

Human rights in drug policy (I): more than an added value

Human Rights challenges related to Drug Policy: First Contribution to the upcoming report (pursuant to HRC resolution 54/22).

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Drug policies –in particular those affecting “drugs” that are plants, fungi, or plant- or fungi-based preparations– run the risk of developing in a normative vacuum, disregarding legal dispositions which either relate to the living organisms directly, to humans which have traditionally cultivated and used these living organisms, or to ecosystems of which both the natural drug and the human species are part of.

Recently, this has been exemplified by the work of the International Narcotics Control Board (INCB), a treaty body to the international drug control conventions. Its attempt to issue “cannabis guidelines” has raised important concerns,¹ insofar the leaked drafts of the project showed that the total ignorance of international legal dispositions relating to human rights, plants, and the environment, translated into guidelines’ recommendations to Member States to establish policies which would have violated international Human Rights law, and other rights-protecting instruments such as the farmers’ rights (as contained in FAO’s Plant Treaty) or the rights of indigenous peoples and local communities to be protected from biopiracy and misappropriation of their traditional knowledge and cultural expressions.

This contribution is inspired by the *Voluntary Contribution*² sent to the INCB in 2021 in relation to its “cannabis guidelines.” Note, however, that the elements outlined are applicable not only to cannabis but also other internationally-controlled traditional living organisms, such as coca, poppy, peyotl, san pedro, psilocybes, etc.

See also the 2nd contribution: [Human rights in drug policy \(II\): due diligence & herbal drugs.](#)

¹ See INCB monitor, documenting the “cannabis guidelines”, available at: kenzi.zemou.li/incb-monitor

² This contribution is an excerpt from the *Voluntary contribution to INCB Cannabis Guidelines – due diligence, good faith, & technical concerns* (FAAAT editions, 2021) available online at: researchgate.net/publication/349572996

Introduction

“Placing human rights at the centre of drug control”³ is broadly recognized as a goal and task of the international community. In 2010, the Executive Director of the United Nations Office on Drugs and Crime (UNODC) commented:

“Such an approach represents **more than ‘added value’; it is a legal obligation.** [...] That the fight against drugs, crime and terrorism must conform to human rights is clear. The challenge is to **understand how these policies may be pursued in a manner that not only respects and protects human rights, but also contributes towards their positive fulfilment.**”⁴

The international community is composed of a series of public stakeholders: the States - parties to the treaties, but also international or inter-governmental organisations (IGOs) as well as non-State actors which include non-governmental organizations, academia and researchers both independent and in publicly or privately supported institutes.

When seeking to pursue human rights-compliant drug policies, not only States, but also IGOs and civil society are subject to the same rule of law in the international order, lying in human rights, development, peace and security. UNODC explains:

“The normative foundation of the United Nations’ work on the rule of law is the Charter of the United Nations and the body of international law, including international human rights law [...]. **Responses to drugs, crime and terrorism that are based on the rule of law must therefore also incorporate human rights law and principles.**”⁵

These norms are to be known, considered and implemented by all stakeholders. At the international level this translates into the **need to respect**, or at least not adversely impact areas of work of other IGOs, but also State obligations beyond drug control.

Due diligence of international organizations in assisting States

IGOs have legal personalities⁶, and can be held accountable. Although IGOs are not *per se* parties to the human rights instruments, this does not allow them to disregard international human rights law (IHRL) in fulfilling their mandate. The International Court of Justice (ICJ) recalls that “there is nothing in the character of international organizations to justify their being considered as some form of ‘super-State.’ **International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.**”⁷ This is confirmed by the International Law Commission

³ UNODC. (2010). *Drug control, crime prevention and criminal justice: A Human Rights perspective. Note by the Executive Director* (E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1).

www.unodc.org/documents/commissions/CND/CND_Sessions/CND_53/CRPs/E-CN7-2010-CRP6_V1051605_E.pdf

⁴ *Ibid.* p. 3

⁵ UNODC. (n.d.). *UNODC mandates and human rights foundations.*

www.unodc.org/unodc/en/Human-rights/unodc-mandates--more.html

⁶ ICJ. (1949). *Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949.* www.icj-cij.org/public/files/case-related/4/1837.pdf

⁷ ICJ. (1980). *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980.* www.icj-cij.org/public/files/case-related/65/065-19801220-ADV-01-00-BI.pdf

(ILC),⁸ which clearly places **a responsibility over IGOs to ensure they do not induce or encourage a State to commit an act in violation of international law.**

This is called **due diligence**.^{9,10} The need for due diligence within and among IGOs is an important field of study for academics¹¹ It has also explicitly been outlined in 2011 by UN Secretary General in its **UN Human Rights Due Diligence Policy**¹² specifically focused on peacekeeping missions. Nonetheless it offers insights for IGO's approach to *due diligence*:

