Why and How to Make a Treaty Crime of Medicine Counterfeiting

A Reply to Attaran, Bate and Kendall

Neil Boister* and Benn McGrady**

Abstract

In response to an article recently published in this Journal by Amir Attaran, Roger Bate and Megan Kendall regarding counterfeiting medicine, the authors dispute Attaran, Bate and Kendall’s understanding of the problem on several points. These points include the choice of a forum such as the WHO for treaty negotiations and the neglect of the pre-existing UN criminal justice framework. The authors conclude that the issue raised by Attaran, Bate and Kendall concerns three sometimes conflicting constituencies — health, customs and criminal justice. Therefore, the authors claim, the problem is better contextualized and handled in a ‘forum familiar’ to criminal law.

In a recent article published in the Journal of International Criminal Justice, Amir Attaran, Roger Bate and Megan Kendall argue for the negotiation of an international treaty to address the counterfeiting of medicines.1 The authors propose that such a treaty should be negotiated under the auspices of the World Health Organization (WHO) and that the functions of the treaty would be to

* Professor of Law, University of Canterbury; consultant to the Framework Convention Alliance on Tobacco Control during the negotiation of the Illicit Trade Protocol. [Neil.Boister@canterbury.ac.nz]

** O’Neill Institute for National and Global Health Law, Georgetown University; Research Assistant Professor, Department of International Health (School of Nursing and Health Studies), Georgetown University; Adjunct Professor, Georgetown University Law Center; consultant to the Framework Convention Alliance on Tobacco Control during the negotiation of the Illicit Trade Protocol. [Benn.McGrady@gmail.com]

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define wrongful acts at the international level, define the concept of counterfeit medicines, classify the worst cases of medicine counterfeiting as crimes against humanity and address jurisdictional gaps when counterfeit medicine is internationally traded.

There are many issues raised by the Attaran, Bate and Kendall paper, including the merits of creating a new crime against humanity in a WHO treaty, how to define wrongful acts in the context of counterfeit medicines, and how the proposal relates to real world law enforcement problems. Leaving these issues to one side, we address only the proposal that international criminalization in the context of counterfeit medicines should be pursued through treaty negotiations under the auspices of the WHO. The proposal was made without analysing questions of institutional choice and accordingly, does not consider the pre-existing United Nations (UN) criminal justice framework, such as the UN Convention against Transnational Organized Crime (UNTOC), nor the lessons learned from ongoing WHO treaty negotiations that touch on transnational crime.

Attaran, Bate and Kendall base their institutional choice on (i) the fact that the WHO is the sole international forum to address health, illness and death, (ii) the unsubstantiated assumption that the alternative (at least for purposes of negotiating a treaty) is to convene an ad hoc conference of states outside the WHO and (iii) the observation that Parties to the WHO Framework Convention on Tobacco Control are negotiating an optional protocol on the illicit trade in tobacco products. However, the WHO is not the only forum in which these issues may be addressed and nor is it clear that negotiations under the auspices of the WHO would be better than negotiating an optional protocol to UNTOC or pursuing a joint initiative of the WHO and the UN Office on Drugs and Crime (UNODC).

The question of institutional choice should be seen firstly within the context of the policy set out by former UN Secretary General Kofi Annan in the late 1990s that a strong effort should be made within the UN institutional family to avoid (i) the fragmentation of efforts and (ii) overlapping mandates and the duplication of efforts. Annan was for coherence; he considered the fragmented and duplicative nature of the UN a source of institutional weakness. He was critical of the fact that the rush ‘to launch numerous new initiatives ... produced parallel mechanisms and created additional bodies’. In this reform transnational crime was identified as an economic and social problem, and Vienna, the home of the UNODC, was identified as the ‘locus for integrated efforts by the United Nations to fight crime’.

2 Ibid., at 350–353.
4 Ibid., at § 12.
5 Ibid., at § 13.
6 Ibid., at § 70.
This is not to say that the efforts of WHO should be ignored. At the time of writing, WHO Member States are preparing to attend the 2011 World Health Assembly, at which the Director-General of WHO will report on the deliberations of a working group of Member States tasked with considering counterfeit medical products. Through this and other processes WHO has provided an important multilateral forum in which the issues can be examined with an emphasis on protecting health rather than intellectual property rights, which are protected in other treaties. Although it is important to capture the progress made in these discussions and to ensure that health interests are properly represented, it does not follow that WHO is the most appropriate forum in which to negotiate a treaty of this kind.

