

I. INTRODUCTION

*Addiction to narcotic drugs constitutes a serious evil for the individual and is fraught
with social and economic danger to mankind*

Preamble, Single Convention on Narcotic Drugs, 1961

*The first evil that we must deal with is that which exists as a consequence of the fact
that the whole thing is the wrong way round*

Aneurin Bevan, 1946¹

In 1945, the United Nations was established to “save succeeding generations from the scourge of war”.² Today, the language of war has been adopted for policy objectives. The ‘war on drugs’ is now more widespread and higher in financial and human cost than ever, and has impacted negatively across borders and across human rights protections. In much the same way as the ‘war on terror’, the war on drugs has left in its wake human rights abuses, worsening national and international security and barriers to sustainable development. Although UN bodies have never officially endorsed the term, for many human rights, public health, HIV and drug policy reform advocates – and for many of those on the front lines of the war on drugs, including indigenous farmers, people who use drugs and service providers – the United Nations drug control system is seen as a significant part of the drug problem, rather than part of the solution.

Despite the documented negative human rights impacts of the current approach to drug policies, human rights have received little more than lip service in the UN drug control system. The international drug control conventions, which form the legal basis for international drug policy, were developed and have been interpreted in a vacuum from human rights law, and the principal organs of drug control have carried out their mandates with little reference to human rights norms, and little regard for their own human rights obligations. Meanwhile, the human rights machinery within the UN has paid scant attention to drug policies. The result is an international environment within which human rights violations connected to drug policies are less likely to be raised and addressed, and within which human rights progress through international drug policy is not pursued. It is a situation that is out of step with the

* Our thanks go to Rick Lines at the International Harm Reduction Association for editing and advice.

¹ House of Commons, 30 April 1946, HC Deb, 30 April 1946, vol. 422, c. 44.

² Preamble, Charter of the United Nations.

process of UN reform which is bringing human rights ever closer to all aspects of the Organisation's work. There has been no discussion or analysis at the UN level of what human rights mean for international drug laws and policies.

This essay begins to address that question. We argue that the aims of international drug policy must be revisited in line with the purposes and principles of the Charter of the United Nations and the binding normative framework of human rights. We argue further that the UN drug conventions are insufficient, alone, as a legal framework for the complex issue of drug policy, and that human rights law must be recognised by the relevant organs of the UN as a part of that framework. The implications of this 'expanded' legal framework for the current pillars of international drug policy are then considered, as are the human rights obligations of the drug control entities, and their possible future roles in the promotion and protection of human rights.

II. HUMAN RIGHTS IN THE 'WAR ON DRUGS'

If war comes it will be from a failure of human wisdom

Andrew Bonar Law³

Every year the United Nations General Assembly adopts, by consensus, a resolution which states that "countering the world drug problem" must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and international law, "in particular" with human rights.⁴ The wording reflects the Political Declaration adopted following the 1998 UN General Assembly Special Session on drugs and echoed in the new Political Declaration on drugs adopted by the UN Commission on Narcotic Drugs (CND) in a High Level Segment on 12 March 2009, and due to be adopted by the General Assembly later this year.⁵ Despite these statements, the negative human rights impact of current national and international approaches to drug policy has been and continues to be substantial. Moreover, there is little recognition among member states of the paradox of inserting human rights rhetoric into an existing policy framework that exacerbates human rights risk.

Individuals who use drugs do not forfeit their human rights, yet too often, people who use drugs suffer discrimination, and are harmed by approaches which over-emphasise criminalisation and punishment while

³ Speech delivered prior to the outbreak of World War I.

⁴ See, for example, GA Res. 63/197, 6 March 2009.

⁵ UN Doc. A/S-20/4, 17 April 1998, Chapter 5, Section A, Resolution I. At the time of writing the 2009 declaration is not yet publicly available.

under-emphasising health and harm reduction.⁶ There are an estimated 15.9 million people who inject drugs worldwide. Less than ten per cent have access to HIV prevention measures, such as clean needles and syringes and opioid substitution therapies, despite the fact that it is estimated that ten per cent of new HIV infections are attributed to unsafe injecting. When sub-Saharan Africa is excluded, this figure increases to 30 per cent and in some countries and regions it is far higher.⁷ In many countries access to anti-retroviral treatment for people who use drugs is disproportionately low relative to other people living with HIV.⁸

The war on drugs has seen prison populations skyrocket. Racial and ethnic minorities are often disproportionately targeted and imprisoned for drug offences. Human Rights Watch research indicates that in the United States African-Americans are ten times more likely than whites to enter prison for drug offences.⁹ It is a situation that is mirrored in the United Kingdom.¹⁰ In many countries, including the United States, those convicted of drug offences may be subsequently denied social housing and other benefits.

The World Health Organization estimates that “approximately 80 per cent of the world’s population has either no or insufficient access to treatment for moderate to severe pain”. This affects almost a million late stage AIDS patients each year, approximately four million cancer sufferers, millions of women in labour, people recovering from surgery, people who have been injured in accidents or through violence etc.¹¹ In some countries this is directly related to “excessively strict drug control regulations that unnecessarily impede access to morphine or establish excessive penalties for mishandling it”.¹² In the United States, doctors have been convicted of drug trafficking and imprisoned for prescribing pain medications.¹³

⁶ OHCHR, ‘High Commissioner calls for focus on human rights and harm reduction in international drug policy’, Press Release, 10 March 2009.

⁷ Catherine Cook and Natalya Kanaef (eds.), *The Global State of Harm Reduction 2008: Mapping the Response to Drug-Related HIV and Hepatitis C Epidemics* (International Harm Reduction Association, London, 2008).

⁸ See, for example, Martin C. Donoghoe *et al.*, ‘Access to Highly Active Antiretroviral Therapy (HAART) for Injecting Drug Users in the WHO Europe Region 2002–2004’ (2007) 18:4 *International Journal of Drug Policy* pp. 271–280.

