

# THE UNITED NATIONS AND DRUG ABUSE CONTROL: A CRITIQUE

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The United Nations declared 1991-2000 as the 'Decade against Drug Abuse'. This has brought into sharp focus, the increasing global threat of drug abuse and drug trafficking.

Traditionally, the emphasis has been on individual consequences of drug abuse - accidents while under the influence of drugs, petty crimes to pay for the habit, etc. But the menace is no longer thus limited. Drug money can, today, effectively stall anti-drug legislation. There is corruption in high places. Entire economies are destabilised by the sheer volume of the illicit drug trade. There are undisputable links between drug trafficking and international terrorism.

The scale of the illicit drug industry<sup>1</sup> is such that no country or region is in a position to solve its own problem. A global concerted action to tackle the same is called for. This is where the United Nations steps in, in its capacity as the body coordinating various national efforts. For the past 50 years, it has been involved in various activities like developing a universal treaty system, dissemination of information, providing training and education to competent national authorities to help combat their drug problem in their respective countries.

## ***HISTORY OF THE UN INVOLVEMENT IN DRUG ABUSE CONTROL***

UN involvement in drug abuse control began with the 1946 Protocol which legally transferred to itself, this responsibility, which had belonged to the League of Nations. Since then, it has passed the following milestones.<sup>2</sup>

1946 The UN Commission on Narcotic Drugs (CND) was established as a functional commission of the Economic and social Council. The CND makes proposals for conventions and international instruments. On reviewing the global drug control situation and on the advice of the World Health Organisation, it decides as to which substance should be declared as "controlled".<sup>3</sup>

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1 The industry as a whole is estimated to have an annual turnover of about US \$ 500 billion. *See generally*, UNDCP - Info, August 6 (1996).

2 *See generally*, The United Nations and Drug Abuse Control, Department of Public Information and UNDCP, 1992.

3 *See generally*, Art. 8 of the 1961 convention, Art. 1 of the 1971 Convention and Art. 21 of the 1988 Convention on 'Functions of the Commission'.

- 1948 The 1948 Protocol entered into force on 1st December 1949. During the forties, a new group of dependence forming substances had been synthetically produced. The 1948 Protocol had been entered into to bring under control, those psychotropic substances.
- 1961 The Single Convention on Narcotic drugs (hereinafter referred to as the 1961 convention) consolidated, simplified and extended the scope of the earlier international instruments on drug abuse control. By virtue of this convention, the International Narcotic Control Board (INCB) was set up in the same year.

The INCB administers mandatory and the statistical Return system,<sup>4</sup> thus keeping a tab on the demand, supply and accumulation of Narcotic drugs in any country at any given point of time.

However, this body can merely draw the attention of the parties concerned and the ECOSOC to any violation of the Convention.<sup>5</sup> To make it effective, it should be given the power to take action against such parties in the form of sanctions.

The 1961 convention was amended in 1972 to highlight treatment and social reintegration of addicts.

- 1971 The next significant step by the UN was the passing of the Convention on Psychotropic Substances.
- 1981 By the late seventies, a need was felt for an international strategy to combat drug abuse. At the same direction of the UN General Assembly, the CND formulated the 1981 International Drug Control Strategy in the form of a five year plan (1982-1986). It focussed on greater participation in the conventions by state parties, by increased ratification of treaties and the role of Non-Governmental Organisation (NGO's).
- 1987 In 1987, the International Conference held on Drug Abuse and Drug Trafficking adopted the comprehensive multi-disciplinary outline for future activities which dealt, broadly, with: (1) Reducing demand (2) Control of illicit supply (3) Suppression of illicit trafficking and (4) Rehabilitation of addicts.
- 1988 As a result of the expression of political will in the conference, the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances came into being. Its main emphasis was on deprivation of illicit

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4 The purpose of these system is to limit production, manufacture and utilisation of drugs in a country, at the same time ensuring availability of drugs for medical and scientific uses. Statistics are supplied by each state party to allow the INCB to have at all times an accurate estimate of drugs in each country.

5 Measures by the Board to ensure the execution of provisions of this Convention are found in Art. 14 of 1961 Convention, Art. 16 of the 1971 Convention and Art. 22 of the 1988 Convention.

gains, control of precursors,<sup>6</sup> and control of related international criminal activity.

- 1990 In March 1990, a Global Programme Action was adopted by the General Assembly in its 17th special session to increase international co-operation against illicit production, supply, demand, trafficking and distribution of drugs.
- 1991 As a result of this, in 1991, the various programmes and funds were consolidated to form the United Nations International Drug Control Program (UNDCP).