The UNODC serves as the secretariat of two organizations where it would be plausible to pursue the negotiations of a new treaty to suppress counterfeit medicines. First, the UN Commission on Crime Prevention and Criminal Justice might be a suitable venue to initiate the exploration of the content of such a treaty. A functional commission of the ECOSOC, it is the principal policy-making body within the UN on criminal justice issues of this kind. It has long experience and can draw on a range of skills (within the UNODC and among the various delegates) in all of the various facets of international cooperation in the suppression of crime — police cooperation, asset recovery, extra-territorial evidence gathering, extradition and so forth. The UNODC also serves as the secretariat of the UNTOC, which has already established an international legal framework that could be used to perform the functions identified by the authors. The UNTOC’s sophisticated regime for international cooperation — the real value of which lies in all of the work that has been done to ensure regional and domestic implementation in the last 11 years — already applies to all domestic medicine counterfeiting offences that carry a penalty of four years or more, that are transnational in nature, and which involve an organized criminal group. The UNTOC provides a platform, which can potentially be reached more comprehensively and more directly by the negotiation of a medicine counterfeiting protocol to the UNTOC, in much the same fashion as the Protocol to Prevent, Suppress and Punish Trafficking in Persons of the United Nations Convention against Transnational Crime was negotiated. The Conference of Parties of the UNTOC might also be an appropriate venue in which to initiate these negotiations.

Attaran, Bate and Kendall refer to the negotiation of an optional protocol to the WHO FCTC on illicit trade in tobacco products as a precedent for the negotiation of a criminal law treaty under the auspices of the WHO. This suggestion is made in spite of the fact that these negotiations have yet to be concluded.

9 In terms of Arts 2 and 3.
(making it difficult to judge their value as a precedent) and in spite of the fact that to date, the negotiations have not gone to plan. When the Inter-Governmental Negotiating Body (INB) was established in 2007 it was tasked with presenting a draft text to the fourth session of the Conference of Parties to the WHO FCTC for adoption in November 2010.\textsuperscript{11} Despite creating small inter-sessional working groups in a bid to meet this deadline, significant aspects of the text remain to be agreed. In response, the Conference of Parties mandated a fifth and final session of the INB to be held in March 2012, after additional working group meetings to be held in 2011.

Some of the reasons the negotiations have not gone to plan, such as failure to agree on measures to control the supply chain of tobacco products, could occur in any forum. Other explanations suggest that the UN Centre in Vienna provides a preferable venue for negotiation. One of the lessons emerging from the negotiation of the protocol on the illicit trade in tobacco products is the difficulty of reconciling the interests of the three constituencies represented there — health, customs and criminal justice.\textsuperscript{12} Health officials from delegations justifiably believe they have ownership of the problem, because they have to deal with the negative health effects of masses of cheap untaxed cigarettes entering the market. Customs want to address the specific problems of enforcement such as tracking and tracing tobacco products on which no excise duty has been paid but are not that concerned with investigation and prosecution. But justice officials are wary of blithely embracing cooperation in the investigation and prosecution of criminal offences, because they know just how difficult such cooperation can be. There has been difficulty in deciding just how serious illicit tobacco smuggling offences are and whether they are a priority for international cooperation. Are they, for instance, administrative offences or crimes, when crimes may justify such processes as extradition but administrative offences usually do not? There has been much debate about what are the key offences, offences committed by the smugglers such as the non-payment of the tax, or offences committed by the tobacco industry, such as the failure to do due diligence. Delegations have been particularly wary of taking on legal assistance and extradition arrangements in regard to these offences. It would seem more appropriate to debate these issues of the method — the use of the criminal law — in fora familiar with that usage and aware of all the difficulties, than under the auspices of the WHO.

There is no question of the need for the public health community to take a leading role on the issue of counterfeit medicines. This is particularly so with respect to how internationally wrongful acts will be defined because this will


determine whether the focus remains on harm to health rather than intellectual property rights. Hence, we would not recommend the exclusive use of the UN’s criminal justice machinery as a forum for the debate of the content of a new treaty. We would however, suggest that if international criminalization is to be pursued, normative engagement with the UN’s criminal justice institutions is desirable in the preparatory phases of the work, in the diplomatic phases and in the construction of the institutional regime that follows.