

## ARTICLES

### THE INTERNATIONAL CONTROL OF ILLEGAL DRUGS AND THE U.N. TREATY REGIME: PREVENTING OR CAUSING HUMAN RIGHTS VIOLATIONS?

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### I. INITIAL CONSIDERATIONS

The international drug control regime has come under a lot of pressure for an alleged lack of focus on its main objective: the preservation of the health and welfare of mankind. The main point of criticism focuses on the failure to sufficiently take human rights into account in drug control efforts. Rightfully or not, it has been contended that the United Nations (UN) regime focuses too much on criminalization and punishment and not enough on education and harm reduction. Especially in academia and by non-governmental organizations, discordant voices have been raised that advocate a new approach to international drug policy, putting more emphasis on liberal mechanisms rather than on repressive measures.<sup>1</sup> It is true that the current control regime sets out a comprehensive strategy for the control of psychoactive drugs

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<sup>1</sup> See, e.g., Dave Bewley-Taylor, *Challenging the UN Drug Control Conventions: Problems and Possibilities* 14 INT'L J. OF DRUG POL'Y 171 (2003); Richard Elliott et al., *Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy*, 8 HEALTH AND HUMAN RIGHTS 104 (2005).

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and that it creates binding international obligations,<sup>2</sup> i.e. upon ratification a State becomes obliged to bring its domestic laws in line with the treaty obligations (*pacta sunt servanda*). States are required to act coercively to prevent the illegal production, trafficking and consumption of dangerous psychoactive substances. Therefore the drug control regime has been labelled a “prohibitionist regime” with an undue emphasis on punishment and law enforcement. It must be noted, however, that the Preamble of the 1961 Single Convention on Narcotic Drugs as amended by the Protocol recognizes that “the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering.”<sup>3</sup>

In any case, this paper does not deal with the pros and cons of legalizing illegal substances, but focuses on the existing legal framework which bans addictive psychoactive substances that are deemed to have serious harmful effects. The paper will attempt to answer the questions of whether the international control regime is still serviceable in light of recent trends on the illegal drugs markets and whether the regime is up to the standards of modern human rights law. Part II of this article will outline the set-up of the international control regime, and provide a brief overview of the system. Part III will assess and summarize recent trends in global drug markets and the impact of the control system on illicit manufacturing, trafficking and consumption. Part IV focuses on the criticism of the United Nations and the drug control institutions for not changing the system due to human rights violations by member States in the so-called ‘war on drugs.’ Finally, the article argues that, if construed correctly, the legal framework in place can meet the desired objectives.

## II. THE INTERNATIONAL DRUG CONTROL SYSTEM

### A. *International Drug Control Law*

International drug control, administered under the auspices of

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<sup>2</sup> DAMON BARRETT, *UNIQUE IN INTERNATIONAL RELATIONS? A COMPARISON OF THE INTERNATIONAL NARCOTICS CONTROL BOARD AND THE UN HUMAN RIGHTS TREATY BODIES* 25 (2008).

<sup>3</sup> Single Convention on Narcotic Drugs, 1961, *amended by the Protocol Amending the Single Convention on Narcotic Drugs*, Aug. 8, 1975, 976 U.N.T.S. 105 [hereinafter *Single Convention*].

the United Nations, rests on three pillars: The Single Convention on Narcotic Drugs as amended by the Protocol (1972) (Single Convention),<sup>4</sup> the Convention on Psychotropic Substances (1971 Convention),<sup>5</sup> and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).<sup>6</sup>

The status of the international drug control regime in international law is noteworthy because the system is almost universally recognized. Almost every State in the world is a party to at least one of the conventions, including: 184 State parties to the Single Convention, 183 State parties to the 1971 Convention, and 184 State parties to the 1988 Convention. By definition of the Conventions, drugs include psychoactive substances comprising two major categories: narcotic drugs (e.g. opium and opium alkaloids, cocaine and cannabis products) and psychotropic substances (e.g. amphetamines, barbiturates and hallucinogens).<sup>7</sup> Alcohol, despite its psychoactive effect, is not included in the conventions and therefore falls outside the scope of international drug control.

By defining control measures to be maintained within each State party's jurisdiction and by prescribing rules to be obeyed by the parties in their relations with each other, the system provides a legal framework for drug control. The rules focus on commodity control on one hand (regulation of licit production, supply and consumption of drugs) and sanctions on the other (suppression of illicit production, supply and possession mainly through criminal law).<sup>8</sup> Thus, the control system has been developed on the premise that a reduction in the illicit drug markets will be achieved predominantly through prohibition-oriented measures.<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175 [hereinafter 1971 Convention].

<sup>6</sup> Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 497 [hereinafter 1988 Convention].

<sup>7</sup> The concrete substances under control are specified in the schedules of the Single Convention and the 1971 Convention.

<sup>8</sup> NEIL BOISTER, PENAL ASPECTS OF THE UN DRUG CONVENTIONS 1-4 (2001).

<sup>9</sup> See BECKLEY FOUNDATION DRUG POLICY PROGRAMME, RECALIBRATING THE REGIME: THE NEED FOR A HUMAN RIGHTS-BASED APPROACH TO INTERNATIONAL DRUG POLICY 20 (2008).

2011] *INTERNATIONAL CONTROL OF ILLEGAL DRUGS* 2411. *International Drug Control Efforts before 1960*

Concerted drug control efforts have evolved over a period of more than 100 years. At the end of the nineteenth century, the increased consumption of psychoactive substances such as morphine, heroin and cocaine, and the globally unregulated market for these substances led to serious concerns in the United States. However, for the other colonial powers, such as the United Kingdom or the Netherlands, narcotic drugs, especially opium, were a commodity of enormous economic significance. For example, the export of Indian opium to China created significant revenues and ultimately led to the two Opium Wars between Britain and China (1839-42 and 1857-60) in which Britain defended the interests of British merchants in the region.

Opium consumption was at a record level when the United States convened an international opium conference in Shanghai in 1909.<sup>10</sup> Due to its relative lack of overseas possessions and slight trading presence in Asia, the United States had no genuine interest in maintaining the global opium market.<sup>11</sup> Therefore, the US approach emphasized that the prohibition of opium was a moral question. However, other countries were not ready to concede a total ban on the opium trade. They preferred controlled trade over a complete prohibition. Due to these discrepancies in strategic interest, no final agreement (besides a set of non-binding resolutions) was reached at the Shanghai conference. But, in retrospect, the conference proved to be crucial because it paved the way for a follow-up conference in The Hague in 1911.<sup>12</sup> These follow-up negotiations resulted in the 1912 International Opium Convention.<sup>13</sup> In addition to opium and morphine, cocaine and heroin were also included as controlled substances. The main principles stipulated in the convention are still valid today. For example, the axiom that the manufacture, trade and use of

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<sup>10</sup> JULIA BUXTON, *THE POLITICAL ECONOMY OF NARCOTICS: PRODUCTION, CONSUMPTION AND GLOBAL MARKETS* 33-34 (2006).

<sup>11</sup> For a detailed analysis of the events and motivation leading to the first opium conference, see Julia Buxton, *The Historical Foundations of the Narcotic Drug Control Regime* 6-12 (World Bank Policy Research, Working Paper No. 4553, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1106042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106042).

<sup>12</sup> BUXTON, *THE POLITICAL ECONOMY OF NARCOTICS: PRODUCTION, CONSUMPTION AND GLOBAL MARKETS*, *supra* note 10, at 35.

<sup>13</sup> International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187 [hereinafter 1912 Opium Convention].

narcotic drugs should be limited to medical and scientific purposes governs the control system to this day. Under the 1912 Opium Convention, national governments were required to enact laws to control the production and distribution of narcotic drugs.<sup>14</sup>

Nevertheless, due to the aforementioned differences in strategic interests between the participating governments, the 1912 Opium Convention was only ratified by China, Norway, the Netherlands, the United States and Honduras before the outbreak of World War I. This changed when the Convention was imposed on the losing parties of the war by linking the ratification of the Opium Convention to the Versailles Peace Treaty of 1919.<sup>15</sup> Thus, by the mid-1920s close to sixty States were party to the 1912 Opium Convention. Furthermore, in the aftermath of World War I the League of Nations assumed responsibility for overseeing the Opium Convention,<sup>16</sup> and specialized bodies, in particular the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs, were created under its auspices. This proved to be a strong foundation for the successful establishment of a comprehensive international drug control system.

A further cornerstone of the international drug control system was established a few years later by the 1925 Geneva Opium Convention<sup>17</sup> and the Agreement Concerning the Manufacture of, Trade in, and Use of Prepared Opium.<sup>18</sup> Now States were required to annually submit statistics on the production of opium and coca leaves to the newly established Permanent Central Opium Board (PCOB). The obligatory control system included mandatory import certification and export authorization by government. Unfortunately, the system failed to prevent legally manufactured drugs from seeping into the illegal market. The 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (1931 Convention) tried to remedy this shortcoming by restricting the quantity of manufactured drugs

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<sup>14</sup> 1912 Opium Convention, *supra* note 13, arts. 9 and 10.

<sup>15</sup> Treaty of Peace between the Allied and Associated Powers and Germany, Jun. 28, 1919, 225 C.T.S. 188.

<sup>16</sup> Covenant of the League of Nations art. 23(c), Jun. 28, 1919, 225 C.T.S. 195 (the Members of the League “entrust the League with the general supervision over the execution of agreements with regard to . . . the traffic in opium and other dangerous drugs.”).

<sup>17</sup> International Opium Convention, Feb. 19, 1925, 81 L.N.T.S. 317.

<sup>18</sup> Agreement Concerning the Manufacture of, Trade in, and Use of Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337.

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available in each country for medical and scientific purposes.<sup>19</sup> The PCOB was given additional powers to control countries that exported or imported drugs beyond their stated manufacturing volumes or consumption needs.<sup>20</sup> One more major drug control treaty was adopted in the period between the First World War and the Second World War: the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.<sup>21</sup> It emphasized the importance of agreement by States on the implementation of provisions into their domestic laws on severe punishment,<sup>22</sup> for, *inter alia*, the production, trafficking, and sale of illicit substances.<sup>23</sup> Articles 7 to 10 were novel in that they dealt in great detail with extradition for drug related crimes. Overall, the inter-war drug control system achieved considerable success in limiting and screening the production and trade of narcotic drugs.<sup>24</sup>

After World War II, the administration of the drug control regime was transferred from the defunct League of Nations to the United Nations by the Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs (Protocol of Lake Success).<sup>25</sup> The Commission on Narcotic Drugs (CND), which replaced the Opium Advisory Committee, was established by the Economic and Social Council (ECOSOC) at its first session.<sup>26</sup> From then on it has been the main body advising ECOSOC on all drug-related matters.

In 1948, the Paris Protocol<sup>27</sup> supplemented the 1931 Convention and provided for bringing under international control the drugs outside the scope of the 1931 Convention. This measure was much needed because of the rise of “designer drugs” (in

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<sup>19</sup> Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 139 L.N.T.S. 301 [hereinafter 1931 Convention].

<sup>20</sup> *Id.* art. 14.

<sup>21</sup> Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 299.

<sup>22</sup> *Id.* (emphasizing imprisonment).

<sup>23</sup> *Id.* art. 2.

<sup>24</sup> Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, *supra* note 11, at 16-17.

<sup>25</sup> Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, Dec. 11, 1946, 12 U.N.T.S. 179.

<sup>26</sup> Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, *supra* note 11, 51 et seq.

<sup>27</sup> Protocol Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, *as amended by* the protocol signed at Lake Success, New York, on 11 December 1946, Nov. 19, 1948, 44 U.N.T.S. 277.

particular opiate derivatives with harmful effects, such as methadone or pethidine), which had been developed to evade international restrictions. Hence, the 1948 Paris Protocol was thought to eliminate loopholes by introducing the “similarity concept” into drug legislation in order to prevent drug manufacturers from evading legislation by producing analogues of prohibited drugs. Accordingly, Article 1(1) of the Paris Protocol states that the Protocol applies to all drugs with similar harmful effects and similar potential for abuse as the drugs specified in Article 1(2) of the 1931 Convention.<sup>28</sup> A new opium protocol was signed in New York in 1953 (1953 Opium Protocol).<sup>29</sup> The intention behind the protocol was to eliminate the overproduction of opium by authorizing only seven states to produce opium for export (Bulgaria, India, Iran, Greece, the Soviet Union, Turkey and Yugoslavia).

Despite the passage of the 1953 Opium Protocol and its predecessors—due to the increasing complexity of the drug control system—the international community felt an increasing need to consolidate the numerous conventions introduced since the initial Opium Convention of 1912 into one treaty. The resultant efforts led to the drug control regime in force today.

## 2. *Single Convention on Narcotic Drugs (1961) as amended by the Protocol (1972)*

The main underlying objectives of the Single Convention, besides the codification of the existing laws into one multilateral treaty, were the streamlining of the control mechanisms and the extension of existing controls.<sup>30</sup> The Single Convention was intended to be the final and definitive document that supersedes all previous treaties, i.e. terminates and replaces them.<sup>31</sup> Covered

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<sup>28</sup> *Id.* art. 1(1).

<sup>29</sup> Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, Jun. 23, 1953, 456 U.N.T.S. 56.

<sup>30</sup> Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, *supra* note 11, at 22; *see also* ADOLF LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961 74 (1973).

<sup>31</sup> Single Convention, *supra* note 3, art. 44. A party to the Single Convention cannot, on the basis of Article 44, refuse to carry out control provisions of an earlier treaty to which it is still a party so long as this treaty is not terminated in accordance with its own terms, or as long as all parties to this treaty have not accepted the Single Convention. This will generally not cause any difficulties because the Single Convention is compatible with earlier treaties and took over the substance of most of the rules of the earlier treaties. *See*



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by the Single Convention are, *inter alia*, the definitions of controlled substances; the framework for the operations of the drug control bodies; reporting obligations of Member States regarding manufacture, trade and consumption of controlled substances; and penal provisions and actions to be taken against illicit trafficking. The scope of the Single Convention includes the classic plant-based drugs, such as opium, heroin, cocaine, and cannabis. It consists of fifty-one articles and four schedules: over one-hundred illicit substances are listed in the four schedules, with drugs grouped according to their perceived dependence-creating properties.<sup>32</sup>

The Preamble stipulates that “addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind.”<sup>33</sup> Article 4(c), the central operational provision of the Convention, manifests a prohibitionist approach by stipulating that “the parties shall take such legislative and administrative measures . . . to limit exclusively to medical and scientific purposes the production, manufacture, export, import distribution of, trade in, use and possession of drugs.”<sup>34</sup> However, it must be noted that medical purposes include veterinary and dental purposes and that the meaning of the term “medical purpose” may change and is not exclusive to the use permitted under the system of “western medicine.”<sup>35</sup>

Article 2 of the Single Convention addresses control measures for the respective substances; the action of two agencies, the WHO and the CND, is required to put a narcotic drug under control.<sup>36</sup>

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LANDE, *supra* note 30, at 457.