### *UN CONTRIBUTION TO INDIAN LAW: A CRITIQUE*

The Narcotic Drugs and Psychotropic Substances Act (NDPSA) was enacted in 1985, pursuant to Art. 4(a) of the 1961 Convention to give effect to the 1961 and 1971 Conventions. Narcotic Drugs and Psychotropic Substance (Amendment) Act, 1989 introduced various provisions to the NDPSA, to incorporate the 1988 Convention. Thus, the Act, as it stands today is a product of the three conventions.

These Conventions have made great contributions to the anti-drug laws in India. But certain lacunae still remain in the Conventions, the Act and the workings thereof, which need to be addressed.

**Discretionary Legal Powers:** Art. 36(6) of the 1988 Convention provides that the parties shall ensure that any discretionary legal powers under their domestic laws are exercised to maximise the effectiveness of the laws and to deter commission of drug related offences.

In India, the law allows two areas of discretionary legal power: (1) The President's/Governor's power to suspend, remit or commute sentences and (2) Certain discretion available to the Judiciary in the form of bail, probation and no prescribed minimum sentence.

As regards (1), the NDPSA has completely disallowed this through S. 32A. But the validity of this section can be questioned since this discretionary power is granted by the Constitution of India which overrides ordinary law.

The Judiciary is barred from giving probation unless the offender is a minor or an addict.<sup>7</sup> The NDPSA has also prescribed minimum sentence, as well as a

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6 Term used to indicate substances in table 1 and 2 of the 1988 Convention, used by the Board in its Report of INCB on the implementation of Art. 12 of the 1988 Convention, United Nations, 1996.

7 Section 33 of the NDPSA.

maximum limit.<sup>8</sup> Thus the Judiciary can exercise its discretion only within the boundaries prescribed by the legislations.

This policy fulfils the mandate of Art. 36(6) of the 1988 Convention, but it fails in practice. Judges in India trained in the pro-defence approach of Indian law, are loath to give even the minimum sentence of 10 years RI. As a result, in many cases, the defendant is acquitted, since the Judge can't reduce his punishment. These acquittals are frequently based on insignificant procedural details which would, if not for the harsh sentence be ignored.<sup>9</sup> To make this provision more effective, it may be necessary to either remove the lower limit or at least reduce it drastically. The provisions of the Convention should be incorporated, but not at the cost of domestic law and specifically not against the mandate of the India Constitution.

**Connection with other Criminal activity:** Art. 3(5) of the 1988 Convention lays an obligation on parties to take into account circumstances which make the offence more serious. E.g. involvement in organised criminal activity, use of arms/violence, abuse of public position, victimization of minors, prior conviction, etc.

This provision is central to the Convention, since it is only through an integrated approach, targeting all organized crime, that the drug problem can be solved. Yet most of the provisions have not found a place in the NDPSA. It is only Art. 3(5)(h) - Prior conviction, that has been provided for in S. 13A of the Act, which proscribes mandatory death penalty for repeat offenders.

This provision too, though in conformity with the Convention, cannot be allowed to remain, in view of the decision of the Supreme Court in *Mithu Singh v. State of Punjab*,<sup>10</sup> which struck down mandatory death penalty as *ultra vires* the Constitution.

Thus, S. 31A needs to be amended to do away with the mandatory death penalty, which at the same time deterrent effect by awarding life imprisonment, or any other jail sentence with fine. Further, punishment should be increased in the offence is aggravated, as provided for in Art. 3(5) of the 1988 Convention. Specially in view of the Indian political scenario as regards abuse of public office.

**Precursors:** another problem which has emerged in the wake of the 1988 Convention is that of monitoring certain precursors. Art. 12 lays an obligation on the parties to take measures to prevent diversion of precursors and other substances used in the manufacture of drugs, for illicit purpose.

8 For most offences, the minimum is 10 years RI, which can go upto 20 years RI with a fine which may be within the limits of Rs. 1 lakh to Rs. 2 lakhs. However, it is lower of lesser offences like consumption (6 months to a year) (S. 27).

9 See generally, *Nizamuddin v. State*, 1955 Cri L.J. 661 *Gaunter Edwin v. State of Goa*, 1993 Cri L.J. 1155, *Matlub Khan v. State of Maharashtra*, 1993 Cri L.J. 364.

10 AIR 1983 SC 473.

The NDPSA has given effect to this through S. 9A inserted by the 1989 amendment which allows the Central government to declare certain substances as “controlled”.

The problem arises because of the wide range of substances needed to produce drugs. Some of which are in common use. E.g.: To produce one kilogram of heroin, 10 kilograms of opium and 20 kilograms of other substances are required, including 2.5 kilograms of acetic anhydride, which is legitimately used in manufacture of dyes and break fluid.<sup>11</sup>

Thus various questions need to be addressed before a substance is declared as controlled. E.g. what are its licit uses in other industries? Can such other industries replace the substance? How essential is it to the production of the drug? etc. To make matters easier, it may be advisable to have a body of experts in the fields of chemicals, medicine and other industrial experts to make decisions as to the substance to be declared as controlled under S. 9A.