⁹ Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 2008.

¹⁰ Alex Stevens, *The Racial Impact of UK Drug Law Enforcement*, Presentation at the 2008 Release conference, *Drugs, Race and Discrimination*, London, 18 September 2008.

¹¹ WHO Access to Controlled Medications Programme, *Improving access to medications controlled under international drug conventions*, September 2008.

¹² For a detailed study, see Human Rights Watch, *Please Do not Make Us Suffer Anymore ...: Pain Treatment, Palliative Care and Human Rights*, 3 March 2009, p. 2.

¹³ See, for example, ‘When is a pain doctor a drug pusher?’, *New York Time*, 17 June 2007.

Crop eradication programmes have been shown to impact negatively upon food security, family income, the environment, indigenous peoples' rights and child health. In Colombia, for example, Glyphosate, a virulent herbicide, is utilised in extensive aerial spraying campaigns as part of 'Plan Colombia', and is known to cause serious harm to the environment and human health. The former Special Rapporteur on the Right to Health, the former Special Rapporteur on the rights of indigenous people and the Committee on the Rights of the Child have all raised concerns about this practice.¹⁴ Ecuador has recently issued a complaint at the International Court of Justice about the negative effects of the aerial spraying within its territory.¹⁵ Research conducted in 2002 and 2003 by the United Nations Office on Drugs and Crime (UNODC) and published in 2005 in the Kokang Special Region 1 in Myanmar (Burma), found that eradication led to a 50 per cent drop in school enrolment, and that two of every three pharmacies and medical practitioners shut down. Those conducting the research concluded that the rapid elimination of the farmers' primary source of cash income caused "economic and social harm to the region".¹⁶ In 2005, in the context of poppy farming in Afghanistan, the World Bank warned that "an abrupt shrinkage of the opium economy or falling opium prices without new means of livelihood would significantly worsen rural poverty".¹⁷ In most cases, however, forced eradication has far outpaced the provision of economic alternatives, devastating communities in Latin America and Asia.¹⁸

In many countries, administrative detention of people who use drugs is common. Reports from China, Viet Nam, Cambodia, India, Nepal and elsewhere indicate the widespread use of detention without trial and torture or cruel inhuman and degrading treatment under the banner of drug dependence 'treatment'. Such practices range from partial lobotomies (through the insertion of heated needles clamped in place for up to a week to destroy brain tissue thought to be connected to cravings)

¹⁴ Paul Hunt, Oral Remarks, 21 September 2007, Bogota, Colombia; *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Mission to Colombia* (E/CN.4/2005/88/Add.2), 10 November 2004; UN Committee on the Rights of the Child, *Concluding observations, Colombia*, (CRC/C/COL/CO/3), 8 June 2006, para. 72.

¹⁵ I.C.J. Press Release, No. 2008/5, 1 April 2008.

¹⁶ Independent Evaluation Unit of the UNODC, *Thematic Evaluation of UNODC's Alternative Development Initiatives*, November 2005, para. 48.

¹⁷ World Bank, *Afghanistan: State Building, Sustaining Growth and Reducing Poverty. A World Bank Country Report*, 2005, pp. 118–119.

¹⁸ Beckley Foundation Drug Policy Programme, *Recalibrating the Regime: The Need for a Human Rights Based Approach to International Drug Policy*, Report No. 13, March 2008, p. 31. On Burma and Laos, see also Transnational Institute, *Withdrawal Symptoms in the Golden Triangle: A Drugs Market in Disarray*, January 2009.

to suspension from the arms or legs, denial of meals, forced labour, isolation and chaining, sexual violence and beatings.¹⁹ In Singapore, caning is employed as a punishment for relapse, a natural part of rehabilitation.²⁰

Police brutality in the pursuit of convictions for drug offences is common, as is abusive treatment of those suspected and convicted once in custody. In Ukraine, Human Rights Watch has documented a range of abuses from the use of drug withdrawal to force testimony from dependent users, to physical and psychological abuse amounting to torture. Drug users are disproportionately affected. As one drug user and former prisoner described, during twenty-seven days of pre-trial detention:

They beat me to unconsciousness. They worked to physically and morally humiliate me ... They tortured me ... They put a gas mask over my head and handcuffed my hands to my legs. Then they put a stick underneath my underarms and suspended me from two large safes. They beat me in the stomach until I lost consciousness. They beat me on the bottom of my feet with nightsticks ... Then they threatened to rape me. They threatened to have another inmate rape me. This is probably one of the worst things imaginable.²¹

In Indonesia, beatings and death threats to extract information and confessions from drug suspects are common practices.²²

Over thirty countries retain the death penalty for drug offences. In some, those convicted of drug offences represent the majority of those sentenced to death. Many of those, including Singapore, Viet Nam, Indonesia and Iran actively execute those convicted.²³ China routinely conducts public executions to mark the UN day against drug abuse and illicit trafficking, June 26.²⁴ A UN human rights monitor reported ‘dozens’ of people being executed to mark the day in 2004, and Amnesty International recorded 55 executions for drug offences over a two-week

¹⁹ Open Society Institute, International Harm Reduction Development Program, *Human Rights Abuses in the Name of Drug Treatment, Reports from the Field*, 2009; Asia Catalyst, Human Rights Watch and International Harm Reduction Association, *Submission on the fourth periodic report of China to the UN Committee against Torture*, 30 September 2008.

²⁰ Central Narcotics Bureau of Singapore, Annual Bulletin, 2007, p. 19, referring to “recalcitrant abusers” of certain drugs.

²¹ Human Rights Watch, *Rhetoric and Risk: Human Rights Abuses Impeding Ukraine’s Fight Against HIV/AIDS*, March 2006.

²² See Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (A/HRC/7/3/Add.7), 10 March 2008.

²³ See Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law* (International Harm Reduction Association, London, 2007).