<sup>32</sup> Schedule I contains substances that are subject to all control measures under the Convention, e.g., heroin, cocaine and cannabis. Schedule II includes substances which are used for medical purposes, and that are deemed to require less stringent control, e.g. codeine. Schedule III includes pharmaceutical preparations perceived not to lead to abuse or ill effect, e.g. products with a very low dosage of opium. Schedule IV contains substances which in small amounts may be allowed for medical and scientific research. *See* Single Convention, *supra* note 3, at 63.

<sup>33</sup> *Id.* pmb.

<sup>34</sup> It is one of the major achievements of the Single Convention that it ended exceptions permitted under earlier treaties, subject only to transitional provisions of limited local application and duration pursuant to Article 49 of the Single Convention. *See* LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, *supra* note 30, at 110.

<sup>35</sup> *Id.* at 111.

<sup>36</sup> Article 2 of the Single Convention offers a synopsis of the various regimes that the Single Convention provides for different categories of drugs by citation to the relevant articles and in some cases by giving the substantive rules themselves. *See id.* at 49.

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First, the WHO must determine whether a substance has dangerous properties and should therefore be listed on one of the schedules. Then the CND can either act in accordance with the recommendation of the WHO, or take no action at all.<sup>37</sup>

Countries allowing for the cultivation of coca bushes and opium poppies were required to establish national monopolies<sup>38</sup> and subsequently centralize and phase out their cultivation and production. The ultimate goal of these efforts is a universal international prohibition of the non-medical use of these substances. In regard to manufacturing,<sup>39</sup> trade and distribution,<sup>40</sup> and international trade<sup>41</sup> of controlled narcotic drugs, a strict licensing system and extensive control measures are prescribed to the parties. Under Article 39, parties are allowed to adopt laws with stricter measures of control than those provided by the Single Convention if they deem them desirable or necessary.<sup>42</sup>

The Single Convention of 1961 was amended by a Protocol in 1972 (1972 Protocol). The objective of the adoption of the 1972 Protocol was to further strengthen the international drug control system. This objective was furthered by introducing provisions on technical and financial assistance<sup>43</sup> and the establishment of

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<sup>37</sup> Single Convention, *supra* note 3, arts. 3(3)-3(6).

<sup>38</sup> *Id.* arts. 23 and 26.

<sup>39</sup> *Id.* art. 29. The term "licence" is used for two kinds of government authorization: (1) for the authorization to manufacture drugs (para. 1); and (2) for authorization to use a particular premise or establishment for that purpose (para. 2). Any State enterprise authorized to manufacture drugs is automatically licensed to do so pursuant to the meaning of "authorization" set out in the Single Convention, and therefore exempted from the formal requirement of a manufacturing licence. LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, *supra* note 30, at 317.

<sup>40</sup> Single Convention, *supra* note 3, art. 30. A general authorization to trade in anything is not sufficient. There must be a special authorization to trade in drugs, e.g. a licence to trade in pharmaceuticals or chemicals. The licence to undertake the wholesale or retail trade in drugs may be granted to an individual, a partnership, or a corporate body. *See* LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, *supra* note 30, at 329.

<sup>41</sup> Single Convention, *supra* note 3, art. 31. Two legal obligations are established: a) not to knowingly permit the export of drugs except in accordance with the laws and regulations of the importing country, and b) not to knowingly permit the export of drugs which would exceed the import limits of the importing country. *See* LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, *supra* note 30, at 348.

<sup>42</sup> Parties which apply "more strict or severe" measures may do this by either imposing controls in addition to those required by the Single Convention or by replacing measures with more strict and severe ones. *See* LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, *supra* note 30, at 449.

<sup>43</sup> Single Convention, *supra* note 3, art. 14.

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regional centers for scientific research and education to combat illegal use and traffic in drugs.<sup>44</sup> Article 22(2) of the 1972 Protocol provided for the seizure and destruction of illegally cultivated opium poppies and cannabis.<sup>45</sup> In addition, the 1972 Protocol modified the penal provisions of the Single Convention by providing extradition provisions similar to those in the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.<sup>46</sup>

### 3. *Convention on Psychotropic Substances (1971)*

In the late 1960s, the technical advances in the manufacture of synthetic drugs led to an unregulated global market for psychotropic substances, (such as amphetamines, barbiturates and hallucinogens).<sup>47</sup> After careful analysis, the CND concluded that the existing drug control system was limited to narcotic drugs and that the Single Convention was not applicable to psychotropic substances.<sup>48</sup> Nonetheless, the international community felt that a control mechanism over those substances was urgently needed, and the CND was called upon to draft a convention, which would bring those substances under control.

The result of the CND's efforts was the 1971 Convention, which consists of thirty-three articles and four schedules.<sup>49</sup> It can fairly be described as being based on the Single Convention, and its general purpose to limit the manufacture, trade, and use of psychotropic substances to medical and scientific purposes is similar to Article 4 of the Single Convention in respect to narcotic drugs.<sup>50</sup> Any substance included in the schedules must be licensed

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<sup>44</sup> *Id.* art. 38.

<sup>45</sup> *Id.* art. 22(2).

<sup>46</sup> *Id.* art. 36(2)(b)(ii). The Single Convention's offenses are deemed to be included in existing extradition treaties, and in the absence of an extradition treaty, the Single Convention can be used as such.

<sup>47</sup> Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, *supra* note 11, at 23.

<sup>48</sup> U.N. Econ. & Soc. Council [ECOSOC], Res. 1401 (XLVI), U.N. Doc. E/RES/1969/1401(LXVI) (June 5, 1969).

<sup>49</sup> The controlled psychotropic substances are categorized in a similar fashion to narcotic drugs under the Single Convention.

<sup>50</sup> Article 5 of the 1971 Convention refers to Article 7, which prohibits all use of those substances "except for scientific and very limited medical purposes." It is however hardly possible to define exactly for all parties and for all time what "very limited medical" use means. See ADOLF LANDE, COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES at 139, U.N. Doc. E/CN.7/589, U.N. Sales No. E.76.XI.5 (1976).

by the government for manufacture, trade, and distribution. However, compared with the strict controls imposed on plant-based drugs under the Single Convention, the 1971 Convention imposes a somewhat weaker control mechanism.<sup>51</sup> Similar to the control mechanism of the Single Convention, the WHO recommends whether a drug should be controlled. But, the CND is not bound by the recommendation of the WHO.<sup>52</sup> It may, (provided that the WHO has made and communicated its findings on control measures), place the substance concerned under a control regime, change the control regime, or free a substance from a control regime—contrary to the recommendations of the WHO. This obviously gives the CND much wider discretion under the 1971 Convention than under the Single Convention.<sup>53</sup>

Detailed provisions deal with licences,<sup>54</sup> prescriptions,<sup>55</sup> and warnings on packages and advertisements.<sup>56</sup> Concerning prescriptions, the main difference between the Single Convention and the 1971 Convention is that under the 1971 Convention a medical prescription is, in general, required for individual use of all psychotropic substances or preparations, whereas under the Single Convention a medical prescription is only required for certain drugs in its Schedule I.<sup>57</sup> According to Article 10 of the

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<sup>51</sup> This was due to concerns raised at the negotiations by the North American and European pharmaceutical industries. See MARTIN JELSMA, *THE CURRENT STATE OF THE DRUG POLICY DEBATE* 14 (2008) (support text for the First Meeting of the Latin American Commission on Drugs and Democracy).

<sup>52</sup> Decisions of the CND providing for changes in the schedules or for terminating wholly, or partially, an exemption of a preparation authorised by a party require a two-thirds majority of the members. LANDE, *COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES*, *supra* note 50, at 33.

<sup>53</sup> *Id.* at 31.

<sup>54</sup> 1971 Convention, *supra* note 5, art. 8. While the system of governmental authorizations referred to as “licence or other similar control measure” applies only to substances in Schedules II, III, and IV, a similar system (on stricter terms) applies to all activities involving substances in Schedule I. LANDE, *COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES*, *supra* note 50, at 168.

<sup>55</sup> 1971 Convention, *supra* note 5, art. 9. The article covers the substance of Article 30(2)(b) of the Single Convention and spells out some details, which are only implied in more general provisions in the Single Convention. See LANDE, *COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES*, *supra* note 50, at 181. On the other hand, it does not contain a specific provision concerning prescriptions “written on official forms to be issued in the form of counterfoil books.” See *id.*

<sup>56</sup> 1971 Convention, *supra* note 5, art. 10. The purpose of Article 10 is to assist retail distributors, physicians, and the parties themselves, in avoiding an improper use of psychotropic substances. See LANDE, *COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES*, *supra* note 50, at 192.

<sup>57</sup> Single Convention, *supra* note 3, art. 30.

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1971 Convention, directions for use, including cautions and warnings, need to be given only if they are necessary for the safety of the patients using them. What is necessary for the safety of the user is left to the judgment of the party concerned.<sup>58</sup> Advertisements to the general public for psychotropic substances are prohibited under the 1971 Convention; this includes newspapers, television and radio, but not announcements in technical journals, e.g. published specifically for medical practitioners.<sup>59</sup>

Article 20 of the 1971 Convention also addresses measures to be taken against the abuse of psychotropic substances, including treatment, education, rehabilitation and social reintegration.<sup>60</sup> Article 20 acknowledges that a system of penal sanctions and administrative control alone is not sufficient to keep drugs from the users and should therefore not form the sole subject of international cooperation against drug abuse. However, the penal provisions are similar to those in the Single Convention, (but without the extradition provisions which were added to the Single Convention by the 1972 Protocol).<sup>61</sup>

4. *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)*

Although the international drug control system satisfactory regulated the lawful production of narcotic drugs and psychotropic substances, the situation regarding illicit production did not noticeably improve. By the mid-1980s it was apparent that global drug abuse had reached unprecedented dimensions. Of special concern was the growing illegal opium production in Asia and the illegal cocaine production in the Andean countries. Against this background, the CND was requested by the General Assembly to prepare a draft convention against illicit traffic in narcotic drugs.<sup>62</sup>

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<sup>58</sup> See LANDE, COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES, *supra* note 50, at 192.

<sup>59</sup> *Id.* at 194.

<sup>60</sup> The terms of Article 20 were kept in general terms so as to present guidelines for the policies to be adopted by the governments, rather than mandatory rules requiring the adoption of specific measures. *Id.* at 331.

<sup>61</sup> For details on the penal provisions and a comparison with the Single Convention, see *id.* at 347-53.

<sup>62</sup> For a detailed elaboration on the background of the 1988 Convention, see WILLIAM C. GILMORE ET AL., COMMENTARY ON THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, at 1-12, U.N.

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Three years of deliberations by expert and review groups resulted in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The main accomplishment of the 1988 Convention is that it extends controls to the entire market chain, including precursors<sup>63</sup> at the beginning of the chain, to anti-money laundering measures at the end of the chain.<sup>64</sup> The Convention consists of thirty-four articles (together with an annex containing two lists of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances) and aims at strengthening compliance with the established drug control system.<sup>65</sup> Member States are required to cooperate and to coordinate their efforts to prevent global drug trafficking.<sup>66</sup> However, some States were worried that the Convention could be misused for other political objectives, i.e. be used to undermine their sovereign rights. Article 2(2) therefore clarifies that “the parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”<sup>67</sup>

While under the Single Convention, Member States are obliged to make trafficking in drugs “punishable offenses,” Article 3 of the 1988 Convention goes a step further and obliges Parties to make them “criminal offenses.”<sup>68</sup> According to Article 3(2) this includes the possession, purchase, or cultivation of drugs for

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Doc. E/CN.7/590, U.N. Sales No. E.98.XI.5 (1988).

<sup>63</sup> A precursor is a compound that participates in the chemical reaction that produces another compound. In the context of psychoactive substances for example, acetic anhydride is a substance that is essential in the refinement of morphine to heroin.

<sup>64</sup> See 1988 Convention, *supra* note 6, arts. 5 and 12.

<sup>65</sup> Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, *supra* note 11, at 25.

<sup>66</sup> See 1988 Convention, *supra* note 6, pmbl.

<sup>67</sup> Article 2(2) reiterates the principles enshrined in Articles 2(1) and (7) of the United Nations (UN) Charter. A party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment including temporary or limited operations. It also prohibits the exertion of pressure in a manner inconsistent with international law. See GILMORE, *supra* note 62, at 45.

<sup>68</sup> The underlying philosophy embodied in Article 3 is that improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition for enhanced co-operation. While the 1988 Convention seeks to establish a common minimum standard for implementation, nothing prevents parties from adopting stricter measures than those mandated in the text of the Convention, subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular, norms protecting human rights. See *id.* at 49.

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personal consumption.<sup>69</sup> Nevertheless, States are allowed to provide for alternatives to punishment (e.g. treatment, education, or rehabilitation) in cases of a minor nature and personal consumption.<sup>70</sup> Furthermore, States are called upon to introduce domestic legislation to prevent drug related money laundering. Although money laundering was in principle already a punishable offense under the Single Convention, the provisions of the 1988 Convention are much more precise. Article 3(1)(b) establishes drug related money laundering as a criminal offense, and, in targeting criminal proceeds, the 1988 Convention asks State Parties to confiscate proceeds from drug related offenses<sup>71</sup> and to empower courts to seize bank and financial records.<sup>72</sup>

As previously mentioned, the establishment of a control system for precursor chemicals was a novelty to the drug control regime. According to Article 12, the manufacture, transport or distribution of precursor chemicals should be deemed criminal offenses.<sup>73</sup> This is reflected in the extension of criminal offenses for which extradition can be sought: they include the offenses of drug related money laundering and the manufacture, transport, and distribution of equipment and precursor chemicals.<sup>74</sup>

Some confusion was created by Article 14(2), which stipulates that measures adopted to prevent illicit cultivation of narcotic plants “shall respect fundamental human rights and take due

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<sup>69</sup> See 1988 Convention, *supra* note 6, art. 3(2).

<sup>70</sup> *Id.* art. 3(4). Treatment will typically include individual and group counselling. Treatment facilities may prescribe pharmacological treatment, such as methadone maintenance. Further treatment services may include drug education, training in behaviour modification, etc. The ability to remain drug free may also be fostered by rehabilitation and reintegration programs, such as the provision of further education, job placement and skill training. See GILMORE, *supra* note 62, at 87-88.

<sup>71</sup> 1988 Convention, *supra* note 6, art. 5(1). In considering Article 5, it is important to recall the state of legal development in 1988. Only during the 1980s did States begin to develop comprehensive domestic legislation dealing with the proceeds of drug trafficking and other organized crime and with related matters such as money laundering. As a result, there was some uncertainty about the amount of detail that would be appropriate, and the preliminary draft of the Convention went into considerable detail, while the final text is much more flexible in style. See GILMORE, *supra* note 62, at 115.