Draft Code on Crimes: Drug trafficking is a transnational phenomenon. And the power wielded by traffickers in terms of influence in government (through bribery or threats or violence) makes this an offence beyond the individual capacity of any state to deal with.

Thus, the General Assembly resolution 46/54 of 1991, adopting the Draft Code on Crimes against Peace & Security of Mankind came as a welcome step in the direction of drug control. The Draft Code and the International Criminal Court are not new ideas, having first been mooted on 9 December 1948 in a General Assembly resolution, requesting the International Law Commission to set up an “International Judicial Organ” to try international crimes. A code was formed in 1954, which was updated and converted into the 1991 Draft Code by the International Law Commission; in response to such a request by the General Assembly, in 1989.

Art. 25 of the Draft Code treats drug trafficking as an offence against mankind. Drug trafficking is made a crime whether committed by a state, its agents or representatives or private parties, including cartels and the financial institutions they use. Further, it criminalizes not only production, manufacture, trade in, import or export, of drugs, but also transfer or conversion of property known to the proceeds of illicit drug trade.

The response by the international community has been, on the whole, a positive reaction with a few reservations. One such view is the US opinion that by not using the word “internationally” as is done with respect to environmental crimes, the concept of mens rea is being done away with.<sup>12</sup> This objection needs to be looked into and perhaps resolved by amendment of the Draft.

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11 The Regulation of Precursors” UNDCP - Info, 3 August 1996.

12 Stephen M. McCaffey. *Current Developments*, 84 AJIL 930 (1990).

The more serious objection seems to be that the main problem is not that of defining crimes, but of prosecuting them.<sup>13</sup> This is definitely a stumbling block, since there are countries where such crimes are not only tolerated, but even supported by the government. E.g. Tapes have revealed that Colombian president Enresio Samper's election campaign in 1994 was largely financed by the Cali Cartel.<sup>14</sup>

The only way this problem, can be solved is by international pressure in the form of economic sanctions. The international community must unite to achieve this successfully. This approach has, in fact, to a great deal improved the Colombian situation where a tougher policy is being followed now as a result of US sanctions.

**Resources:** A major issue in the UN programmes is that of resources. The UNDCP fund was established in Dec. 1991 by General Assembly resolutions. It is supported entirely by voluntary contributions of member states and private organisations.<sup>15</sup> This not only creates a severe resource crunch, but greatly limits UNDCP's programme flexibility. The largest share of resources for the projects is made available from jars earmarked funds (44.1%) leaving the UNDCP without much choice as to area of spending.

A possible solution to this problem may be to decentralize the activities of the UNDCP. Increasing NGO involvement would reduce the strain on UNDCP funds, at the same time, resulting in better implementation because "each NGO represents a particular segment of world society and thereby knows the most effective way to reach its constituency".<sup>16</sup> Religious institutions can also play an important role. E.g. In Rio, where a murder takes place every hour, churches have taken up the challenge of cleaning the city of crime. They train fevela (slum) dwellers for alternative jobs to drug peddling.

## **CONCLUSION**

The UN involvement in drug abuse control began in 1946 with the 1946 Protocol. The CND and the INCB were set up under the aegis of the Economic and Social Council. Together, they piloted the cornerstone of international anti-drug legislation - the Conventions of 1961, 1971 and 1988.

But apart from this UN effort, every country must take measures to translate the treaties into laws and administrative measures to reduce this global scourge. It is for this reason that the NDPSA was enacted in 1985.

However certain issues have to be kept in mind regarding the Conventions, the Act and their working.

13 ILC *Draft Code on Crimes*, 87 AJIL 607 (1993).

14 *Ibid.*

15 *Standing guard for Uncle Sam*, *The Economist*, 44 Jan 14-20 1995.

16 *The UN and Drug Abuse Control*, 51 (1992).

Firstly, by taking away the discretionary legal powers conferred by our Constitution and laws, the Act fulfils the international agreements, but at the cost of domestic laws. These need to be harmonised.

Secondly, greater punishment must be given for involvement in international organised crime. Recidivism is punished by mandatory death penalty, the Constitutional validity of which needs to be looked into. The need for an international criminal code is increasingly being felt. The Draft Code is a step in the right direction. but it needs to be made more effective by including sanctions for states which do not cooperate to present a united front to the traffickers.

Finally the problem of resources can be resolved through increased NGO involvement and even action in personal capacities. It is only through integrated action, at all levels, that this global challenge can be met.

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17 *Ibid.*

18 *Urban Crime: From Rio*, *The Economist*, 57 Dec. 2nd-8th 1995.