²⁴ See, for example, ‘China executes six drug dealers on international anti-drug day’, Xinhua, 26 June 2008.

period running up to 26 June 2005.²⁵ In 2008, the day was marked in Indonesia by the execution by firing squad of two Nigerians and a government promise to expedite further executions.²⁶

In Mexico, since President Calderón deployed almost 40,000 troops onto the streets to fight the drug war, killings have increased significantly.²⁷ The killings are not limited to the drug cartels, or their actions. In June 2007, two women and three children aged two, four, and seven were shot and killed when they failed to stop at a military checkpoint involved in “the permanent campaign against drug trafficking.”²⁸ In 2007, Rio de Janeiro’s security secretary, Jose Mariano Beltrame, said that violent conflicts were a “bitter pill” that slum residents would have to swallow if they wished to rid their communities of the drug gangs.²⁹ In one particularly violent confrontation in June 2007, between 19 and 24 people were killed in a single day, as part of a larger operation involving over 1,300 police that laid siege to Complexo do Alemão in Rio, a complex of favelas that houses over 200,000 people. In the first half of 2007, official police figures recorded 449 killings in such confrontations, with another 60 police officers losing their lives.³⁰ In Thailand, in 2003, almost 3,000 people were extra-judicially killed during the now notorious government sanctioned crackdown.³¹ To date nobody has been brought to justice.

These examples are by no means exhaustive. Such violations are neither trivial, nor hidden. But despite the range, scale and visibility of human rights violations connected to drug laws and policies worldwide, these strands of law and policy at the UN level have developed practically detached from each other.

²⁵ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Summary of cases transmitted to Governments and replies received* (E/CN.4/2005/7/Add.1), 17 March 2005, para. 69; Amnesty International Asia Pacific, *Death sentences for drug-related crimes rise in region*, Public Statement AI Index: ASA 01/004/2007 (Public) – News Service No.114, 26 June 2007.

²⁶ ‘Nigerians Executed in Indonesia’, BBC News, 27 June 2008; ‘Indonesia to speed up execution process for drug offenders’, The Age, 26 June 2008.

²⁷ ‘The age of innocents – Violence is rising in Mexico’s drug war, and the victims include cartel members—and now children’, Newsweek, 25 October 2008; ‘Is Mexico’s Drug War Calderón’s Iraq?’, Drug War Chronicle, 15 June 2007; ‘Obama and the lethal war on drugs’, Independent (UK), 11 February 2009.

²⁸ ‘19 in Mexican Army held in deaths of 5’, Los Angeles Times, 5 June 2007.

²⁹ ‘Blood on the streets as drug gang and police fight for control of Rio favelas’, Guardian, 29 June 2007.

³⁰ ‘War on Rio’s Drug Gang Slums’, BBC News, 28 June 2007.

³¹ Human Rights Watch, *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, June 2004.

III. THE 'PARALLEL UNIVERSES' OF DRUG CONTROL AND HUMAN RIGHTS IN THE UN

What do we mean by the United Nations human rights system?

Nigeria, UN Commission on Narcotic Drugs, 2008³²

International drug policy is underpinned by three treaties geared towards the reduction of supply and demand for specific scheduled substances: the 1961 Single Convention on Narcotic Drugs, as amended by its 1972 protocol; the 1971 Convention on Psychotropic Substances; and the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.³³ The 1961 and 1971 Conventions bring certain organic and synthetic substances (such as coca, opium, cannabis, LSD and MDMA) under international control. The 1988 Convention, the most prescriptive and punitive of the three, is aimed at increased international law enforcement and stronger domestic criminal legislation. Each treaty encourages, and in some instances requires, criminal sanctions to be put in place at the national level. Under the treaties, the twin aims of the international drug control system are to reduce illicit use and supply and to ensure access to controlled substances for medical and scientific purposes. In practice, the overwhelming focus of the international drug control regime has been on law enforcement.

While the drug conventions do not directly result in the human rights abuses detailed above, they also cannot be divorced from these and other violations, as their influence on domestic drug control policy and legislation is considerable. All three treaties have been very widely ratified, incorporated in whole or in part into national laws and have guided the development of restrictive and punitive policies in countries all over the world. This connection was illustrated in a recent judgment of the Indonesian Constitutional Court, in which it was held that Indonesia's international obligations under the 1988 drug trafficking convention supported the application of the death penalty for drug offences. The Court used its interpretation of the drug conventions to equate drug offences with genocide and crimes against humanity.³⁴

³² Committee of the Whole, *Debates on Res. 51/12*, 51st Session of the CND, March 2008 (unrecorded). These debates are never officially recorded but NGOs are often on hand to record such statements. See <www.ihrablog.net/2008/03/discussion-of-political-issues-such-as.html>, 26 May 2009.

³³ Single Convention on Narcotic Drugs, 30 March 1961, 520 *UNTS* p. 204 (hereafter 'Single Convention'); Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, TIAS 8118, 976 *UNTS* p. 3; Convention on Psychotropic Substances, 1971, 32 *UST* p. 543, TIAS 9725, 1019 *UNTS* p. 17 (Hereafter '1971 Convention'); Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (E/CONF.82/15). (Hereafter '1988 Convention').

³⁴ Constitutional Court of the Republic of Indonesia, Decision Number 2-3/PUU-

Despite their impacts, the drug conventions are all but silent on the question of human rights. This lack of human rights content is troubling considering the issues that the treaties cover and the obligations created for States Parties. These include obligations to create criminal offences, and others relating to, *inter alia*, extradition, crop eradication and confiscation of property.³⁵ These are all of significant human rights concern, of themselves, and because they relate to a much wider range of human rights issues such as torture, the death penalty, arbitrary detention, HIV prevention, civil liberties, environmental protection and indigenous peoples' rights.