<sup>72</sup> 1988 Convention, *supra* note 6, art 5(3). The purpose is to deprive offenders of the advantages offered by bank secrecy. Covered also are other “financial” records (a category that has considerably increased in size and importance with the growth of the financial service industry), and “commercial” records (e.g. shipping lines, insurances). See GILMORE, *supra* note 62, at 122.

<sup>73</sup> The INCB and CND are the bodies responsible to monitor and act in regard to the precursor control regime.

<sup>74</sup> 1988 Convention, *supra* note 6, art. 6(1) in conjunction with art. 3(1).

account of traditional licit uses, where there is a historic evidence of such use.” Some States<sup>75</sup> tried to interpret this as an acknowledgement that traditional licit uses still existed and had to be taken into account.<sup>76</sup> However, the Single Convention had already outlawed the traditional habits of cocoa chewing and opium smoking. The maximum transitional period granted by the Single Convention ended for opium in 1979 and for cannabis and the cocoa-leaf in 1989. Thus, it is clear that the drug conventions, including the 1988 Convention, do not provide for the production of these controlled drugs for licit traditional use. Such a conclusion is underpinned by Article 14(1) of the 1988 Convention, which points out that “any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances . . . under the provisions of the 1961 Convention.”<sup>77</sup>

#### 5. UNGASS Declaration and Action Plans (1998)

Although during the 1990s law enforcement measures based on the international drug control system had been successfully employed in the dismantling of some of the most notorious drug cartels (e.g. the Cali and Medellin cartels), global drug abuse did not, as had been hoped for, decrease.<sup>78</sup> A remarkable initiative to refocus international attention on the global drug problem was therefore taken by the UN General Assembly in 1998 when a Special Session (UNGASS) was convened. UNGASS focused on a number of measures to enhance international cooperation, and the UN General Assembly adopted a Declaration on the Guiding Principles of Drug Demand Reduction, a Political Declaration, and various action plans to this end.<sup>79</sup>

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<sup>75</sup> For example, Bolivia and Peru.

<sup>76</sup> GILMORE, *supra* note 62, at 296.

<sup>77</sup> For a detailed discussion of the drafting history of Article 14, see *id.* at 294-301.

<sup>78</sup> For a summary of the development of the global illicit drug markets see *infra* Part III below. For an in-depth analyses of the cocaine and heroin markets over the last 20 years, see Claudia Costa Storti & Paul De Grauwe, *The Cocaine and Heroin Markets in the Era of Globalization and Drug Reduction Policies*, 20 INT'L J. DRUG POL'Y 488 (2009).

<sup>79</sup> U.N. General Assembly, Special Session of the General Assembly Devoted to the Countering of the World Drug Problem Together (June 8-10, 1998), *Political Declaration, Guiding Principles of Drug Demand Reduction and Measures to Enhance International Cooperation Counter the World Drug Problem*, GAOR, 20th Spec. Sess., Supp. No. 1 (A/S-20/4), ch. V (1998), [www.unodc.org/pdf/report\\_1999-01-01\\_1.pdf](http://www.unodc.org/pdf/report_1999-01-01_1.pdf) [hereinafter *Political Declaration*].



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The Political Declaration is notable for various reasons, but particularly so for linking, for the first time, the illicit production and trafficking of drugs with terrorism and arms trafficking.<sup>80</sup> States were called upon to consider the documents agreed on at UNGASS when formulating national drug strategies. Moreover, they were encouraged to report biennially to the CND on their efforts to meet the goals of the action plans.<sup>81</sup> However, in contrast to the three drug conventions, the Political Declaration does not set up a system for monitoring compliance with the Declaration and the accompanying action plans. Article 20 of the Political Declaration solely declares that the CND will analyze the reports that it obtains from member States and use them for the enhancement of cooperation, but there is no formal sanction system foreseen in the Political Declaration. It thus remains a soft instrument.

At the time, UNGASS was a necessary step to encourage countries to renew and strengthen their commitment to international drug control. The year 2008 was envisaged as a target date by which measurable results of the implementation of the action plans were to be achieved, and indeed, considerable success was achieved in reducing the cultivation of coca in South America and opium in some regions of Southeast Asia. But these achievements were overshadowed by the rapid expansion of opium production in Afghanistan. Overall the problem of global drug abuse did not improve significantly during the UNGASS period.<sup>82</sup> Based on the review, the CND at its fifty-second session in 2009 considered further action and adopted a new political declaration<sup>83</sup> and action plan.<sup>84</sup> The new action plan addresses novel trends in drug trafficking, such as the use of information

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<sup>80</sup> *Id.* paras. 11 and 12. There seems to be evidence that Al Qaeda and other terrorist and guerrilla groups generate earnings from both the production and early stage trafficking of drugs. See PETER REUTER & FRANZ TRAUTMANN, A REPORT ON GLOBAL ILLICIT DRUG MARKETS 1998-2007 24 (2009).

<sup>81</sup> Most notable are the UNGASS Action Plan on International Cooperation on the Eradication of Illicit Drug Crops and on Alternative Development; the Action Plan against Illicit Manufacture, Trafficking and Abuse of Amphetamine-Type Stimulants and their Precursors; and the Action Plan on the Control of Precursors.

<sup>82</sup> For a more detailed analysis of the developments during these years, see *infra* Part III on trends in global illicit drug markets (with further references).

<sup>83</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Narcotic Drugs, Rep. on its 52nd Sess., at 37, U.N. Doc. E/CN.7/2009/12 (March 11-20, 2009) [hereinafter ECOSOC Report].

<sup>84</sup> *Id.*

technology, and calls for better regulation of online pharmacies and enhanced intelligence exchange and judicial cooperation.<sup>85</sup>

### *B. United Nations Drug Control Bodies*

In order to complete the overview of the functioning of the admittedly complex control regime, some remarks are warranted on the agencies coordinating and developing international drug policies. Compliance with the drug control system outlined in the preceding chapter is managed (rather than enforced) by the United Nations. Three bodies carry out the UN's main activities in this area: the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), and the UN Office on Drugs and Crime (UNODC). Other UN related agencies are also involved, on the periphery, in administering the global drug control effort, most notably the World Health Organization (WHO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).<sup>86</sup>

#### *1. Commission on Narcotic Drugs (CND)*

The CND is a functional commission of ECOSOC and the central policy-making body concerning all drug related matters in the UN. It was created by ECOSOC at its first session in 1946<sup>87</sup> and although initially composed of fifteen States, membership increased over time to fifty-three States.

According to Paragraph 2, Resolution 9(I), the CND's tasks include: (a) to assist ECOSOC in exercising powers of supervision over the application of international conventions and agreements dealing with narcotic drugs; (b) to carry out functions formerly entrusted to the League of Nations Advisory Committee on the Traffic in Opium and Other Dangerous Drugs; (c) to advise ECOSOC on all matters pertaining to the control of narcotic drugs and prepare such draft international conventions as may be

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<sup>85</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM 29-30 (2009), <http://www.unodc.org/documents/commissions/CND-Uploads/CND-52-RelatedFiles/V0984963-English.pdf>.

<sup>86</sup> WHO and UNESCO are mainly involved in harm reduction and education efforts on the demand side.

<sup>87</sup> U.N. Econ. & Soc. Council Res. 9(I), at 129, U.N. Doc. E/RES/1946/9(I) (Feb. 16, 1946).

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necessary; (d) to consider what changes may be necessary in the existing machinery for the international control of narcotic drugs and submit proposals thereon to ECOSOC; and (e) to perform such other functions relating to narcotic drugs as ECOSOC may direct.<sup>88</sup>

Summed up, the main task of the CND is to analyze the global situation on drug control and, when necessary, advise ECOSOC on changes to enhance the drug control system. In this context, the CND acts as guardian of the three international drug conventions. For example, according to Article 8 of the Single Convention, the CND is authorized to consider all matters pertaining to the aims of the Single Convention.<sup>89</sup> Similar blanket clauses can be found in Article 17 of the Convention on Psychotropic Substances and Article 21 of the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>90</sup>

Furthermore, special functions are assigned to the CND under the drug control conventions. Most important in the catalogue of competencies is the CND's supervision of the classification of controlled substances. The CND's authority to decide—on the basis of recommendations by the WHO—whether a drug is listed on, deleted from, or transferred to the schedules, is powerful.<sup>91</sup> Similarly, the CND decides pursuant to the 1988 Convention on the recommendation of the INCB, on placing precursor chemicals on the Convention's list of controlled substances. Whereas general decisions of the CND—as those of any other functional commission of the UN system—remain subject to approval by the ECOSOC or the General Assembly,<sup>92</sup> this is not the case when the CND decides on amending the schedules annexed to the conventions. Although a decision on amending the schedules is not subject to an initial review by ECOSOC or the General Assembly,<sup>93</sup> the CND's powers are restricted by the right of any party to file an appeal against such a decision. ECOSOC may then confirm, alter or reverse the decision of the CND.<sup>94</sup> Recently the position of the CND has been strengthened by the mandate to

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<sup>88</sup> *Id.*

<sup>89</sup> Single Convention, *supra* note 3, art. 8.

<sup>90</sup> 1971 Convention, *supra* note 5, art. 17; 1988 Convention, *supra* note 6, art. 21.

<sup>91</sup> See *supra* text concerning the role of the WHO in this process: Part II.A.2. (for narcotic drugs) and Part II.A.3. (for psychotropic substances).

<sup>92</sup> *Id.* art. 7.

<sup>93</sup> *Id.* art. 3(9).

<sup>94</sup> Single Convention, *supra* note 3; 1971 Convention, *supra* note 5, art. 2(8).

receive reports on States' efforts to meet the goals agreed upon at the UNGASS.<sup>95</sup>

## 2. *International Narcotics Control Board (INCB)*

The INCB differs from the CND and UNODC in that it is an independent treaty body rather than a UN agency.<sup>96</sup> Notably, it is not purely an inter-governmental body, as the members are elected by ECOSOC from candidates proposed by governments and the WHO. However, the elected members do not represent governments, but act in their personal capacity as experts on drug related matters.<sup>97</sup>

The INCB was established in 1968 as the monitoring body for the implementation of the Single Convention.<sup>98</sup> Today it monitors the implementation of all three drug conventions and is concerned with the monitoring and screening of the production, trade, and use of licit and illicit drugs. To this end it works closely with national governments to ensure that adequate supplies of drugs are available for medical and scientific uses, and that weaknesses in national approaches to combating the production, trafficking, and use of illicit drugs are identified. The INCB collects and administers the statistical data for drug production, trade, and consumption; a measure aimed at helping governments to establish a balance between (licit) supply and demand.<sup>99</sup> The main task in this regard is the administration of the estimates and statistical returns systems.<sup>100</sup> States have an obligation to report their

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<sup>95</sup> Political Declaration, *supra* note 79, para 20, at 6 (noting the reports are to be submitted biennially and are analyzed by the CND in order to enhance the co-operation in combating the world drug problem).

<sup>96</sup> For a comparison of the INCB with the UN human rights treaty bodies, see BARRETT, *supra* note 2.

<sup>97</sup> Originally the INCB consisted of 9 members. The 1972 Protocol extended membership to 13 members. At least three members must have a medical, pharmacological or pharmaceutical background and are nominated by the WHO. See Single Convention, *supra* note 3, art. 9(1).

<sup>98</sup> See generally *Mandate and Functions*, INT'L NARCOTICS BOARD (2009), <http://www.incb.org/incb/en/mandate.html>.

<sup>99</sup> See Single Convention, *supra* note 3, art. 15 (requiring the statistical data at the disposal of the INCB is collected and published in the annual report, which is submitted to ECOSOC through the CND); 1971 Convention, *supra* note 5, art. 18, at 11 (requiring the reports shall also be communicated to the State Parties and be published by the U.N. Secretary-General, and mandating the INCB to make additional reports as it considers necessary).

<sup>100</sup> Single Convention, *supra* note 3, arts. 12-13. The parties to the Single Convention

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statistical data at certain deadlines, and, if they fail to submit estimates, the INCB might establish the estimates for them.<sup>101</sup> If the INCB has objective reason to believe that the aims of the Convention are being seriously endangered by a party (e.g. if a State is under the risk of becoming a centre of the illicit cultivation or production of narcotic drugs), the INCB may request the State to explain the condition, and it may propose the opening of consultations or the initiation of a study.<sup>102</sup> The mandate of the INCB includes entering into a continuing dialogue with governments relating to their obligations under the drug control conventions, and ultimately, if all measures of cooperation with the respective government fail, the INCB may recommend that other States stop the import and export of drugs to and from a country that fails to explain properly its activities.<sup>103</sup> However, the authority is much weaker than that of the INCB's predecessor, the Permanent Central Board, which actually could impose sanctions on States.<sup>104</sup> Although the INCB does not have the power to administer sanctions, it may well censure States which it judges not to be in compliance; such censure may have a positive effect in and of itself on compliance with the control regime.

### 3. *United Nations Office on Drugs and Crime (UNODC)*

The set-up of the UN programs and initiatives on drug control has changed frequently in recent decades. In 1991, the secretariat of the INCB (but not the Board itself), the functions of the Division of Narcotic Drugs (DND), and the UN Fund for Drug Abuse Control (UNFDAC) were integrated into the UN Drug Control Programme (UNDCP). A further streamlining took place in 1997, when UNDCP was merged with the Centre for International Crime Prevention to form the UN Office for Drug Control and Crime Prevention (UNODCCP). This agency finally became the UN Office on Drugs and Crime (UNODC) in 2002. With a staff of about five hundred worldwide, UNODC is a rather small office, but carries out important activities.

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are, under Article 19, required to furnish estimates on quantities of drugs to the INCB (under the 1971 Convention similar obligations exist in regard to psychotropic substances). See 1971 Convention, *supra* note 5, art. 16 (4).

<sup>101</sup> Single Convention, *supra* note 3, arts. 12(3) and 12(4).

<sup>102</sup> *Id.* arts. 14(1) and 14(2); 1971 Convention, *supra* note 5, art. 19(1), at 11.

<sup>103</sup> Single Convention, *supra* note 3, art. 14(2); 1971 Convention, *supra* note 5, art. 19(2).

<sup>104</sup> See also BARRETT, *supra* note 2, at 27.

Besides providing secretarial services for the other drug control bodies, UNODC is also responsible for the coordination of the UN anti-drug programs. Its mission involves close cooperation and assistance to national governments on the domestic and regional level. A variety of programs, mainly in developing and transitional countries, are executed under the supervision of UNODC.<sup>105</sup> One of the most prominent initiatives is the Global Programme on Monitoring Illicit Crops, which covers the cultivation of illegal crops in the most troubled countries, such as Myanmar, Laos, Afghanistan in Asia, and Bolivia, Colombia, and Peru in South America. In pursuing its mandate UNODC follows a twofold approach: on the one side research and awareness-raising by publishing material on global trends in drug cultivation and trafficking (e.g., the annual World Drug Report, which is the most cited document on the state of the global drug problem), and on the other side programs on drug abuse prevention and drug dependence treatment/rehabilitation.

