised medical condition, it also ignores the well-established link between drug use and depression, mental illness, alcohol use and homelessness.’⁵

The Press Ombudsman upheld the main element of the complaint, finding that the newspaper ‘breached Principle 8 (Prejudice) of the Code of Practice for Newspapers and Magazines because it was likely to cause grave offence to or stir up hatred against individuals or groups addicted to drugs on the basis of their illness.’⁶ Significantly, the Ombudsman rejected the Independent’s defence that its subsequent publication of other opinions and letters opposed to O’Doherty was a sufficient response. According to the Ombudsman’s decision, ‘[T]he subsequent publication by the newspaper of letters from other complainants, or the publication of a feature reacting to the article, can[not] obviate the need to make it clear that this article represents a breach of Principle 8 of the Code.’⁷ On the secondary complaint under Principle 1.1, the Ombudsman concluded that there was insufficient evidence to render a decision.⁸

This was the first time that the Press Ombudsman in Ireland has found people who use drugs to be an identifiable group, entitled to protections against prejudicial reporting in the media. It may well be the first case of its kind internationally. According to the complainants, ‘We believe this to be the first time that drug users have been identified by a media watchdog as an identifiable group, entitled to protections against hate-type speech in the press. In this sense, we think the decision of the Press Ombudsman has international significance.’⁹

4 *ibid.*

5 International Harm Reduction Association, et. al., ‘Letter to the Office of the Press Ombudsman’ (7 March 2011), available online at http://www.ihra.net/files/2011/06/13/Letter_to_the_Office_of_the_Press_Ombudsman_7_March_2011.pdf (date of last access 7 February 2012).

6 Office of the Press Ombudsman, ‘International Harm Reduction Association and Others and The Irish Independent’ (23 May 2011), available online at <http://www.pressombudsman.ie/decided-by-press-ombudsman/the-international-harm-reduction-association-and-others-and-the-irish-independent-.2220.html> (date of last access 7 February 2012).

7 *ibid.*

8 *ibid.*

9 ‘Irish Independent censured for “offensive” column likely to “stir hatred” against drug users: Press Ombudsman upholds complaint by coalition of drug services’ (Press release: 13 June 2011), available online at <http://www.ihra.net/fr/contents/1030> (date of last access 8 February 2011).

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