Unlike human rights law, which focuses to a large extent on the protection of the most vulnerable, the drug conventions criminalise specifically vulnerable groups. They criminalise people who use drugs, known to be vulnerable to HIV, homelessness, discrimination, violence, and premature death; and they criminalise farmers involved in the cultivation of crops made illicit by the conventions, despite generations of traditional use and existing vulnerability to poverty.³⁶ Alongside war criminals, mass murderers, human traffickers, torturers and terrorists, drug users and farmers are deemed worthy of criminal sanction in international law in order to address what is seen as an "evil"³⁷ and a danger of "incalculable gravity" and which poses "a serious threat to the health and welfare of human beings".³⁸

This is the international legal environment within which national decisions on drugs have been made, laws enacted, policies developed and practices shaped. And it is the environment within which the drug control organs of the UN – the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB) and the UN Office on Drugs and Crime (UNODC) – carry out their respective mandates. There is a lack of human rights guidance from the core drug control treaties that has too often resulted in poor or non-existent human rights practice among these UN bodies. For example, the CND, the UN's main policy-setting body on drugs, has never once, as an entity, condemned any of the abuses we have described. In sixty years it has adopted only one human rights resolution, and this only after references to the death penalty and the then newly adopted Declaration on the Rights of

V/2007, 30 October 2007, in particular pp. 93–103.

³⁵ On extradition, *see* articles 36 of the Single Convention, 22 of the 1971 Convention and 6 of the 1988 Convention. On crop eradication *see* articles 26(2) of the Single Convention, and 14 of the 1988 Convention. And on the confiscation of property, *see* articles 37 of the Single Convention, 22(3) of the 1971 Convention and 5 of the 1988 Convention.

³⁶ *See* in particular article 3 of the 1988 Convention, which introduced the criminalisation of possession for personal consumption into international law.

³⁷ Single Convention, Preamble.

³⁸ 1988 Convention, Preamble.

Indigenous Peoples were removed from the agreed text, along with any mention of the Special Procedures and the Human Rights Council.³⁹ The INCB, the treaty body for the drug conventions, has no human rights capacity within its membership and currently no international lawyers. It has specifically stated that it will not discuss human rights⁴⁰ (though it has done so on two recent occasions), and has never publicly criticised the abuses above. The UNODC, though it has recently increased its use of human rights language,⁴¹ has so far not incorporated human rights safeguards into its drug enforcement programmes, despite the very real human rights risk connected with aspects of that work.

All too often, the drug control conventions are considered in an artificial legal vacuum. From these conventions have developed the twin pillars of international drug policy – supply and demand reduction, with little or no regard for the requirements of human rights law. Within this limited and restrictive policy structure, it is extremely difficult to incorporate harm reduction/HIV prevention, access to medicines, development, environmental protection, conflict resolution, cultural heritage and indigenous people’s rights, and other core concerns relating to drugs. There is no human rights scrutiny of processes, little co-ordination across UN agencies and nothing in the way of human rights outcome evaluation for drug control projects. At the same time, the UN human rights machinery, with a few notable and recent exceptions, has been all but silent on drug control issues. It is no wonder that drug control and human rights in the UN system have been described as “parallel universes”.⁴²

IV. FIRST PRINCIPLES

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments

Vienna Declaration and Programme of Action, 1993⁴³

There is a danger that drug control has become an end in itself. With near universal ratification of the three international drug conventions has come near universal acceptance of the inherent benefit of this approach.

³⁹ The debates were not recorded, *but see* <www.ihrablog.net/2008/04/life-of-human-rights-resolution-at-un.html>, 26 May 2009.

⁴⁰ Koli Kouame, Secretary of the INCB, UN Press Conference, 7 March 2007.

⁴¹ *See, for example*, UNODC Annual Report, 2008, p. 19.

⁴² Paul Hunt, ‘Human Rights, Health and Harm Reduction: States’ Amnesia and Parallel Universes’, Speech delivered at the 19th International Harm Reduction Conference, Barcelona, May 2008.

⁴³ World Conference on Human Rights, *Vienna Declaration and Programme of Action* (A/CONF.157/23), 12 July 1993, para. 1.

Success is all too often measured in terms of kilos seized, hectares eradicated, crops substituted, prosecutions secured and in the number of people using drugs.⁴⁴ But these kinds of indicators confuse means and ends, processes and outcomes. Human rights require scrutiny of both.

There is a need for a paradigm shift and a return to the purposes and principles of the UN Charter.⁴⁵ Three interconnected ‘pillars’ are identified: security, development and human rights.⁴⁶ From the adoption of the Charter and through the Cold War years, these pillars developed with little co-operation, much like human rights and drug policy. Peace and security was seen as the absence of international armed conflict or the threat of war. Development was viewed solely in economic terms, understood as a process of industrial growth. Human rights were seen as legalistic, with little connection to the other two, and continued to be considered by many to be strictly issues of domestic concern. More recently, following the development of human rights treaties, norms and principles, various efforts have sought to place the human being at the centre of policies that previously had been seen as purely macro-economic or military, and the concepts of ‘human security’ and ‘human development’ emerged. Human development is focused on the eradication of poverty, and is the core concept that led to international agreement on the Millennium Development Goals. Human security is geared towards the eradication of global violence. Rather than simply focusing just on national security threats, human security also covers the protection of individuals, and may extend to protection from hunger, disease and economic insecurity, all known to be root causes of instability and violence. Some of these root causes are now well accepted in the fight against terrorism and they are core concerns for human development. The interdependence of the three pillars was reinforced by the landmark report of Kofi Annan in 2005, ‘In larger freedom: towards development, security and human rights for all’, in which the former Secretary-General set out a comprehensive set of reforms for the United Nations based around these pillars.⁴⁷ In that paper, Annan made clear the fundamental importance of human rights, not only of themselves, as a pillar of the UN, but as crucial aspects of human security and

⁴⁴ See, in particular, the annual UNODC ‘World Drug Report’. There are many other indicators, such as the reduction in injection driven HIV, but the most visible and those with the most investment relate to supply reduction and law enforcement.