### *C. Regional Initiatives and Cooperation on Drug Control*

The UN-guided international drug control effort must be put into perspective by acknowledging that it does not operate in a vacuum. In fact, it is interdependent with unilateral efforts at the domestic level and with numerous bilateral initiatives (for example between the United States and various Latin American countries).<sup>106</sup> Additionally, regional and sub-regional cooperation on drug control takes place on all continents. To a considerable extent these multilateral efforts are also supervised by the United

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<sup>105</sup> For example, a Caribbean Regional Drug Law Enforcement Training Centre was established in Kingston, Jamaica in 1996. See *Caribbean Regional Drug Law Enforcement Training Centre*, JAMAICAN MINISTRY OF NATIONAL SECURITY (2005), [http://mns.org.jm/cms/?page\\_id=63](http://mns.org.jm/cms/?page_id=63). The main focus of the Centre's activities is the strengthening of local and regional drug control bodies. *Id.* Similar projects are carried out all over Asia, Africa and Latin America. *Id.*

<sup>106</sup> The United States, for example, provides substantial assistance to many producer States, especially in South America. One tool employed by the United States in a unilateral effort is the certification procedure: each year the President submits to Congress a report identifying the major drug producing and drug transit countries. The President also identifies every country of that list that failed demonstrably to make substantial efforts to adhere to substantial international counternarcotics agreements. Decertification may entail the loss of US economic aid. However, the decertification of a producer or transit country does not affect humanitarian, counternarcotics or any other assistance that is vital to US interests. See Kal Raustiala, *Law, Liberation and International Narcotics Trafficking*, 32 N.Y.U.J. INT'L. L. & POL. 89, 110-13 (1999).

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Nations through the CND. Five subsidiary bodies have been established, in which the Heads of National Drug Law Enforcement Agencies (HONLEA) coordinate and strengthen their efforts in drug law enforcement activities.<sup>107</sup> The HONLEA bodies meet annually to identify policy and enforcement issues and to establish respective working groups.

But, regional organizations and action plans have also been launched outside of the UN system. Although these initiatives oftentimes cooperate with UNODC on some level, they are not directly affiliated with the United Nations. For example, the European Council, in December 2004, endorsed a European Union Drugs Strategy. This was followed by two successive Drugs Action Plans, which aimed at strengthening cross-border cooperation with third countries and international organizations.<sup>108</sup> In Asia, members of The Association of Southeast Asian Nations (ASEAN) and China endorsed an action plan called Drug Free ASEAN 2015,<sup>109</sup> under which the respective States plan to improve their bilateral and regional cooperation. In South America, the Inter-American Drug Abuse Control Commission (CICAD) was established in 1986 under the framework of the Organization of American States (OAS).<sup>110</sup> Furthermore, a Permanent Commission for the Eradication of the Illicit Production, Trafficking, Consumption and Use of Illicit Narcotic Drugs and Psychotropic Substances was established for Central America in 1993. Also the African Union has recently taken action by adopting in 2008 the Plan of Action on Drug Control and Crime Prevention.<sup>111</sup> An important inter-regional drug control

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<sup>107</sup> The CND subsidiary bodies include: HONLEA Europe; HONLEA Latin America and the Caribbean; HONLEA Asia and the Pacific; HONLEA Africa; and the Sub-Comm'n on Illicit Drug Traffic and Related Matters in the Near and Middle East. See *Subsidiary Bodies of the Commission on Narcoting Drugs-Subcommission on Illicit Drug Traffic and Related Matters in the Near and Middle East*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (2011), <http://www.unodc.org/unodc/commissions/CND/06subsidiarybodies.html>.

<sup>108</sup> *EU Drugs Action Plan 2005-2008*, 2005 O.J. (C 168) 1; *EU Drugs Action Plan 2009-2012*, 2008 O.J. (C 326) 9.

<sup>109</sup> Bangkok Political Declaration in Pursuit of a Drug Free ASEAN 2015, Oct. 11-13, 2000, available at <http://www.aseansec.org/5714.htm>.

<sup>110</sup> For the achievements of CICAD in the fields of alternative development and demand reduction see its various action plans, available at <http://www.cicad.oas.org/EN/BasicDocuments.asp>.

<sup>111</sup> AU Plan of Action on Drug Control and Crime Prevention (2007-2012) and its Mechanism for Implementation, Follow-up and Evaluation, (Dec. 3-7, 2007),

initiative worth mentioning is the Paris Pact Initiative. It is a partnership of more than fifty countries and international organizations aimed at combating the trafficking and consumption of Afghan opiates and focuses on enhanced border control and law enforcement on the drug trafficking routes from Central Asia to Europe.<sup>112</sup> In addition to the aforementioned high-level institutions and programs, various other regional and bilateral initiatives have been created, e.g., in the field of intelligence sharing, joint investigations, and the establishment of permanent task forces.

### III. THE STATE OF AFFAIRS: TRENDS IN GLOBAL ILLICIT DRUG MARKETS

Now that the operational set-up and legal framework of the international drug control regime has been outlined, the following section will take a look at the effectiveness of the system in achieving its main objective: controlling the manufacture, distribution and use of psychoactive substances.

#### A. Production

Due to the fact that in many instances the cultivation and production of drugs takes place in remote places and concealed settings, it is extremely hard to estimate the quantities of drugs produced. This explains why UNODC and other institutions are very careful with statistical data concerning drug production and pronounce that it is impossible to accurately determine the level of global production and whether it has increased or decreased over recent years. However, estimates are possible and figures in the 2009 World Drug Report indicate that the overall production of illicit drugs did not increase over the last decade.<sup>113</sup> For some drugs, there might have even been a slight decline in production levels.<sup>114</sup>

Most of the cultivation of drug crops is confined to well known areas in only a handful of countries. The biggest concern on the international level is opium production in Afghanistan.

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[http://www.africa-union.org/  
root/ar/index/AUPA%20-%20English.doc](http://www.africa-union.org/root/ar/index/AUPA%20-%20English.doc)

<sup>112</sup> See PARIS PACT INITIATIVE, <http://www.paris-pact.net> (last visited Apr. 10, 2011).

<sup>113</sup> U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2009, 9-19, U.N. Sales No. E.09.XI.12 (2009) [hereinafter WORLD DRUG REPORT 2009].

<sup>114</sup> For the decline in cocaine production, see *id.*



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Although opium production has shown a steady downward trend in the Golden Triangle for over a decade, it now concentrates in Afghanistan.<sup>115</sup> The increased production of opium in Afghanistan started in 2002 and is directly related to the fall of the Taliban regime following the invasion of Afghanistan after the September 11, 2001 attacks. In the years before, the Taliban had prohibited the cultivation of opium, and production had been drastically reduced by 2001.<sup>116</sup> However, production resumed quickly after the invasion, and by 2003 had reached previous levels, surpassing them significantly by 2006.<sup>117</sup> It is important to note that the massive increase in opium cultivation in Afghanistan is not explained by a larger world demand of opiates (the demand seems stable, with a decline in some major markets), but rather by the lack of government control in the respective provinces in the south of Afghanistan.<sup>118</sup> Although growing opium is prohibited by the central government, it lacks the authority to persuade farmers (which act as independent entrepreneurs and depend on opium growing generated income for their livelihood) to cultivate other crops.<sup>119</sup>

With regard to cocaine, production has fluctuated around a fairly constant level, with a slight downward trend since 2001.<sup>120</sup> Production is confined to three countries: Colombia, Peru, and Bolivia.<sup>121</sup> While the conditions for the production of cocaine considerably deteriorated in Peru and Bolivia during the 1990s (due in some cases to aggressive eradication efforts and interception of air smuggling), the intensifying civil war in Colombia made it the principal location for the production of cocaine. In 1995 Colombia accounted for about 22% of the total

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<sup>115</sup> REUTER & TRAUTMANN, *supra* note 80, at 26. The so-called “Golden Triangle” is a mountainous area in the border region of the Southeast Asian countries of Myanmar, Laos, Vietnam and Thailand.

<sup>116</sup> *Id.*

<sup>117</sup> See U.N. Office on Drugs and Crime & the World Bank, *Afghanistan’s Drug Industry: Structure, Functioning, Dynamics and Implications for Counter-Narcotics Policy*, 33 (2006) (Doris Buddenberg & William A. Byrd eds.).

<sup>118</sup> U.N. Econ. & Soc. Council, Commission on Narcotic Drugs, *Making Drug Control “Fit for Purpose”*: *Building on the UNGASS Decade*, 6-7, U.N. Doc. E/CN.7/2008/CRP.17 (May 7, 2008) (prepared by Antonio Maria Costa) [hereinafter *Making Drug Control “Fit for Purpose”*].

<sup>119</sup> However, it might be seen as a success of the system that the overwhelming majority of the worldwide illicit production of opium is contained to a single country and a few provinces in that country.

<sup>120</sup> REUTER & TRAUTMANN, *supra* note 80, at 27.

<sup>121</sup> *Id.*

cocaine production; this figure rose to 60% by 2007 and peaked at almost 80% in 2000.<sup>122</sup>

While opium and cocaine are traditionally produced in only a handful of countries, the situation regarding cannabis and amphetamine-type stimulants (ATS) is completely different. Cannabis can be produced almost everywhere—even indoors—and therefore estimating the production is much harder. Since it requires relatively little maintenance, it is often grown on vacant land in developing countries by small-scale farmers also cultivating other crops.<sup>123</sup> Furthermore, it is the only illicit drug where users can comfortably generate their own supply. For psychotropic substances such as amphetamines the production is harder to estimate, as it is a heterogeneous collection of substances with different production technologies. ATS production centers are assumed to be located in geographically diverse spots, which cannot be categorized. They include, for example, developed countries (such as the Netherlands), transitional countries (such as Russia), and developing countries (such as Myanmar). In contrast to cocaine and opiates, whose production requires vast arrays of land and considerable manpower to harvest the crops, some psychotropic substances can be produced with minimal fixed capital and the use of a very small labor force. Some ATS can be produced in small movable facilities or even private kitchens. However, unlike cannabis, for most ATS synthetic drugs the skills needed to access and process the needed chemicals are not widely spread.<sup>124</sup>

### *B. Consumption*

The global demand for illicit drugs is even harder to measure than the production. This is due to the fact that most countries lack reliable monitoring systems. In any case, the UNODC estimates that the drug problem is contained to less than 5% of the adult world population and that problem drug users are limited to about 0.6% of the global adult population.<sup>125</sup> As for consumption patterns, it can be stated that, although drug use has declined in some countries, the global number of drug users has expanded

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<sup>122</sup> *Making Drug Control "Fit for Purpose," supra* note 118, at 8.

<sup>123</sup> WORLD DRUG REPORT 2009, *supra* note 113, at 174.

<sup>124</sup> *Id.*

<sup>125</sup> The UNODC estimates that only about 25 million problem drug users exist, see *Making Drug Control "Fit for Purpose," supra* note 118, at 3.

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over the last decade.<sup>126</sup> The changes in consumption patterns have been uneven. In Western countries the use of heroin has drastically declined, and to some extent, the use of cocaine and cannabis may have also declined in the latter years of the first decade of the twenty first century. The United States has traditionally been the most important market for cocaine; however, there now is a decline in estimated prevalence of cocaine consumption in the United States,<sup>127</sup> with a partial absorption of the supply by a substantial expansion of the cocaine market in European countries such as the United Kingdom and Spain.<sup>128</sup> Outside of North America and Europe, cocaine use remains low.<sup>129</sup>

A rising problem of heroin and opium abuse is observed in developing countries in Eastern Europe, Africa, and Asia. A serious epidemic of opiate use has been reported in Russia and bordering Central Asian countries.<sup>130</sup> The supply increase from Afghanistan seems to be the factor primarily responsible for this development. In contrast, in the Golden Triangle, both a “massive production decline” and consumption decline have been reported over the last decade.<sup>131</sup> China and India, countries with a long history of opiate addiction, have high absolute numbers of heroin users.<sup>132</sup> But, in relation to the huge population of these countries, the prevalence level is rather low. The country with the most severe opiate abuse problem, although statistical data is rare, might be Iran.<sup>133</sup>

Cannabis use has stabilized in countries in which there had been a high rate of cannabis consumption before the 1990s.<sup>134</sup> For countries in which cannabis use was not well established before the 1990s the upward trend only began to decline by the mid 2000s, despite a steady rise before. In the major transitional countries,<sup>135</sup> cannabis use remains generally low, although some of these countries (e.g., India) have a tradition of the use of cannabis in religious ceremonies. Finally, in regard to ATS the trend in

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<sup>126</sup> REUTER & TRAUTMANN, *supra* note 80, at 11.

<sup>127</sup> *Id.* at 30.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 31.

<sup>130</sup> *Id.* at 30.

<sup>131</sup> *Making Drug Control “Fit for Purpose,” supra* note 118, at 9.

<sup>132</sup> REUTER & TRAUTMANN, *supra* note 80, at 30.

<sup>133</sup> *Id.*

<sup>134</sup> *E.g.*, United States, United Kingdom, Canada, and Australia. *See id.* at 29.

<sup>135</sup> China, India, and Brazil.

consumption is hard to quantify (as with the production). The problem seems to be most acute in Southeast Asia.<sup>136</sup>

In summary, at least in countries that have a functioning monitoring system in place—especially in North America and Western Europe—the trends in drug consumption are somewhat encouraging. The number of illicit drug users worldwide is dominated by the number of people using cannabis. In 2007, there were an estimated 160 million cannabis users versus a total of just 40 million users of ATS, cocaine, and heroin combined.<sup>137</sup> According to UNODC the problem of illicit drug use is contained to a rather small user group compared to the consumption levels of legalized psychoactive drugs such as tobacco or alcohol.<sup>138</sup> In regard to the change of drug consumption patterns in the UNGASS period (1998-2008), Reuter and Trautmann observe that the main trends were: (1) a decline of cannabis and heroin use in Western countries; (2) an expansion of heroin markets in Russia and its neighboring countries; (3) the growth of the cocaine market in Western Europe which roughly compensated for the decline in the US market; and (4) the stabilization of ATS use, although the estimates are not very exact.<sup>139</sup>

### C. Revenues

The markets for illegal psychoactive substances are subject to the laws of economics and the rules of supply and demand. In theory, drug control efforts generate scarcity, boosting the prices out of proportion to the production costs. This, again in theory, helps to keep illegal substances out of the hands of potential addicts, but the high prices allow traffickers to generate huge profits.<sup>140</sup> In reality, cocaine and heroin prices have sharply declined in major markets over the last thirty years (especially between 1980 and 1990).<sup>141</sup> The price decline has led to a drop in

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<sup>136</sup> *Making Drug Control "Fit for Purpose," supra* note 118, at 9.

<sup>137</sup> REUTER & TRAUTMANN, *supra* note 80, at 31.

<sup>138</sup> Alcohol and tobacco are each used by about 30% or even more of the adult population. Mortality statistics associated with illicit drugs, tobacco and alcohol show that worldwide annually about 5 million deaths are caused by tobacco, 2 million deaths are caused by alcohol and about 200,000 deaths are caused by abuse of illicit drugs, see *id.* at 4.