"This endeavour is congruent with the growing attention that issues of 'shared responsibility' receive today. **Traditionally, the law of international responsibility was focussed very much on the relationships between pairs of two states**—a wrongdoing state and an injured state. Whether and if so how a third state—let alone an [IGO]—would impact on the commission of a wrongful act was considered to be a marginal issue. **This is no longer the case. Especially for states and [IGOs] which proclaim in a solemn manner their attachment to ideals of the international rule of law**, it would fall significantly short of this rhetoric if they pretended that it was none of their business how their support to another actor would be used for the furtherance of wrongful conduct. **This is especially true for the UN.**"¹³

IGOs (including the INCB) have a legal responsibility to show due diligence with respect to the international legal order while performing their treaty mandates. **Omission or failure to do so –negligence– can lead States to breach compliance in other areas of international law** and/or hinder the work of other IGOs.

⁸ In its *Articles on the responsibility of international organizations*, the ILC included a Chapter on the "Responsibility of an international organization in connection with the act of a State or another international organization" which, in particular in its Article 15 on the "Direction and control exercised over the commission of an internationally wrongful act" and Article 17. See: ILC. (2011).

⁹ Interestingly, the concept of due diligence can be related to that of *bona fide* (good faith) present in the international drug control Conventions. With the difference, as we have seen, that due diligence applies also to IGOs between themselves, and with regard to States.

¹⁰ "Due diligence comes from Latin *diligentia* which can be translated as care or circumspection. The opposite of (due) diligence is negligence. [...] Diligence is a qualifier of behaviour as shown in its adverbial use: an actor can behave diligently –or negligently. Due diligence thus is no free-standing obligation but a modality attached to a duty of care for someone or something else (including the duty to prevent and mitigate harm). One might call it an ancillary obligation if one wants to use the language of obligation at all." Peters A., Krieger H. & Kreuzer L. (2020). *Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates*. In: Krieger, H. Peters, A. & Kreuzer, L. *Due Diligence in the International Legal Order* (pp.1–19). Oxford, UK: Oxford University Press. books.google.es/books?hl=es&lr=&id=tmkLEAAAQBAJ

¹¹ In 2020, a new Chair on "International Law of Institutions" opened at the College de France, with its first course titled "Diligence and Negligence in International Law" and addressing specifically the roles and responsibilities of IGOs. See: Collège de France. (2020). *Samantha Besson, International Law of Institutions, 2020-2021 lecture "Diligence and Negligence in International Law"*. www.college-de-france.fr/site/en-samantha-besson/course-2020-2021.htm; see also Samantha Besson. (2020). *Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap! ESIL Reflections*, 9, 1. hal.archives-ouvertes.fr/hal-02918960/document

¹² United Nations Secretary-General. (2013). *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council: "Human rights due diligence policy on United Nations support to non-United Nations security forces"* (A/67/775–S/2013/110). undocs.org/en/A/67/775

¹³ Helmut, P. A. (2015). *The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?* *Journal of Conflict and Security Law*, 20, 1, pp.61–73.

Table I. Non-exhaustive list of human rights affected by the modalities of international control over Cannabis for medical and scientific purposes.

Right	Included in:		Examples involving Cannabis
	Human Rights declarations	International legal instruments	
Right to highest standards of health	UNDRIP Art. 21, 23, 24 UNDROP Art. 4(2), 23(1)	UDHR Art. 25(1) ICESCR Art. 12 ICERD Art. 5(e)(iv)	Lack of access and availability besides ease of cultivation
Right to traditional medicines	UNDRIP Art. 24 UNDROP Art. 23(2)	ICCPR Art. 1, 47 ICESCR Art. 1(2), 11, 15, 25 ICERD Art. 5(e) CBD Art. 8(j), 10, 15 Plant Treaty Art. 9	Access to medicinal plant based products restricted Biopiracy
Right to seeds, plants and genetic resources	UNDRIP Art. 31 UNDROP Art. 19		Undue appropriation of traditional medical knowledge, or agricultural know-hows
Right to prior and informed consent	UNDRIP Art. 11, 19, 28, 29		
Rights to natural and cultural heritage	UNDRIP Art. 8, 11, 29, 31 UNDROP Art. 5, 18, 26		
Right to benefit from science	UNDROP Art. 2(6)(c), 25	ICESCR Art. 15	Findings about medical applications not reflected in broader patient access Research hampered by strict treaty controls
Right to privacy	American Convention on Human Rights Art. 11 Arab Charter on Human Rights Art. 16, 21, 31 ASEAN Human Rights Declaration Art. 21 European Convention on Human Rights Art. 8	UDHR Art. 12 ICCPR Art. 17	Interference with self medication and home cultivation Invasion of private property and consensual transactions
Right to participation in policy-making	UNDRIP Art. 18, 23 UNDROP Art. 2(3), 10, 11, 15(4) Sustainable Development Agenda, Goal 17	UDHR Art. 21 ICCPR Art. 25 ICESCR Art. 8 ICERD Art. 5(c) CEDAW Art. 7, 8	Only large companies are consulted, and not peasants, IPLC, patients or healthcare workers