⁴⁵ See also David R. Bewley-Taylor, ‘Emerging Policy Contradictions Between the United Nations Drug Control System and the Core Values of the United Nations’ (2005) 16:5-6 *International Journal of Drug Policy* pp. 423–431.

⁴⁶ See Manfred Nowak, ‘The Three Pillars of the United Nations: Security, Development and Human Rights’ in M. E. Salomon *et al.* (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp/Oxford, 2007), pp. 25–41.

⁴⁷ UN Doc. A/59/2005, 21 March 2005.

development, stating “we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed”.⁴⁸

Drug policy is fundamentally out of step with this basic premise. This area of policy was specifically omitted from the UN Charter.⁴⁹ Instead, during the San Francisco Conference it was made clear that drug control was a subset of ‘international economic, social, health and related problems’ contained in Article 55, and for which the UN had competence to consider.⁵⁰ Today we refer to this as the development pillar of the UN. Since that time, the interdependence of the pillars of the UN and rights based approaches to these problems has been developed. Moreover, universal norms relating to economic and social rights were subsequently enshrined in the Universal Declaration of Human Rights and made binding by the International Covenant on Economic Social and Cultural Rights and other core human rights treaties. Today, it is impossible to divorce the development pillar of the UN, and within which drug policy was deemed to sit, from human rights norms. Just as, over time, the concept of economic development evolved into human development, and state security into human security, so too must international drug policy meet the challenge of placing individuals and communities at its centre.

We must, therefore, go back to first principles. “The health and welfare of mankind” is recognised in the preamble to the Single Convention as the overarching concern of the drug control system.⁵¹ At the most basic level, drug policy must contribute to this overarching concern and must not act contrary to it. All too often, however, the current approach to drug policy – focussed on supply and demand reduction and related enforcement activities – is presumed, by definition, to pursue and achieve these aims, without having to demonstrate evidence of positive outcomes for health and welfare. In reality, considerable harms to health and welfare due to overly restrictive drug policies that prioritise law enforcement over public health and human rights are easily demonstrable, and the failure of the current approach on its own terms, evidenced in increasing availability and use and increasing cultivation and supply, has been well established.⁵²

⁴⁸ *Ibid.*, para. 17.

⁴⁹ It had appeared in the Treaty of Versailles, which established the League of Nations.

⁵⁰ Commentary on the Single Convention on Narcotic Drugs, 1961, p. 115, para. 1

⁵¹ Single Convention, Preamble.

⁵² See, for example, Peter Reuter and Franz Trautmann, *A Report on Global Illicit Drug Markets 1998–2007* (Trimbos Institute and Rand Europe, 2009); and Transnational Institute, *Rewriting History: A response to the 2008 World Drug Report*, Drug Policy Briefing No. 26, June 2008.

Meanwhile, in the sixty years since the adoption of the Universal Declaration, international human rights law has developed to pursue the health and ‘well being’⁵³ of everyone without discrimination. Human rights law recognises that without certain civil and political rights being guaranteed, economic, social and cultural rights will remain out of reach. At the same time, without progressive realisation of economic social and cultural rights, civil and political rights are all the more difficult to exercise. It is the interdependence of rights that mirrors that of the pillars of the UN.

Today, every UN member state has ratified at least one of the core human rights treaties (most have ratified many more), and all are bound by customary human rights law, including norms of *jus cogens*. In our view, based on the interdependence of the pillars of the UN, including human rights, international drug policy objectives and activities, being a subset of UN aims, should be justified only insofar as they contribute to human development, human security and human rights. Based on the binding normative framework of human rights law, this may be measured with reference to the respect for and the protection and progressive realisation of civil, political, economic, social and cultural rights. Without this level of justification based in human rights, and without demonstrable results in terms of human rights impact, the international drug policy regime and its current supply and demand reduction approach remain self-justifying and self-perpetuating, and unanswerable for human rights failures.

What we are describing is a human rights based approach to international drug policy.⁵⁴

V. HUMAN RIGHTS AND THE LEGAL FRAMEWORK FOR INTERNATIONAL DRUG POLICY

*No rule, treaty or custom, no matter how special its subject matter
...applies in a vacuum*

International Law Commission⁵⁵

⁵³ To use a phrase more commonly seen in human rights discourse. *See, for example*, article 25 of the Universal Declaration.

⁵⁴ On the main features of a human rights-based approach, such as empowerment of vulnerable groups through the explicit recognition of a binding international human rights framework with rights holders and duty bearers, legal remedies, monitoring and accountability, participation, equality and non-discrimination *see* OHCHR, *Human Rights and Poverty, A Conceptual Framework* (United Nations, New York/Geneva, 2004); OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (United Nations, Geneva, 2006).

⁵⁵ Report of the Study Group of the International Law Commission, finalized by Martti

The drug conventions, while representing a separate branch of international law, do not displace human rights. Despite this, the core human rights treaties are rarely if ever referenced by the INCB. They have not been recognised in CND resolutions, and have been all but absent from the development of drug policies. During its Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the International Court of Justice had to consider whether the right to life, which includes protection from the arbitrary deprivation of life, continued to apply during times of war. The Court held that “the protection of the International Covenant on Civil and Political Rights does not cease in times of war ... In principle, the right not arbitrarily to be deprived of one’s life applies in hostilities.”⁵⁶ What was considered an ‘arbitrary’ taking of life then fell to be decided with reference to the applicable *lex specialis* – in this case, international humanitarian law. The Human Rights Committee, too, has taken this approach, stating that “both spheres of law are complementary, not mutually exclusive”.⁵⁷

The analogy between humanitarian and international drug control law is helpful. The drug conventions are designed to regulate drug control (*i.e.* human activity), and the human rights treaties are designed to regulate state actions towards individuals and groups. There are inevitable crossovers, and upon analysis, there is a strong case that the drug conventions are insufficient, alone, as a legal framework for the range and complexity of issues involved. What is ‘appropriate’ falls to be decided by the relevant *lex specialis*, which in many cases, is human rights law, not the drug conventions.