<sup>139</sup> *Id.*

<sup>140</sup> WORLD DRUG REPORT 2009, *supra* note 123, at 165.

<sup>141</sup> Retail prices for cocaine and heroin have fallen to less than half their levels of 1990. See Costa Sorti & De Grauwe, *supra* note 78, at 488. This can be seen as a desirable result because lower prices reduce criminal revenues and thereby reduce incentives for drug

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retail revenue as well. UNODC estimates that cannabis is generating the highest revenues of any drug.<sup>142</sup> It estimated the sales revenue in 2003 at \$322 billion and the wholesale revenues at \$94 billion, but estimates of other agencies are significantly lower.<sup>143</sup> However, it is clear from these figures that the illicit global drug market is a multi-billion dollar enterprise. The annual trade in cocaine from Colombia to Europe and the United States is estimated around €6 to €9 billion.<sup>144</sup> For heroin, a rough calculation by Reuter and Trautmann suggests that the global total heroin trade does not exceed €20 billion annually.<sup>145</sup> However, as with production and consumption, it is hard to estimate total revenues accurately.

Generally, the cost of production, as opposed to distribution, is only a small share of the final price (usually about one to two percent): the vast majority of costs accrue at the distribution level in the consumer country. Smuggling also accounts for a modest share of the final price—bigger than production and refining in the source country—but still relatively small compared to the costs of distribution.<sup>146</sup> The high cost of distribution in consumer countries is due to the fact that low-level dealers need to be compensated for the risk of detection and arrest. Since drug distribution requires a certain degree of coordination and organization to be efficient, usually racketeering organizations that are also involved in other criminal activity, such as gambling or prostitution, organize the distribution of illicit drugs.<sup>147</sup> It is integral to the system that even though the illicit drug markets generate billions of dollars in sales, the overwhelming majority of the people involved at some point of the production and distribution chain make only modest incomes. This holds true for the farmers involved in the cultivation of the plants, the “mules” transporting the drugs, and the low level

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related crimes. But on the other hand lower prices might lead to new users or heavier and more frequent use by existing drug users.

<sup>142</sup> WORLD DRUG REPORT 2009, *supra* note 113, at 89.

<sup>143</sup> For a comparison of UNODC and more conservative figures see REUTER & TRAUTMANN, *supra* note 80, at 12. Reuter and Trautmann estimate the size of the cannabis retail market in 2005 for the major regions (North America, Western Europe and Oceania) being close to only U.S. \$34 billion. *Id.*

<sup>144</sup> This includes transportation costs, payoffs, and compensation for trafficking risks. *See id.* at 32.

<sup>145</sup> *Id.* at 33.

<sup>146</sup> *Id.* at 23.

<sup>147</sup> This might not hold true for the United States, where the drug distribution system seems to be organized separately and independent of other racketeering organizations.

dealers in consumer countries. While actual producers and refiners make about 1-2% of the total, the rest is payment for the distribution labor.<sup>148</sup> A significant amount goes to retailers in consumer countries, while the main beneficiaries are high-level traffickers in the producing countries.<sup>149</sup>

One would imagine that supply containment policies have increased retail prices and reduced consumption and production. This is not the case, and a crucial role is played by the liberalization of (licit) markets and its influence on the illicit drugs markets. The global economic liberalization of the last decades undermines and runs counter to efforts controlling the trafficking in illicit drugs, because illicit trade is intrinsically tied to licit trade.<sup>150</sup> Raustiala identifies numerous ways in which international economic liberalization facilitates drug trafficking: (1) it lowers the price of legal inputs into drug production; (2) it improves the infrastructure of trade, lowering transportation costs and expanding access and distribution; (3) it increases the volume of goods in commerce, overtaxing customs officers, and making it easier to transport drugs undetected; and (4) it facilitates money laundering and legal investment, thereby helping drug traffickers hide and clean their profits.<sup>151</sup> Ultimately, it is argued that globalization offsets the effects of supply containment policies because it lowers intermediation margins, and as a result lowers retail prices, thereby stimulating consumption. At the same time it increases prices charged by producers, and tends to increase production.<sup>152</sup>

Overall, and keeping purely theoretical models of explanation aside, it seems that revenues from illicit drug trafficking have declined over the last decade because retail prices have fallen for all major drug types,<sup>153</sup> and production quantities have been more

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<sup>148</sup> REUTER & TRAUTMANN, *supra* note 80, at 11. The major economic consequence of the illicit trafficking of drugs is that they create illegal incomes. Laundering illegal profits is an essential part of drug trafficking, therefore strategies to control the illicit drug markets must include strategies to hinder money laundering. The 1988 Convention established the means to move beyond arrest and seizure. But it has been argued that international cooperation and anti-trafficking measures must also make better use of the U.N. Office on Drugs and Crime. See U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, 2225 U.N.T.S. 209 (Nov. 15, 2000).

<sup>149</sup> REUTER & TRAUTMANN, *supra* note 80, at 59.

<sup>150</sup> Raustiala, *supra* note 106, at 143.

<sup>151</sup> *Id.* at 116.

<sup>152</sup> Costa Storti & De Grauwe, *supra* note 78, at 495.

<sup>153</sup> For indexed prices of the major drugs on the European market between 2001-2006,

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or less stable.

#### IV. HUMAN RIGHTS AND INTERNATIONAL DRUG CONTROL LAW

The statistical data summarized in the preceding section can be read in two ways: either as a indication of the success of the drug control regime (that the global drug problem has been contained) or as a failure (that the drug problem has not been solved). Whichever interpretation one endorses, it is obvious that drug control is not an end in and of itself. Rather, the ultimate objective is to improve public health and to limit human suffering. The prevalent strategy of combating drug related dangers with a “war on drugs” has—in some countries—led to extreme actions such as military operations against farmers, chemical fumigation of illegal crops, and wholesale imprisonment of drug users. The statistical data indicates that drug production and consumption has not been substantially reduced by employing these strategies. Moreover, it is argued that the international drug control regime as an integral cornerstone in the “war on drugs” abets human rights abuses, worsens international security, and builds barriers to sustainable development.<sup>154</sup> The Latin American Commission on Drugs and Democracy, an initiative formed by former Presidents Cesar Gaviria (Colombia), Ernesto Zedillo (Mexico), and Fernando Henrique Cardoso (Brazil) to evaluate the effectiveness and impact of the war on drugs in Latin America, came to the conclusion that “prohibitionist policies based on the eradication of production and on the disruption of drug flows as well as on the criminalization of consumption have not yielded the expected results.”<sup>155</sup>

##### A. *Domestic Implementation of the Drug Control Conventions*

An increasing number of States, non-governmental organizations and scientists, are concerned that the drug

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see REUTER & TRAUTMANN, *supra* note 80, at 33-34.

<sup>154</sup> Damon Barrett & Manfred Nowak, *United Nations and Drug Policy: Towards a Human Rights based Approach*, in *THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF KALLIOPI KOUFA* 449, 449-50 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

<sup>155</sup> Latin American Commission on Drugs and Democracy, *Drugs and Democracy: Toward a Paradigm Shift* 7, [http://www.drogasedemocracia.org/Arquivos/livro\\_ingles\\_02.pdf](http://www.drogasedemocracia.org/Arquivos/livro_ingles_02.pdf) [hereinafter *Drugs and Democracy: Toward a Paradigm Shift*].

conventions, despite the impact that they carry, are not flexible enough to allow for an individually tailored approach that takes the special socioeconomic features of different States into account. The Latin American Commission on Drugs and Democracy has stated that “the search for more efficient policies, rooted in the respect for human rights, implies taking into account the diversity of national situations and emphasizing prevention and treatment.”<sup>156</sup> Indeed, the implementation of the various U.N. conventions into domestic law prompts concerns because some of the most vulnerable groups of society are affected by the drug conventions: drug addicts (who are already vulnerable to discrimination and poverty) and farmers in developing countries (who cultivate illicit crops because they often do not have an economically sound alternative).

As a matter of fact, an inconsistent approach to drug control has, on occasion, led to the occurrence of serious human rights violations. States subscribing to a restrictive interpretation of their obligations under the drug conventions tend to implement laws that are beyond the treaty requirements. When assessing the influence of the drug conventions on domestic policies of States, it must be borne in mind that the drug conventions are only one considerable factor out of many that States must take into account when implementing domestic policies and legislation. Things are further complicated by the fact that the international drug control regime faces a twofold problem: while on the one hand some States work, to the extent that human rights are violated, with very repressive drug control legislation and enforcement, different States on the other hand apply liberal drug policies, which have a potential to run counter to the objectives of international drug control. This dichotomy is a direct result of the autonomy of domestic legislation and is integral to the conventions. On a more basic level, it is part of the principle of sovereign equality under international law. Governments are left with ample room for interpretation and they are presented a huge degree of freedom when formulating individual drug control policies.<sup>157</sup> This latitude is not unlimited, of course, as states must make *bona-fide* efforts to

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<sup>156</sup> *Id.* at 8.

<sup>157</sup> Bewley-Taylor, *supra* note 1, at 173. The leeway arguably even includes the de facto legalisation of certain “soft” drugs, such as cannabis. Further latitude is provided by terms such as “medical purposes,” which might have different meanings at different times in different nations. See SYAMAL KUMAR CHATTERJEE, LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL 356-57 (1981).



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comply with their international obligations.

The international drug control regime is dedicated to controlling global drug flows, and States must implement laws towards this common end. Therefore, the complete legalization of substances currently the target of the drug control regime seems not to be a valid option under the regime—especially in light of the fact that it is debatable whether legalization would be a solution for the problems related to drug abuse in any case.<sup>158</sup> Be that as it may, the point to be made is that the drug control conventions do not contain provisions that bind Member States to certain compliance actions without granting them sufficient leeway for implementing individually tailored policies.<sup>159</sup> In fact, the most troublesome measures on the domestic level are arguably carried out outside the mandatory framework of the conventions. As will be demonstrated, it is in fact the obligation of each party to one of the conventions, and of the international community as a whole, to remedy the unwelcome effects of the global drug control regime and to prevent grave human rights violations from happening.

*B. Unintended Consequences of International Drug Control Policies*

Dissatisfaction with the UN drug control system is on the rise, and a consensus has formed that the focus of international drug

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<sup>158</sup> Just as repressive methods have harmful effects, so the absence of control might also have a negative effect on public health. See JELSMA, *supra* note 51, at 2-3. The UNODC, in the *World Drug Report*, argues that legalization would have a counterproductive effect: the consequence of making currently illegal substances legal would likely result in an increase in their popularity to levels of licit addictive substances such as alcohol or tobacco. While developed countries might be able to deal with this, the burden would be placed on developing countries, which would likely be afflicted by new problems the way they are currently afflicted by growing alcohol and tobacco problems. See WORLD DRUG REPORT 2009, *supra* note 123, at 164-65. Antonio Maria Costa, the executive director of UNODC, has labelled legalization efforts as “drug neo-colonialism,” which would open the “floodgates of a public health disaster in the Third World.” See Antonio Maria Costa, *International Drug Policy, An Unfinished Architecture*, Address Before the 53d Session of the Commission on Narcotic Drugs, 4, (March 8, 2010), [http://www.unodc.org/documents/frontpage/CND\\_Costa\\_Speech\\_08\\_03\\_10.pdf](http://www.unodc.org/documents/frontpage/CND_Costa_Speech_08_03_10.pdf). For an assessment of the impacts of drugs on development (productivity, health, violence, and corruption) see Merrill Singer, *Drugs and Development: The Global Impact of Drug Use and Trafficking on Social and Economic Development*, 19 INT’L J. DRUG POLICY 467, 472-75 (2008). Singer concludes that both legal and illegal drugs are a threat to development and contribute to the maintenance of social inequality because of their effect of hindering development. See *id.* at 476.

<sup>159</sup> See *infra* the discussion of certain provisions of the conventions in Part IV.C.2.

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control policies needs to be shifted because the repressive approach has not resulted in the desired cessation of the production and consumption of harmful psychoactive substances. The system, being a prohibition based regime which focuses on control of production of psychoactive substances that are deemed to be harmful, has over time developed side-effects that were not foreseen (at least in their magnitude) when it was established. The Secretary-General of UNODC, in a position paper presented in 2008, admitted that the application of the drug control system has had several “unintended consequences.”<sup>160</sup>

The main unintended consequence identified by UNODC is the enormous black market for illicit drugs that evolved in order to get the prohibited substances from producer to consumer.<sup>161</sup> A second unintended consequence is the occurrence of a policy displacement, meaning that public funds were, in a lot of cases, drawn into law enforcement and public security instead of into public health<sup>162</sup> (even though “the health and welfare of mankind” are recognized in the Preamble of the Single Convention as the overarching concerns of drug control policy<sup>163</sup>). As a consequence, public health has been placed in the background, while public security oftentimes was seen as the primary and most effective way of containing the global drug problem.<sup>164</sup> The third unintended consequence is geographical displacement.<sup>165</sup> Geographical displacement concerns the phenomenon that stricter controls in one place lead to an increase in production in another place (the heavily increased opium production in Afghanistan, which is directly connected with the decrease in the Golden Triangle is evidence of this: the supply control success in one region directly led to the displacement of the problem to another region, in this case to Afghanistan). A fourth unintended consequence is substance displacement, whereby one drug is controlled by

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<sup>160</sup> Even though this has been generally praised as a step in the right direction, the term “unintended consequences” is euphemistic considering the effects of the war on drugs in some regions of the world. For a detailed explanation of the five identified unintentional consequences. See *Making Drug Control “Fit for Purpose,” supra* note 118, at 10-11.

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> Single Convention, *supra* note 3, pmb1.

<sup>164</sup> An additional problem in this context is that the framing of the narcotics problem as an issue of criminality instead of public health, and the application of “zero tolerance” policies obviously make the use of regulatory tools like cost-benefit analysis difficult. See Raustiala, *supra* note 106, at 140.

<sup>165</sup> *Making Drug Control “Fit for Purpose,” supra* note 118, at 10-11.

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reducing either supply or demand, and as a consequence users and suppliers move to another psychoactive substance with similar effects but less stringent controls.<sup>166</sup> The fifth and final unintended consequence identified by UNODC is the way that the drug control system perceives and deals with users of illicit drugs: due to strict domestic laws, these people oftentimes find themselves excluded and marginalized from society.<sup>167</sup>

Despite the unfortunate effects of globalization and free trade on drug control—which could not possibly have been taken into account when the drug control conventions were drafted decades ago—a consensus seems to be building that the unintended consequences of the current regime warrant a paradigm shift.<sup>168</sup> While most countries heavily affected by drug control measures have built a supportive infrastructure for law enforcement and penal sanctions, the same does not hold true for issues concerning public health. The challenge for the system is to maintain a balance between effective control measures on the one hand and the negative consequences of such controls on the other.<sup>169</sup> It has therefore, rightfully, been proposed that the international drug control system should refocus on three main directives: (1) treating drug use as a matter of public health; (2) reducing drug consumption through information, education, and prevention; and (3) focusing repressive measures on organized crime.<sup>170</sup>

*C. Adequacy of the Existing Drug Control Framework to React to Legitimate Concerns*

The question must be answered whether the drug control regime is flexible enough to be refined within its existing boundaries, or whether a new system must be established. Changing the international legal control framework would be problematic,<sup>171</sup> but might not be necessary at all. Although the

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<sup>166</sup> This phenomenon might explain the increasing popularity of ATS. *See id.*

<sup>167</sup> *Id.*

<sup>168</sup> All references cited in this paper, including the UN agencies, seem, in general at least, to agree on this premise.