Table I. *Continued.*

Right	Included in:		Examples involving Cannabis
	Human Rights declarations	International legal instruments	
Right to non-discrimination	UNDRIP Art. 2, 46(3) UNDROP Art. 4 UN Declaration on the Right to Development Art. 6 Sustainable Development Agenda Goal 10	ICCPR Art. 2(1), 26 ICESCR Art. 2(2) ICERD Arts. 2, 5 CEDAW Art. 2	Persistence of colonial policy and practice w.r.t. non-Western plants, products & practices. Access to legal schemes not possible for small stakeholders
Right of religion and belief	UNDRIP Art. 11, 12, 24, 35 UNDROP Art. 8	UDHR Art. 18 ICCPR Art. 18 ICERD Art. 5(d)(vii)	Rastafari (Caribbean), Sadhus (Himalayas), etc.

Scholars^{14,15} and IGOs themselves,^{16,17} including the INCB¹⁸ agree that an enforcement of international drug control requirements without consideration of other aspects of IHRL can lead to breaches. When considering the cultivation, trade and use of *Cannabis sativa* L. for medical and scientific purposes for its Guidelines **it is quintessentially important for the INCB to consider the package of IHRL that relate to health, well-being and access to medicine and health services.**¹⁹

It is also important to consider that *Cannabis sativa* is **a plant with environmental, biodiversity, traditional, cultural, and indigenous ties** –all elements constitutive of relevant IHRL dispositions on their own (see Table 1).

¹⁴ Piet Hein van Kempen and Masha Fedorova. (2016). *International law and cannabis II. Regulation of cannabis cultivation and trade for recreational use: positive human rights obligations versus UN Narcotic Drugs Conventions [Executive summary]*. Nijmegen: Radboud University.

www.ru.nl/publish/pages/797876/internationaal_recht_en_cannabis_ii_-_english_summary.pdf

¹⁵ Piet Hein van Kempen and Masha Fedorova. (2016). *Internationaal recht en cannabis II: Regulering van cannabisteelt en-handel voor recreatief gebruik: positieve mensenrechtenverplichtingen versus VN-drugsverdragen*. Alphen aan den Rijn: Wolters Kluwer. www.ru.nl/publish/pages/797876/internationaal_recht_en_cannabis_ii.pdf

¹⁶ United Nations Development Programme. (2019).

¹⁷ UNODC. (2012). *UNODC and the promotion and protection of human rights; position paper*.

unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf

¹⁸ "There are a number of unintended consequences that can flow from a variety of factors, including the unbalanced implementation of national and international drug control measures." §38 in INCB. (2016). *Report of the International Narcotics Control Board for 2015* (E/INCB/2015/1).

¹⁹ See for instance: OHCHR. (2021). *Claiming Human Rights > Definitions of the right to health* [online]. www.claiminghumanrights.org/health_definition.html

Precautionary principle

Although the role of the INCB is not to comprehensively assess and balance the international obligations of States with regards to *Cannabis*, **the Board should exercise due diligence to ensure, at least, that its “cannabis guidelines” do not support States in, or promote them to ignore or breach other dispositions of international law that can supercede drug control.**

[This is of course valid for all work of UN entities related to any herbal drug]

On *Cannabis* and drug policies, the Committee on Economic, Social and Cultural Rights (CESCR) recently provided insights about *Cannabis*,²⁰ recalling that:

“given the potential health benefits of these controlled substances, the [drug control] restrictions should also be weighed up in relation to States parties’ obligations under article 12 of the Covenant [on Economic, Social and Cultural Rights].”

The CESCR also clarifies the dynamic nature of the “precautionary principle” noting that:

“The precautionary principle should not hinder and prevent scientific progress, which is beneficial for humanity. Nonetheless, it should be able to address available risks for human health and the environment, inter alia. Thus, in controversial cases, participation and transparency become crucial because the risks and potential of some technical advances or some scientific research should be made public in order to enable society, through informed, transparent and participatory public deliberation, to decide whether or not the risks are acceptable.”²¹

These elements should be kept in mind while discussing matters pertaining to the intersection of *Cannabis* control with economic, social and cultural rights.

Continued in the 2nd part: [Human rights in drug policy \(II\): due diligence & herbal drugs.](#)

The [original text](#) was authored by K. Riboulet-Zemouli and M. Krawitz in 2021.

²⁰ See § 68, in: CESCR. (2020). *General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*.

undocs.org/E/C.12/GC/25

²¹ *Ibid.* § 57.