For example, the 1988 Convention specifically refers in its preamble to the aim of eliminating the ‘root causes’ of drug abuse. But none of the conventions make reference to poverty, discrimination or social exclusion, well known to act as push factors towards the drug trade and as significant risk factors for drug dependence and drug related harms. Instead, they focus on drug use and supply – visible symptoms, not root causes. Indeed, for many, the problem being addressed within the conventions is one which they themselves perpetuate – the criminal market for drugs.⁵⁸

Koskenniemi, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, (A/CN.4/L.682), 13 April 2006, para. 120.

⁵⁶ *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice, Advisory Opinion, I.C.J. Reports 1996, para. 25.

⁵⁷ Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 11.

⁵⁸ The Executive Director of the UNODC, Antonio Maria Costa, has recognised that the current approach has created a massive criminal black market. *Making drug control fit for purpose: Building on the UNGASS decade* (E/CN.7/2008/CRP.17), 7 March 2008.

The 1961 Convention calls upon states parties to “give special attention to and take all *practicable measures* for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends”.⁵⁹ The 1988 Convention refers to “*appropriate measures* to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances”.⁶⁰ Human rights law demands scrutiny of ‘practicable measures’ and may be seen as *lex specialis* for what measures are deemed ‘appropriate’. The 1988 Convention, in fact, recognises this, stating that “[t]he measures adopted shall respect fundamental human rights”.⁶¹ Indeed, ‘appropriate measures’ is the very wording used in article 33 of the Convention on the Rights of the Child, the only UN human rights treaty to deal specifically with the issue. It is therefore useful to consider, as examples, some of the human rights issues outlined above to address the question of appropriateness. These violations, while egregious, would not necessarily contravene the international drug conventions, because they do not legislate for or, more accurately, against, this kind of abuse.

The drug conventions do not refer to harm reduction interventions such as needle exchange and opioid substitution therapy, but harm reduction has nonetheless remained a flashpoint of treaty interpretation. The International Covenant on Economic Social and Cultural Rights, on the other hand, guarantees the right to the highest attainable standard of health, including protection from epidemics.⁶² This has been interpreted by the Committee on Economic Social and Cultural Rights as including harm reduction services. It is a position also taken by the current and former UN Special Rapporteurs on the right to health.⁶³ Moreover, the denial of medical assistance, including harm reduction services, to people in places of detention may amount to cruel, inhuman and degrading treatment.⁶⁴

The drug conventions are silent on appropriate and proportionate penalties, leaving this to individual member states. While this is

⁵⁹ Article 38 (emphasis added).

⁶⁰ Article 14(2) (emphasis added).

⁶¹ *Ibid.*

⁶² Article 12(2)(c).

⁶³ Committee on Economic Social and Cultural Rights, *Concluding Observations, Tajikistan*, (E/C.12/TJK/CO/1), para. 70; and *Ukraine* (E/C.12/UKR/CO/5), para. 28; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Mission to Sweden* (A/HRC/4/28/Add.2).

⁶⁴ *See, for example*, the European cases of *McGlinchey v. UK*, 27 July 2003, European Court of Human Rights, Application No. 50390/99; *Khudobin v. Russia*, 26 October 2006, European Court of Human Rights, Application No. 59696/00; and *Dybeku v. Albania*, 18 December 2007, European Court of Human Rights, Application No. 41153/06.

appropriate, there are also no guiding principles, such as proportionality of the sentence relevant to the crime. Capital punishment is, in fact, recognised in the official commentary to the 1961 Single Convention⁶⁵ as a “permissible substitute control” in the context of states parties adopting more strict measures than provided for in the conventions.⁶⁶ This, however, is out of date, and an inappropriate penalty in terms of human rights, as it fails to meet the test of “most serious crimes” allowed for in article 6 of the ICCPR.⁶⁷

It may be noted, in this regard, that the drug conventions do not require the criminalisation of drug use, *per se*, but possession for personal use (article 3 of the 1988 convention) which amounts to *de facto* criminalisation of drug users. There is no requirement of imprisonment for possession, or, indeed, other such penalties. There is therefore flexibility within the drug conventions for the *de facto* decriminalisation of personal use through the use of nominal penalties for possession, what may be referred to as ‘prosecutory tolerance’.⁶⁸

Eradicating illicit crops is a specific requirement of the 1988 Convention and it states specifically that such measures shall respect human rights. But no further references to the *methods* of eradication are made. The commentary to that convention barely mentions this requirement.⁶⁹ Aerial spraying with Glyphosate or any other chemical is not prohibited by the drug conventions (so long as environmental risks are ‘weighed’⁷⁰), as is non-consensual ‘alternative development’. However, these methods must be determined with reference to human rights, which would, in our view, lean towards a presumption against such detrimental and unfocused tactics as aerial spraying, and which would require informed consent.⁷¹

⁶⁵ Each of the drug control treaties has an accompanying book as an official commentary, authored by the UN Secretariat.

⁶⁶ Commentary on the Single Convention on Narcotic Drugs, pp. 449–450, para. 2.

⁶⁷ See, for example, Human Rights Committee, *Concluding Observations, Thailand* (CCPR/CO/84/THA), para. 14. See also Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd ed. (Oxford University Press, Oxford, 2002), p. 77; and William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge University Press, Cambridge, 2002), p. 110; Martin Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd ed. (Engel, Kehl/Strasbourg/Arlington, 2005), p. 11.

⁶⁸ See Nicholas Dorn and Alison Jamieson, ‘Room for Manoeuvre: Overview of comparative legal research into national drug laws of France, Germany, Italy, Spain, the Netherlands and Sweden and their relation to three international drugs conventions’, Study by DrugScope for the [UK] Independent Inquiry on The Misuse of Drugs Act 1971, March 2000, p. 1.

⁶⁹ Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, pp. 300 and 301.