<sup>169</sup> JELSMA, *supra* note 51, at 4.

<sup>170</sup> *Drugs and Democracy: Toward a Paradigm Shift*, *supra* note 155, at 11.

<sup>171</sup> Because changing the existing system is almost impossible and against the will of the influential States backing the current drug control approach (*e.g.*, United States, China, and Japan), it has been discussed whether “more progressive States” should collectively withdraw from the treaties in order to refocus the debate. *See Elliott et al.*, *supra* note 1, at 126-27.

drug control regime has been developed in a relative vacuum, the conventions might allow for an interpretation which remedies the shortcomings of the system and grants enough flexibility for States to fulfil their domestic and international obligations, especially in the context of human rights.

1. *Respect for Human Rights as a binding obligation under the UN Charter*

“Today one of the principal aims of international law is the protection of the human rights<sup>172</sup> of the individual . . . .”<sup>173</sup> If one shares the—progressive, but sustainable—view that the UN Charter is the quasi-constitution of the international community (in the sense that it “is a set of rules of international law which takes precedence over other norms because their existence is a precondition [to] the validity of the latter”),<sup>174</sup> then the axiom of protection of human rights as a binding obligation on all States can be derived directly from the UN Charter.

Conceptually, the United Nations—and thus each of its Member States through Article 56 in conjunction with Article 55(c) of the UN Charter—is committed to the respect for, and promotion of, human rights.<sup>175</sup> As a guiding purpose of the Charter, human rights occupy a position of great legal authority. This is emphasized by the Charter’s reference to human rights seven times—most prominently in the Preamble (“determined. . . to reaffirm faith in fundamental human rights”) and in Article 1 (“the purposes of the United Nations are . . . to achieve international cooperation in promoting and encouraging respect

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<sup>172</sup> According to Henkin, “[h]uman rights are those liberties, immunities and benefits with by accepted contemporary values all human beings should be able to claim ‘as of right’ of the society in which they live.” See Louis Henkin, *Human Rights*, in 2 MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 886 (Rudolf Bernhardt ed., 1995).

<sup>173</sup> JOHN DUGARD, INTERNATIONAL LAW 308 (Lucienne Walters ed., 3rd ed. 2005).

<sup>174</sup> BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 175 (2009). Fassbender demonstrates that a comparison of the UN Charter with the “ideal type” of constitution (in the context of Max Weber’s methodology) reveals a similarity sufficiently strong to attribute a constitutional quality to the UN Charter. See *id.* at 180. Along the same lines, Thomas M. Franck notes that the four characteristics of perpetuity, indelibility, primacy, and institutional autochthony relate the UN Charter more proximately to a constitution than to a mere normative contractual arrangement, see Thomas M. Franck, *Is the U.N. Charter a Constitution?*, in VERHANDELN FÜR DEN FRIEDEN – NEGOTIATING FOR PEACE – LIBER AMICORUM TONO EITEL 96, 102 (Jochen Abr. Frowein ed., 2003).

<sup>175</sup> U.N. Charter arts. 55(c) and 56.

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for human rights”).<sup>176</sup> In other words: the protection of human rights is, besides development, peace, and security, the UN’s main purpose.<sup>177</sup>

The purposes and principles as enshrined in the Charter are to be complied with without restrictions<sup>178</sup> and in this context it is widely acknowledged that a minimum standard of human rights obligations exists that no State can ignore with simple reference to its *domaine réservé*.<sup>179</sup> However, the human rights clauses of the UN Charter admittedly have several defects: besides giving no indication of the rights protected (apart from non-discrimination), they also do not provide for an enforcement mechanism—unless violations constitute a threat to peace under Chapter VII of the UN Charter.<sup>180</sup> These shortcomings must be contemplated in the historical context. The Charter lacks a clear definition of the term “human rights,” but it nevertheless introduced principles and policies which were innovative at the time of its drafting in 1945.<sup>181</sup> The substance of the vague human rights obligations in the UN Charter was later spelled out in nine core human rights treaties promulgated under the auspices of the United Nations. Most important are the Universal Declaration of Human Rights,<sup>182</sup> the

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<sup>176</sup> *Id.* art. 2. See U.N. Econ. & Soc. Council [ECOSOC], Commission on Narcotic Drugs, *Drug control, crime prevention and criminal justice: A Human Rights perspective*, para. 5, U.N. Doc. E/CN.7/2010/CRP.6 (March 3, 2010) [hereinafter *Drug control, crime prevention and criminal justice: A Human Rights perspective*].

<sup>177</sup> G.A. Res. 60/1, para. 9, U.N. Doc. A/RES/6/1 (Oct. 24, 2005).

<sup>178</sup> The Preamble and Articles 1 and 2 form the indivisible core of the UN Charter, and whilst protection of human rights is not a principle (U.N. Charter art. 2), but a purpose of the United Nations (U.N. Charter art. 1), human rights form a constitutional requirement of the United Nations and its membership. See Katarina Mansson, *Reviving the ‘Spirit of San Francisco’: The Lost Proposals on Human Rights, Justice and International Law to the UN Charter*, 76 *NORDIC J. INT’L L.* 217, 232 (2007).

<sup>179</sup> See, e.g., THORSTEN STEIN & CHRISTIAN VON BUTTLAR, *VÖLKERRECHT* 360 (12th ed. 2009). Of the same tenor is Walter Kälin’s and Jörg Künzli’s statement that, “[i]n view of the fact that virtually all States are members of the United Nations, the Charter may be taken as the legal foundation of the universality of human rights,” see WALTER KÄLIN & JÖRG KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 39 (2009).

<sup>180</sup> DUGARD, *supra* note 173, at 311.

<sup>181</sup> The implementation of these principles alone was a major achievement of the negotiations at the San Francisco conference and helps explain the lack of a more sophisticated and elaborate structure of the Charter in this respect, see Farrokh Jhabvala, *The Drafting of the Human Rights Provisions of the UN Charter*, XLIV *NETHERLANDS INT’L L. REV.* 1, 31 (1997).

<sup>182</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/3/217A (Dec. 10, 1948). Article 25 of the Universal Declaration states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary

International Covenant on Civil and Political Rights (ICCPR)<sup>183</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>184</sup>

The concretization of human rights obligations in the main human rights treaties has been necessary to fill the void left by the vague obligations of the Charter. However, simple reference to the human rights treaties cannot solve the problem of primacy in the event of a conflict between two highly sophisticated treaty regimes such as, in this case, the human rights regime on the one hand and the drug control regime on the other hand. Such a problem can only be solved by reference to the Charter itself, because it serves as the base of human rights obligations.<sup>185</sup>

While the drug control conventions contain very limited provisions relating to human rights—despite a stated concern for the health and well-being of mankind—this does not mean that the system is free from oversight to ensure the protection of human rights. Drug control is part of the “international economic, social, health, and related problems,” international cooperation on which is a purpose of the United Nations.<sup>186</sup> Drug control, however, is not explicitly mentioned in the UN Charter. This is an important deviation from the Covenant of the League of Nations, which specifically mentioned drug control in Article 23(c), and explicitly entrusted the League of Nations with general supervision over the execution of agreements with regard to “the traffic in opium and other dangerous drugs.”<sup>187</sup> Drug control, under the UN Charter, is part of the larger aims of the organization and its members.<sup>188</sup>

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social services.” *Id.* art. 25. The argument has been made (although far from being undisputed) that the provisions are customary international law and are therefore binding on all States. For a discussion on which human rights might form part of customary international law, see KÄLIN & KÜNZLI, *supra* note 179, at 67-72.

<sup>183</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>184</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>185</sup> The primacy of human rights goes so far that the UN Security Council cannot take decisions that clearly violate human rights. See Marten Zwanenburg, *United Nations and Humanitarian Law* pa, in MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 44 (Rüdiger Wolfrum ed., 2001), available at <http://www.mpepil.com>.

<sup>186</sup> U.N. Charter, art. 55(b). U.N. Charter arts. 55(b) and 60 mandate ECOSOC to promote solutions of international economic, social, health and related problems.

<sup>187</sup> League of Nations Covenant, art. 23(c).

<sup>188</sup> BECKLEY FOUNDATION, *supra* note 9, at 4. See Rick Lines & Richard Elliott, *Injecting drugs into human rights advocacy*, 18 INT'L J. DRUG POL'Y 453, 455 (2007) (coming to the same conclusion: that human rights take priority over the international drug control regime).

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Enforcement of drug control measures does not carry the same weight as respect for human rights—a main purpose of the United Nations.<sup>189</sup> Hence, the answer to the question which system is to take precedence in case of an irreconcilable clash between human rights obligations and commitments under the drug control conventions lies in the hierarchy of norms. Human rights obligations ultimately prevail over specialized treaty regimes such as the drug control conventions.

One could argue that respect for human rights cannot be considered a binding obligation under the UN Charter because of the aspirational nature of the rights, as a kind of “guiding light.” Whether respect for human rights forms a fundamental obligation might indeed, on its face, be questioned. However, under Article 56 of the UN Charter (which refers to the purposes set forth in Article 55(c) of the Charter), all Member States have pledged themselves—and *ergo* are bound—to take joint and separate action for the achievement of universal respect for, and observance of, human rights and fundamental freedoms.<sup>190</sup> It has been repeatedly stated by the UN General Assembly that Article 56 imposes a legally binding obligation on States.<sup>191</sup>

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<sup>189</sup> On the technical level, the primacy of human rights over the three drug conventions is derived from the provisions of Article 103 of the UN Charter, which states that “in the case of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement their obligations under the present Charter shall prevail.” This formula includes all obligations that are an immediate and direct result of the UN Charter, see Rudolf Bernhardt, *Article 103*, in *THE CHARTER OF THE UNITED NATIONS A COMMENTARY* 1116, 1120 (Bruno Simma ed., 1994).

<sup>190</sup> See U.N. Charter, art. 56.

<sup>191</sup> G.A. Res. 1248 (XIII), U.N. Doc. A/3962 (Oct. 30, 1958); G.A. Res. 1598 (XV), U.N. Doc. A/4728 (April 13, 1961); see also Rüdiger Wolfrum, *Article 56*, in *THE CHARTER OF THE UNITED NATIONS A COMMENTARY* 793, 795 (Bruno Simma ed., 1994), with further references. Jordan J. Paust, *The UN is bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity*, 51 *HARVARD I.L.J. ONLINE* 1, 5 (2010), speaks of an independent obligation of members of the United Nations to respect and observe human rights under Article 56. Moreover, certain aspects of U.N. Charter Article 1—among them the respect for human rights—arguably constitute a legally binding obligation not only under the U.N. Charter but also under customary international law. See Rüdiger Wolfrum, *Article 1*, in *THE CHARTER OF THE UNITED NATIONS A COMMENTARY* 49 (Bruno Simma ed., 1994). Further account must be taken of the International Court of Justice’s statement in its Advisory Opinion on South West Africa, where it declared that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, at 57, para. 131 (June 21).

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A different question is of course whether this holds true for all human rights or just for a core of “fundamental” human rights. The question of which human rights are to be considered fundamental is complex and lies beyond the scope of this article.<sup>192</sup> But, despite manifold uncertainties surrounding the concretization of human rights, the fact remains that, even though they may not always be completely justiciable, core human rights obligations are legally binding on all UN Member States.

Although human rights obligations serve elementary ends, they must not be seen as an adverse counter-balance to the drug control regime. Rather, they are a substantial part of the regime itself, inherent in all legitimate drug control measures because of their status as a fundamental principle protecting human dignity.<sup>193</sup> Drug control law must be construed in conformity with human rights obligations and human rights obligations may take precedence if a balancing of interests does not lead to reconciliation of clashing norms.<sup>194</sup> The CND and the UN General Assembly have repeatedly acknowledged this by stating that drug control must be carried out in full conformity with the purposes and principles of the United Nations, and, *inter alia*, human rights.<sup>195</sup> In conclusion, all efforts to control harmful psychoactive substances must take notice, and must not violate, the principles guiding the United Nations, including the protection of, and respect for, human rights. It follows then, that grave human rights violations that stem from drug control efforts must be brought to an end. Such a human rights based approach represents more than “added value”; it is a legal obligation.<sup>196</sup>

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<sup>192</sup> However, some human rights, which arguably are of particular interest in the context of international drug control, will be briefly scrutinized in *infra* Part IV.C.2.

<sup>193</sup> The International Law Commission’s study group on fragmentation noted in this vein that “no treaty, however special its subject matter . . . applies in a normative vacuum, but refers back to a number of general, often unwritten principles of customary law.” See MARTTI KOSKENNIEMI, INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: THE FUNCTION AND SCOPE OF THE LEX SPECIALIS RULE AND THE QUESTION OF SELF-CONTAINED REGIMES’ 7, [http://untreaty.un.org/ilc/sessions/55/fragmentation\\_outline.pdf](http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf).

<sup>194</sup> See BARRETT, *supra* note 2, at 29; see also JELSMA, *supra* note 51, at 19.

<sup>195</sup> ECOSOC Report, *supra* note 83.

<sup>196</sup> *Id.* para 4.



2011] *INTERNATIONAL CONTROL OF ILLEGAL DRUGS* 2772. *Interpretation of the Drug Control Conventions in Light of Human Rights Obligations*

Human rights obligations are pertinent in international drug control on both the supply side (e.g., in producer countries in regard to farmers cultivating illegal crops), as well as on the demand side (e.g., concerning drug users in consumer countries). This paper will now undertake to demonstrate that the drug control conventions are structurally fit to take human rights concerns into account. However, it must be emphasized that an in-depth analysis of the technicalities of the discussed rights is not intended. The following remarks provide a few examples of when and how human rights must be taken into account in the context of the drug control conventions. It must, however, not be seen as a comprehensive analysis of these rights in the context of drug control, but rather as proof that it is conceptually possible to respect human rights while following the mandatory legal framework of the drug conventions.

In regard to the supply side, Article 14(2) of the 1988 Convention acknowledges that the measures taken to prevent the illicit cultivation of plants “shall respect fundamental human rights.”<sup>197</sup> It is not explicitly stated which methods of eradication are appropriate, but if human rights must be taken into account for determining the appropriateness of a measure, this clearly implies that some measures are problematic. For example, aerial herbicide sprayings must be evaluated in the light of human rights, even though the 1988 Convention is silent on aerial spraying and does not prohibit it (but Article 14(2) explicitly emphasizes the protection of the environment).<sup>198</sup> Aerial spraying not only affects coca plants, but also other crops that are farmed nearby. Some herbicides even have a long-term effect that makes it impossible to grow other crops for years after spraying. So, despite the effectiveness of toxic chemicals, the risks associated with their use need to be weighed.<sup>199</sup> The impact of aerial sprayings and other such radical eradication efforts might well interfere with the human rights standard set forth in Article 11 of the ICESCR, which provides for “the right of everyone to an adequate standard of living for himself and his family, including adequate food,

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<sup>197</sup> 1988 Convention, *supra* note 6, art. 14(2).

<sup>198</sup> *See id.*

<sup>199</sup> GILMORE, *supra* note 62, at 301.

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clothing, and housing, and to the continuous improvement of living conditions.”<sup>200</sup> Moreover, Article 12 of the ICESCR and the right to the highest attainable standard of health might be directly affected, because aerial sprayings with herbicides have an adverse impact on the health conditions of the people living and farming in the concerned areas.<sup>201</sup> Peoples right to the development might also be jeopardized, as forced crop eradication oftentimes deprives farmers of their livelihood and drives them into poverty. But, as this right is highly disputed and far from being universally accepted, a lot of additional questions can be raised.<sup>202</sup>

As evinced by the previous discussion, it is easy to see that a variety of human rights can be affected by a single measure aimed at controlling drug production. Key to balancing conflicting interests is the fair evaluation of all legitimate concerns. The infringement of human rights is not *per se* interdicted; human rights may well be affected by a measure with a legitimate aim that is guided by the principle of proportionality (i.e. is necessary and the least intrusive method to meet the goal). Finally, it must be

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<sup>200</sup> On the right to an adequate standard of living and the basic necessities that are covered, see Asbjorn Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in *ECONOMIC SOCIAL AND CULTURAL RIGHTS A TEXTBOOK* 133 (Asbjorn Eide & Catarina Krause & Allan Rosas eds., 2nd ed. 2001).

<sup>201</sup> The right to health does not cover everything that involves health, but is one right in a set of human rights that are all important for the protection of people's health. The core of the right to health can be divided into two categories: one containing elements related to health care and one encompassing elements related to underlying preconditions for health. Birgit Toebes, *The Right to Health*, in *ECONOMIC SOCIAL AND CULTURAL RIGHTS A TEXTBOOK* 169, 174 (Asbjorn Eide & Catarina Krause & Allan Rosas eds., 2nd ed. 2009).

<sup>202</sup> Although the right to development is not universally recognized, the UN General Assembly stated that “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). Alternative development is an important component of a balanced drug control strategy. The aim must not solely be a reduction in illicit crops, but rather broad based development leading to sustainable illicit crop reduction. According to UNODC, the farmers' rights to development and sustainable livelihood are non-negotiable and all measures related to crop eradication must address poverty reduction and the overall improvement in the socio-economic situation of small-farmer households. *Drug control, crime prevention and criminal justice: A Human Rights perspective*, *supra* note 176, paras. 48-9. The CND has also urged Member States to ensure that alternative development programmes and eradication measures fully respect international standards and human rights. See ECOSOC Report, *supra* note 83. For an overview of the right to development see Allan Rosas, *The Right to Development*, in *ECONOMIC SOCIAL AND CULTURAL RIGHTS A TEXTBOOK* 119 (Asbjorn Eide & Catarina Krause & Allan Rosas eds., 2nd ed. 2001).

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kept in mind that farmers who cultivate and refine illegal psychoactive substances—despite often arguably being victims of human rights violations themselves—play a crucial, non-passive role in drug production. Even in the context of human rights guarantees there are varying shades of grey, and matters are not always black and white.<sup>203</sup> Assessing the legality of a drug control measure must therefore take account of all possible factors. Under distinct circumstances the assessed legality of a measure may be different because achieving a given end may require different strategies in different settings.<sup>204</sup> This, however, is not necessarily a bad thing, as it may allow for individually tailored measures, which are better suited to deal with specific situations in different regions, rather than a general prohibition or allowance.

As has been stated above, this paper is not concerned with the technicalities of particular human rights, such as the right to health or the even more disputed right to development. The answer to the question of whether these rights are violated by a given enforcement measure on the ground or through particular legislation in the “war on drugs” must be left to a different study. The question of their universal acceptance and that of the classification of these rights (and what exactly is derived from such a grouping) also cannot be tackled here.<sup>205</sup> However, there is much to be said for the argument that universally accepted human rights include at least basic rights protecting human existence, such as the rights to life, food, and shelter.<sup>206</sup> In the end, and apart from the examples discussed above, there is no doubt that core universal human rights exist and that these fundamental rights can never be neglected.<sup>207</sup>

On the demand side, human rights concerns focus on harm reduction,<sup>208</sup> the treatment of drug users, and overly harsh law

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<sup>203</sup> For a critique of some features of the human rights approach, especially its generalizations and the tendency to forget about the “costs,” see David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

<sup>204</sup> Charles R. Beitz, *Human Rights as a Common Concern*, 95 AMERICAN POL. SCI. REV. 269, 277-78 (2001).

<sup>205</sup> On the foundations of international human rights guarantees, see KÄLIN & KÜNZLI, *supra* note 179, at 31-76.

<sup>206</sup> KÄLIN & KÜNZLI, *supra* note 179, at 273-319.

<sup>207</sup> Bardo Fassbender, *Idee und Anspruch der universalen Menschenrechte im Völkerrecht der Gegenwart*, in MENSCHENRECHTE ALS WELTMISSION 11, 34 (Josef Isensee ed., 2009).

<sup>208</sup> There is no single agreed upon definition of the term “harm reduction.” The term

enforcement practices. Of particular concern are law enforcement measures in the “war on drugs,” which frequently result in human rights violations.<sup>209</sup> While the specific content of criminal laws and criminal penalties under the drug conventions are left to the discretion of the States, human rights law provides a normative framework, against which criminalization and penalties are to be assessed.<sup>210</sup> For example, the way drug users are treated during detention can potentially conflict with the provisions against torture and inhumane or degrading treatment and punishment under Articles 7 and 10 of the ICCPR,<sup>211</sup> or the right to a fair trial under Article 14 of the ICCPR.<sup>212</sup> Clearly human rights law continues to apply when the international drug conventions request Member States to establish drug related offenses as criminal offenses in their domestic legislation.<sup>213</sup> But one must also keep in mind that most of the concepts suggested as an alternative to criminalization are themselves controversial. This holds especially true for harm reduction initiatives; harm reduction—while helping drug addicts to protect themselves from overdosing and diseases—does not have as its objective the prevention of drug abuse itself.<sup>214</sup> Some practices in drug

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describes measures taken to reduce the harm caused by drug abuse as opposed to measures aimed at eliminating the abuse itself. See Saul Takahashi, *Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues*, 31 HUMAN RIGHTS QUARTERLY 748, 764 (2009).

<sup>209</sup> See, e.g., Alex Wodak, *Health, HIV infection, Human Rights and Injecting Drug Use*, 2 HEALTH AND HUMAN RIGHTS 24, 33-36 (1998).

<sup>210</sup> *Drug control, crime prevention and criminal justice: A Human Rights perspective*, *supra* note 176, para. 13.

<sup>211</sup> Not every case of infliction of pain or suffering violates the prohibition of torture and inhuman or degrading treatment or punishment. It must be noted that the ill-treatment must reach a minimum degree of intensity. This threshold, however, cannot be determined in the abstract but is dependent on the circumstances involved. See KÄLIN & KÜNZLI, *supra* note 179, at 329.

<sup>212</sup> ICCPR, *supra* note 183, art. 14(2): “[E]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” The right ensures that criminal convictions can be rendered only by a competent, independent and impartial tribunal. To be considered independent the tribunal must not take instructions from the legislature or the executive in their adjudicatory activities, but must be free from outside influence. KÄLIN & KÜNZLI, *supra* note 179, at 451.

<sup>213</sup> The INCB acknowledges that the obligation to establish criminal offenses under the 1988 Convention is subject to each Party’s constitutional principles and its basic legal concepts, this will usually include human rights. See INT’L NARCOTICS CONTROL BOARD, REP. OF THE INT’L NARCOTICS CONTROL BOARD FOR 2001, para. 211, U.N. Doc. E/INCB//2001/1, U.N. Sales No. E.02.XI.1 (2002).

<sup>214</sup> See Takahashi, *supra* note 208, at 767 with further references (especially the United States seem opposed to harm reduction with the argument that harm reduction efforts

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dependence treatment facilities, including deprivation of certain liberties, may give rise to concerns under Article 9 of the ICCPR which states that: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds in accordance with such procedures as are established by law.”<sup>215</sup> But Takahashi rightfully notes that not every level of involuntariness in the area of drug dependence treatment is in violation of an individual’s rights and that “to exclude completely the possibility of any level of coercion would be in many cases to exclude the possibility of the addict overcoming his addiction.”<sup>216</sup> Again, a fair balancing of all concerned rights and interests is needed.

Another point of debate has centered on the drug conventions’ silence on appropriate penalties, leaving this matter to the Member States. The criticism seems somewhat unfounded, as the drug conventions do not per se require a *de facto* criminalization of personal drug consumption or minor cases of drug offenses.<sup>217</sup> According to Article 3(4)(c) of the 1988 Convention, “in appropriate cases of a minor nature, the parties may provide an alternative for conviction or punishment; measures such as education, rehabilitation, or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.”<sup>218</sup> In regard to possession or use of illicit psychoactive substances for personal consumption, Article 3(4)(d) in conjunction with Article 3(2) states that “either as an alternative to conviction and punishment or an addition to conviction and punishment . . . measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender” may be provided for by State Parties.<sup>219</sup> Importantly, the obligation to criminalize personal consumption is subject to the constitutional principles and the

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undermine the global counter drug efforts).

<sup>215</sup> The notion of deprivation of liberty must be interpreted broadly and includes not only arrest, pre-trial detention and imprisonment, but also coercive internment in locked wards of psychic hospitals. KÄLIN & KÜNZLI, *supra* note 179, at 443.

<sup>216</sup> Takahashi, *supra* note 208, at 775 points out that “[i]t is disingenuous to pretend that the decision not to undergo treatment is an entirely free one. . . . Decisions made under the influence of drugs are not decisions of the free will, and to base one’s argument on the premise that it is so is to come dangerously close to arguing that there is a right to abuse drugs.”

<sup>217</sup> See also Elliott et al., *supra* note 1, at 114.

<sup>218</sup> 1988 Convention, *supra* note 6, art. 3(4)(c).

<sup>219</sup> *Id.* arts. 3(4)(d) and 3(2).

basic concepts of the legal system of a State.<sup>220</sup> If enshrined in the constitution or accepted as a basic legal principle—which is arguably the case for all States—fundamental human rights directly interrelate with the obligations under the 1988 Convention and give each State leeway to temper the prohibitionist approach in their drug policies.<sup>221</sup> The framework of the conventions is sufficiently flexible to at least *de facto* decriminalize personal consumption, as well as drug offenses in minor cases.<sup>222</sup> Understood correctly, the international drug control regime is not hostile towards a somewhat liberal approach that emphasizes education, treatment, and even harm reduction over purely repressive measures. In this spirit, the UNODC encourages States to adopt laws that allow for alternatives to imprisonment when a small amount of drugs for personal use is concerned.<sup>223</sup> It has been argued that drug related incidences should be documented, but “it is rarely beneficial to expend limited prison space on such offenders.”<sup>224</sup> However, it is also clear that it is counterproductive to construe human rights law in a manner which provides for a general right to use drugs.<sup>225</sup>

Article 38 of the Single Convention exemplifies that the drug control regime is not at all blind to the human rights concerns of drug users.<sup>226</sup> It calls upon State Parties to “give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts.”<sup>227</sup> Again, although the provision leaves States free to decide what facilities are deemed adequate for such medical treatment, the provision has to be interpreted in light of human rights. For example, the right to health might call for access to measures such as clean needles and syringes, drug dependence treatment, and therapies.<sup>228</sup> The right to the highest

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<sup>220</sup> *Id.* art. 3(2).

<sup>221</sup> See *supra* Part IV.A., for a discussion of domestic implementation of the drug control conventions.

<sup>222</sup> Barrett & Nowak, *supra* note 154, at 463; Elliott et al., *supra* note 1, at 114.

<sup>223</sup> WORLD DRUG REPORT 2009, *supra* note 113, at 167.

<sup>224</sup> *Id.*

<sup>225</sup> For a detailed analysis why illicit drugs must remain illicit, see *id.* at 163 et seq.

<sup>226</sup> Single Convention, *supra* note 3, art. 38.

<sup>227</sup> *Id.*

<sup>228</sup> That these measures are compatible with the drug conventions has been stated by the INCB. It notes that governments should adopt measures that may decrease the sharing of hypodermic needles in order to limit the spread of HIV/AIDS, and it also states that the implementation of drug substitution and maintenance treatment does not breach provisions of the drug conventions. See INT'L NARCOTICS CONTROL BOARD, REP. OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2003, para. 222, U.N. Doc.

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attainable standard of health is not only a concern in the context of drug abuse treatment, but is also an important factor to be taken into account in the regulation of the access to controlled medicines, as well as the licit production and distribution of narcotic drugs.<sup>229</sup> Governments must assure the adequate availability of narcotic drugs for medical and scientific purposes, and should take all available steps to provide essential medicines (e.g., opioid analgesics) as part of their obligations under the right to health.<sup>230</sup>

In a nutshell, human rights are—despite not being spelled out in the drug conventions—a tacit component of all legitimate drug control measures. Human rights law is applicable at all times when Member States enforce domestic control measures based on the conventions. The obligations under the international drug control regime cannot be invoked for a measure that unjustifiably runs counter to human rights, and, as a consequence, such law or enforcement measure is illegal. Thus, extra-judicial killings by law enforcement officers in drug operations, imprisonment without trial, and beatings in detention centers for drug dependence treatment seem to be clear violations of international human rights standards.<sup>231</sup> Where the drug conventions fail to give instructions, gaps must be filled and be interpreted in accordance with human rights obligations. While human rights law does not prescribe the content of criminal laws or penalties, it does demand strict scrutiny to ensure that laws do not deny the rights of individuals. Human rights are not a counterbalance to drug control laws, but rather an integral part of them.

*D. The Human Rights Obligations of the Drug Control Bodies*

*1. Nature and Content of the Human Rights Obligations*

It is fundamental for the acceptance of human rights standards that they are anchored in intergovernmental

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E/INCB//2003/1, U.N. Sales No. E.04.XI.1 (2004).

<sup>229</sup> In this sense it is part of the right to health care, which includes the provision of essential drugs. See Toebes, *supra* note 201, at 177.