⁷⁰ *Ibid.*

⁷¹ According to James Anaya, now UN Special Rapporteur on the situation of human

The INCB has repeatedly requested that States parties consider the drug conventions as the legal basis for allowing extradition for drug offences, without any reference to human rights norms.⁷² There is no specific mention in any of the conventions or any of the commentaries to the prohibition in international law of returning a person to a country where they may be tortured. This obligation clearly restricts any extradition obligations undertaken in the drug conventions.

The 1961 Convention states that people who use drugs may be required to undergo treatment or rehabilitation instead of or as well as a custodial sentence. There is no reference to the form such treatment should take as this was left to states to decide. The Commentary to the 1961 Convention is contradictory. It notes that the concept of 'compulsory treatment' was deliberately excluded from the Convention,⁷³ but also specifically endorses, as an 'adequate' penalty, the sort of labour and re-education camps in which people who use drugs are often confined, without trial, and in which the abuses we have described have been systematic.⁷⁴ Human rights law, on the other hand, prohibits absolutely any form of torture or cruel, inhuman or degrading treatment or punishment, including any such activities carried out in the name of drug 'treatment' or 'rehabilitation', and demands *habeas corpus* and due process of law.

Human rights law applies at all times in international drug policy. Specifically, where the drug conventions fail to legislate or are unclear, human rights law must fill the gaps, and it is within these gaps that human rights law serves as *lex specialis* for determining what is "appropriate". This includes such crucial areas as poverty and social exclusion, development, HIV/AIDS, education, penalties, the treatment of prisoners, the form of drug dependence treatment and juvenile justice (on which the Conventions are also silent). In other words, it is not about the blind application of one branch of law, but careful consideration of specific provisions and issues. This demands the official recognition of

rights and fundamental freedoms of indigenous people, "[i]t has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them", 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources' (2005) 22:1 *Arizona Journal of International and Comparative Law* p. 7. See also the recommendation of the former mandate holder, Rodolfo Stavenhagen, following his mission to Colombia: "Except where expressly requested by an indigenous community which has been fully apprised of the implications, no aerial spraying of illicit crops should take place near indigenous settlements or sources of provisions" (E/CN.4/2005/88/Add.2), para. 106.

⁷² See, for example, *Report of the INCB on Follow-up to the 20th Special Session of the General Assembly* (E/INCB/2008/1/Supp.1), 19 February 2009, para. 118.

⁷³ Commentary on the Single Convention, p. 447, para. 6.

⁷⁴ *Ibid.*, p. 429, para. 10.

human rights law as a core element of the international legal framework for drug policy.

VI. FROM LAW TO POLICY: RETHINKING THE ‘PILLARS’ OF DRUG CONTROL

A set of programme activities that only incidentally contributes to the realization of human rights does not necessarily constitute a human rights-based approach

UN Development Group⁷⁵

The current twin ‘pillars’ of supply and demand reduction bring into policy the gaps and limitations of the legal framework provided by the drug conventions. An integrated legal framework that incorporates human rights law necessitates revisiting these strategies.

There are a number of demands made upon drug policy structures and strategies when human rights law is recognised as part of their international legal framework. The first is the creation of new policy strands that strengthen those areas of common concern, or those that are more in the domain of human rights, in order to develop a more holistic framework. These include, but are not necessarily limited to:

Public Health, including:

Access to essential medicines: This is very much sidelined in international drug policy but ostensibly one of the twin objectives of the entire system. To date, the inflexible twin pillars structure has resulted in such logical nonsense as *ensuring access* to opiates for pain relief being dealt with under demand *reduction*. It is an area where international human rights and drug control laws are mutually reinforcing and demands greater focus.

Harm reduction: Currently not an official part of the international drug control framework, due to its abiding and unwarranted controversy within the CND. It is, however, a crucial public health and human rights intervention, requiring a separate pillar to ensure universal access and to contribute to the Millennium Development Goal of halting and reversing the spread of HIV by 2015.

Prevention and treatment: Harm reduction works for those for whom prevention has failed and for whom treatment is ongoing (relapse being a natural part of treatment), or for those for whom abstinence-based treatment is either not possible or not desired.

⁷⁵ *Statement on a Common Understanding of a Human Rights Based Approach to Development Cooperation*, UNDG, 2003.

All three – harm reduction, prevention and treatment – are aspects of human rights obligations, and all three must operate as a comprehensive care system for people who use drugs.

Development

The current framework includes ‘alternative development’ under the pillar of supply reduction, aimed at replacing illicit crops with licit alternatives. We would abandon the word ‘alternative’. Development in the context of drug policy is wider than the type of crops involved and extends to the vital role of poverty reduction, education, employment, social security etc. in reducing recourse to the illicit drug trade and reducing drug related harms. This affects not just cultivation, but trafficking and consumption, and not just rural areas but urban areas as well. This is the essence of a more holistic approach to drug policies reflecting the interdependence of human rights. These factors, however, are often ignored in assessing drug policies.⁷⁶

Law Enforcement

Law enforcement is currently a central aspect of both demand and supply reduction measures. An important benefit of a separate pillar for law enforcement, rather than its incorporation into broader supply and demand reduction pillars, is to better allow for human rights scrutiny of the area of drug policy that is, in many ways, the one which carries the greatest human rights risk. Furthermore, international criminal law focuses on those most responsible – for war crimes, crimes against humanity, terrorism etc. This must apply also to drugs. Law enforcement measures should not target people who use drugs, low level dealers and mules, and farming communities, better suited to the pillars of public health and development. A separate pillar for law enforcement would assist in focusing its role within international policies and programmes and highlighting where law enforcement approaches are less appropriate.

There are three main consequences of this change in the policy structure of drug policy:

(a) Disaggregating these elements from the current twin pillars helps to define what we mean by demand and supply reduction. In fact, once this is done, the terms supply reduction and demand reduction become redundant as strategies, too ill-defined in themselves to have any meaning. Instead, they are more useful as indicators, based on their

⁷⁶ See, for example, the UNODC’s 2007 report *Sweden’s Successful Drug Policy: A review of the evidence* in which Sweden’s restrictive approach was applauded with little analysis of the impact of the country’s social welfare system, healthcare system, education system, low levels of inequality etc.

ordinary meaning, for other strategic goals. (We return to indicators below).