<sup>230</sup> It is estimated that each year tens of millions of patients, including cancer and AIDS patients, suffer moderate to severe pain without adequate treatment. See *Drug control, crime prevention and criminal justice: A Human Rights perspective*, *supra* note 176, para. 47.

<sup>231</sup> *Id.* para. 34.

organizations that are endowed with powers to monitor, report, and protect them.<sup>232</sup> As an international organization dedicated to promoting universal respect for human rights, the United Nations itself must regard human rights.<sup>233</sup> According to the UN Charter, the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>234</sup> Therefore, it would be inconsistent to assume that UN agencies do not have to respect and protect human rights, whose promotion was one of the primary reasons for the creation of the United Nations.<sup>235</sup> Ergo, not only Member States of the United Nations, but also United Nations agencies are human rights duty bearers.<sup>236</sup>

The primacy of human rights as a guiding principle in the UN system extends to decisions of all UN organs in that they must fulfil their tasks while respecting and protecting human rights.<sup>237</sup> In this spirit, in its 2006 report, the United Nations High-level Panel on United Nations System-wide Coherence in the Areas of Development observed that “all United Nations agencies and programmes must further support the development of policies, directives and guidelines to integrate human rights into all aspects of United Nations work.”<sup>238</sup> However, it can be argued that the duties owed by the UN agencies and programs transcend the duty

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<sup>232</sup> See Henry Steiner, *International Protection of Human Rights*, in INTERNATIONAL LAW 753, 756 (Malcolm D. Evans ed., 2d ed. 2006).

<sup>233</sup> Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 473 (2009).

<sup>234</sup> U.N. Charter art. 55(c).

<sup>235</sup> This omission arguably stems from the failure of the drafters of the UN Charter to anticipate a situation in which human rights violations through UN actions could have practical significance.

<sup>236</sup> Mac Darrow & Louise Arbour, *supra* note 233, at 457-64 (providing a detailed explanation of the conceptual sources of the United Nations human rights responsibilities. They can be construed either internally (derived from its own internal constitutional legal order, i.e. the UN Charter), or externally (derived from the status of the United Nations as a subject of international law). A third alternative would be to conclude that the United Nations are bound to the extent that its members are bound (hybrid conception)).

<sup>237</sup> This has also been stated by the General Assembly in its annual resolution on drug control. See, e.g., G.A. Res. 63/197, 1, U.N.Doc. A/RES/63/197 (Mar. 6, 2009), available at <http://www.un.org/depts/dhl/resguide/r63.shtml>.

<sup>238</sup> General Assembly, *Letter dated 9 November 2006 from the Co-Chairs of the United Nations High-level Panel on United Nations System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment Addressed to the Secretary-General*, para. 51, U.N. Doc. A/61/583, (Nov. 20, 2006), available at <http://daccess-ods.un.org/TMP/7333485.48412323.html>.



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to simply “promote” human rights, because the United Nations is a significant participant in international relations, expanding on the traditional international system of sovereign States.<sup>239</sup> Therefore, all UN agencies are obliged to take a proactive role in actively strengthening the protection of the human rights of all people.

In the context of the drug control regime, it has been criticized that a lack of proper guidance from the drug control conventions results in poor human rights practice among the drug control bodies (i.e. the CND and INCB).<sup>240</sup> The influence of the international control bodies on global drug policies is reflected in their overall authority concerning the most fundamental matters.<sup>241</sup> It follows from the above stated obligations that the drug control bodies inherit both positive and negative human rights obligations: firstly, they must ensure that they do no harm,<sup>242</sup> (this is a negative obligation that includes the obligation to act with due diligence and to respect human rights); secondly, they are under a positive obligation to protect and uphold human rights.<sup>243</sup> This includes the rights of people who use drugs, farmers who cultivate drugs, and even the protection of drug traffickers from human rights violations that are carried out in the name of harsh drug policies.<sup>244</sup> Promotion and protection of human rights are two sides of the same coin, and unduly rigid or categorical distinctions between promotion and protection risk the efficiency of UN actions. As Darrow and Arbour candidly put it: “[i]gnoring serious human rights obligations is simply not an option.”<sup>245</sup>

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<sup>239</sup> On the functions of international institutions and their organs in the context of human rights promotion, see generally HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, *HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS* 669 (3rd ed. 2008).

<sup>240</sup> Barrett & Nowak, *supra* note 154, at 456. However, the connection between human rights and the international drug control regime has repeatedly been stressed by the General Assembly in its annual resolution on “International Co-operation Against the World Drug Problem.” See, e.g., G.A. Res. 63/197, 1, U.N. Doc. A/RES/63/197 (Mar. 6, 2009), available at <http://www.un.org/depts/dhl/resguide/r63.shtml>.

<sup>241</sup> See *supra* Part II.B.

<sup>242</sup> Barrett & Nowak, *supra* note 154, at 470.

<sup>243</sup> ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 68 (2006).

<sup>244</sup> Barrett & Nowak, *supra* note 154, at 470.

<sup>245</sup> Darrow & Arbour, *supra* note 233, at 476.

## 2. *Necessary Change in the Approach of the Control Bodies*

Given these obligations, why do the drug control bodies seem to pay little attention to human rights matters, and why is there a lack of UN guidance on ways to implement drug control policies that comply with human rights norms?

The answers are not simple and the main bodies concerned with carrying out the drug policies under the conventions must be scrutinized separately. For example, one of the main issues negatively impacting the work of the CND is that it never puts an issue to vote—despite being empowered to make decisions by majority vote. In effect, every decision can be vetoed because of the custom of voting in consensus. Therefore, if the CND is to take its role seriously, this custom may have to change. Matters that concern sensitive human rights issues will hardly ever be adopted unanimously; the work of the UN human rights treaty bodies gives a good example for the tough bargaining and sometimes irreconcilable rifts between different factions. Only by agreeing on majority voting would the CND be able to adopt decisions—including on crucial human rights issues—when a consensus of all Member States would otherwise be out of reach.

UNODC, as the lead UN agency on drug control initiatives and programs, advises and assists governments in their drug control efforts. In this context, awareness for human rights concerns must be further incorporated into UNODC programs, and human rights abuses must be identified as potential risks in drug control enforcement strategies.<sup>246</sup> Tensions arise from UNODC's role as a research center on the one hand and an outlet for political messages on the other hand.<sup>247</sup> But its mandate and expertise in the areas of law enforcement, health services, and criminal justice perfectly justifies the articulation of a human rights based approach in its operational activities; it is encouraging that UNODC is aware of its unique position and “the potential to make a significant move from human rights commitments to implementation.”<sup>248</sup> Steps in this direction have been taken by, for

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<sup>246</sup> Barrett & Nowak, *supra* note 154, at 473; BECKLEY FOUNDATION, *supra* note 9, at 45.

<sup>247</sup> Christopher Hallam and David Bewey-Taylor, *Mapping the World Drug Problem: Science and Politics in the United Nations Drug Control System*, 21 *INT'L J. DRUG POL'Y* 1, 2 (2010). A problem with the UNODC is that it relies heavily on voluntary donations, which gives the main donors great power. Its role as an independent agency may be somewhat undermined by this. See JELSMA, *supra* note 51, at 19.

<sup>248</sup> *Drug Control, Crime Prevention and Criminal Justice: A Human Rights Perspective*,

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example, using the Human Rights Impact Assessment as “a predictive tool for assessing the potential human rights impact of a policy or programme.”<sup>249</sup>

The INCB’s disposition is slightly different from that of UNODC and the CND (which are subsidiary bodies of ECOSOC and the UN Secretariat), because the INCB is an independent treaty body whose Secretariat is administered by UNODC. The Single Convention explicitly states that there are no limits to the recommendations and observations that the INCB may make.<sup>250</sup> Therefore, human rights considerations are in the scope of the mandate of the INCB,<sup>251</sup> and its 2007 annual report INCB stated that:

Due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions. Non-respect for them can prejudice the ability of the criminal justice system to enforce the law, can lead to discriminatory disproportionate responses to drug offending, and can undermine the conventions.<sup>252</sup>

When the conventions are in danger of being undermined by a lack of respect for human rights, the INCB must consider how this concerns its work. In this context, a frequent criticism is that the INCB conducts most of its work with governments in strict privacy, and that transparency and accountability do not exist.<sup>253</sup> Indeed, the time might be ripe for a change, including a more open approach to the public in the working procedures of the INCB.

Another delicate question is whether the drug control bodies can be complicit in human rights violations by other actors if they do not sufficiently perform their functions to protect human rights. Such a scenario seems farfetched, although the drug control bodies do have a duty to act with due diligence to avoid human rights violations by third parties. That they are under a duty to act with due diligence is inherent in their *raison d’être*, and a situation in

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*supra* note 176, para. 52.

<sup>249</sup> *Id.* para. 59.

<sup>250</sup> Single Convention, *supra* note 3, art. 15(1). “The Board shall prepare an annual report on its work . . . together with any observations and recommendations, which the Board desires to make.”

<sup>251</sup> See also Barrett & Nowak, *supra* note 154, at 471.

<sup>252</sup> INT’L NARCOTICS CONTROL BOARD, REP. OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2007, at 9, U.N. Doc. E/INCB//2007/1, U.N. Sales No. E.08.XI.1 (2008).

<sup>253</sup> Barrett & Nowak, *supra* note 154, at 474. See JELSMA, *supra* note 51, at 19.

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which a drug control body could reasonably be accused of complicity (or aiding and abetting) in a human rights violation would have to be grave and the body's involvement rather direct. It is hard to foresee a scenario where this would be the case. The INCB and the CND may at times be appropriate forums to discuss human rights violations,<sup>254</sup> but while their mandate includes maintaining a permanent dialogue with governments, their power remains soft and limited in scope. In cases where governments are reluctant to address human rights concerns in the enforcement of their drug control measures a mediatory approach taken by the INCB and the CND often leads to the best results. Of course, if there is the danger of collusion, the bodies will have to act and speak out candidly. But, in general, specialized human rights bodies such as the Human Rights Committee or the Human Rights Council, are better suited than the drug control bodies to take action through targeted, strategic interventions within the human rights system.<sup>255</sup>

Philip Alston has noted in the context of the specialized UN human rights treaty bodies that "the essential role of each of the treaty bodies is to monitor and encourage compliance with a specific treaty regime, while the political organs have a much broader mandate to promote awareness, to foster respect, and to respond to violations of human rights standards."<sup>256</sup> The same holds true for the drug control regime and its respective control bodies: the UN's political organs seem to be in a better position to tackle thorny human rights issues in comparison to the drug control bodies, which, to work effectively, must maintain good working relations with governments.<sup>257</sup>

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<sup>254</sup> Barrett & Nowak, *supra* note 154, at 473.

<sup>255</sup> The Human Rights Committee has done so in the past and elaborated on human rights violations of a member State carrying out its drug control policies. See Communication No. 1474/2006, Human Rights Committee, U.N. Doc. CCPR/C/91/D/1474/2006 (Nov. 14, 2007), available at <http://daccess-ods.un.org/TMP/1875759.html>, regarding a law prohibiting the possession and use of a narcotic drug. The Human Rights Committee found that the law did not violate the right to freedom of religion for an individual who was a member of a religious minority to which the drug was an essential part of the practice of his religion.

<sup>256</sup> Philip Alston, *Appraising the United Nations Human Rights Regime*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 1, 4 (Philip Alston ed., 1992).

<sup>257</sup> For a discussion of reports by UN human rights bodies that tackle on the issue of drug control and harm reduction, see Lines & Elliott, *supra* note 188, at 455.

## V. CONCLUDING REFLECTIONS

The international drug control system has dramatically evolved over the last one hundred years. At the end of the nineteenth century the global markets for narcotic drugs were unregulated, and free trade during the twentieth century presented additional problems for the regulation of global drug production and distribution. However, due to a concerted effort by the international community, the licit trade in narcotics was brought under control in the mid-twentieth century, and the international drug control system had become one of the most advanced areas of international law. However, in retrospect, an unavoidable consequence of the international control of narcotic and psychotropic substances has been the establishment of illicit markets and the influence of organized crime on those markets. Although the drug control regime in place has played an important role in the efforts to dismantle notorious drug cartels and other organized crime syndicates, the illicit drug markets prove hard—if not impossible—to eradicate. In some countries, efforts to this end have been accompanied by serious human rights violations. However, before condemning the system, one must keep in mind that it was created for a reason.

Although it is true that the global production of illicit drugs has not dropped as much and as rapidly as had been hoped for, a comparison of the global opium production (licit and illicit) at the beginning of the twentieth century and in 2007 shows that overall production declined by 78% over this period—despite the fact that the world population more than quadrupled during the same time.<sup>258</sup> Considering that opium was the narcotic drug for which the international drug control system had originally been established, the statistics evidence remarkable success. It can be concluded that the international drug control system has, at least in some instances, functioned reasonably well in fulfilling one of the main tasks for which it was created, i.e. containing the problem of the illegal production, trafficking and use of psychoactive substances. Containment is, however, not the same as solving the problem completely. Additional steps have to be taken to keep the problem of global drug abuse under control. Clearly, these

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<sup>258</sup> U.N. OFFICE ON DRUGS AND CRIME, *WORLD DRUG REPORT 2008*, at 213, U.N. Sales No. E.08.XI.1 (2008), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2008.html>.

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steps will have to be taken in accordance with human rights standards as enshrined in the UN Charter and the respective human rights treaties.

This paper concludes that the drug conventions must, and can, be construed in a human rights friendly way, with an emphasis on education and treatment as opposed to repressive drug control measures.<sup>259</sup> Despite the leeway that each State is given under the conventions in the implementation of domestic laws, the United Nations, through its drug control bodies, must also take a guiding role in protecting human rights. The agencies concerned with drug control, and especially UNODC, have demonstrated a willingness to recalibrate their approach, and they must continue down on the same path. If managed correctly, the legal instruments in place can effectively help to prevent human rights violations. The treaty regime allows for refinement of the system while taking into account valid concerns without amending the drug control conventions. Ultimately, the responsibility to apply the mechanisms in an effective, but appropriate way lies with the main actors, i.e. national governments and the drug control bodies.<sup>260</sup>

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<sup>259</sup> Barrett & Nowak, *supra* note 154, at 476. The authors come to the same conclusion that the legal framework for a paradigm shift exists, as does the capacity and expertise to facilitate a move towards an approach that takes human rights into account.

<sup>260</sup> This means that the conventions must be interpreted and implemented in line with the obligations inscribed in the UN Charter, honoring the commitment of all UN Member States to the protection of human rights and fundamental freedoms. *See Making Drug Control "Fit for Purpose," supra* note 118, at 19. An encouraging sign is also that the CND affirmed in its 2009 Political Declaration the:

[C]ommitment to ensure that all aspects of demand reduction, supply reduction and international cooperation are addressed in full conformity with the purposes and the principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights and, in particular, with full respect for . . . all human rights, fundamental freedoms, the inherent dignity of all individuals and the principles of equal rights and mutual respect among States.

*See ECOSOC Report, supra* note 83, at 38.