(b) Placing these issues in equal standing serves to highlight gaps in expenditure and international effort and to address the current imbalance between law enforcement and supply side measures, and public health and access to medicines. It serves also to highlight the need, and provide a policy framework for, greater integration with poverty reduction strategies.

(c) Spaces for UN agency co-ordination are clarified. It is important, of course, that any strategies or pillars adopted are not so broad as to become meaningless or to replicate the mandates of other areas of the UN. But drug policy strategies must be so arranged that co-ordination across UN bodies is made easier, and that objectives and measures of success are shared. Indeed, it is human rights law that binds each and every UN body. What is required is not a set of dissociated 'pillars', but an interconnected matrix.

The second demand of human rights is the conduct of detailed rights analyses to uncover the pertinent rights issues related to each strand of policy. Activities should be geared towards addressing the rights issues identified. Such analyses also assist in identifying the rights bearers and assessing their ability to claim those rights. And they should identify the corresponding state and non-state duty bearers, including drug cartels, corporations, and the international drug control bodies in order to ensure that they are held to account.

The third is appropriate indicators so that positive gains in terms of human rights are demonstrated, instead of presumed. Success in drug policy has very often been measured in hectares, kilos and prosecutions and in rates of drug use. But these indicators tell us little about human impact. Human rights based approaches, on the other hand, place the well-being of individuals, communities, and populations at the centre.⁷⁷ It is here that the concepts of demand and supply reduction are perhaps more appropriately placed. Though they are obligations of the drug conventions, placing demand and supply reduction as overall objectives or strategy pillars is to confuse goals, processes and outcomes. The *goal*, for example, is not demand reduction *per se*. It is, among other concerns, improved health. And the *strategy* is not demand reduction; it is, for example, prevention and treatment.⁷⁸ Success may then be *indicated* by less demand for drugs. As indicators, therefore, supply and demand reduction may be more helpful, but in each case they must be

⁷⁷ Paul Hunt and Gunilla Backman, 'Health Systems and the Right to the Highest Attainable Standard of Health' (2008) 10:1 *Health and Human Rights* p. 83.

⁷⁸ This is why harm reduction, as a strategy, does not fit within demand reduction. It is not aimed at reducing demand or use, but reducing the harms to existing users and communities.

supplemented by further indicators, in order to demonstrate progress towards specific human rights justifications and to assess how that success was achieved. The role of indicators in UN system-wide coherence must be emphasised. Rights-based indicators, as a harmonised method of measuring UN programmatic success and failure, may assist agency co-ordination and cross-working by identifying common risks and setting common goals. Such indicators have a vital role to play in closing the gap that has arisen between the human rights and drug policy fields at the UN.

The fourth demand is human rights scrutiny of process. The core principles of a human rights-based approach should underpin any and all strategies adopted – Universality; Equality and non-discrimination; Transparency and accountability; Participation and empowerment.⁷⁹ Programmes must focus on the most vulnerable, root causes of vulnerability, and the impact of rights violations upon drug dependence and involvement in the drug trade. They must be fully participatory and they must aim to hold duty bearers, at all levels, to account, through decision making processes, increased civil society engagement and ensuring that those responsible for rights violations are brought to justice. This relates to how decisions are made, policies and practices developed, and to the working methods of the drug control bodies, which have been heavily criticised for their lack of civil society engagement, their lack of transparency and the resulting lack of accountability (an issue to which we return below).

The test of proportionality, in particular, applies at all times as a check and balance against arbitrary measures. Very few human rights are absolute. Where limitations are permissible, their legality must be determined by reference to the schema developed in human rights law. “Countering the world drug problem”, while certainly a “legitimate aim”,⁸⁰ alone is insufficient as a justification for infringements of rights. Any measures must also be “necessary in a democratic society” for the achievement of the stated aim. If a measure cannot or has not achieved its stated aim, can it be considered necessary or proportionate? This basic question raises a difficult challenge for advocates of the current punitive and law enforcement based approach to drug policies. A full impact assessment of the prohibitionist model should be considered to assist in answering it.⁸¹

⁷⁹ See OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (United Nations, New York/Geneva, 2004), <www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>, 26 May 2009.

⁸⁰ See, for example, the European case of *Air Canada v. UK*, 5 May 1995, European Court of Human Rights, Application No. 18465/91.

⁸¹ Calls for an impact assessment of drug policies have been made at the national level. See, for example, Transform Drug Policy Foundation, *MP calls for impact assessment of*

VII. TOWARDS ACCOUNTABILITY: THE HUMAN RIGHTS OBLIGATIONS OF THE DRUG CONTROL ENTITIES

It is ridiculous to require [CND] to work in accordance with human rights law

China, UN Commission on Narcotic Drugs, 2008⁸²

There is increasing awareness, scholarly literature and international jurisprudence to the effect that the UN and its bodies are bound by international human rights standards.⁸³ This is a crucial dimension to this discussion and highlights the need for greater accountability for human rights from the international drug control system.

Sixty years ago, in the *Reparations for Injuries* case, the International Court of Justice considered the question of whether the UN, as an organisation, had the capacity to bring a legal claim against a state.⁸⁴ In its decision, the ICJ confirmed that “the organization is an international person” and “a subject of international law”.⁸⁵ The Court reaffirmed this position in 1980.⁸⁶ The UN may enter into contractual agreements and may enter into treaties with UN member states.⁸⁷ That international legal obligations apply to the UN drug control bodies, as entities, is therefore clear. According to the ICJ, three main *sources* of international legal obligation may be identified for international organisations: general rules of international law; the constituting documents of the relevant organisations; and agreements to which they are parties.⁸⁸ We shall focus on the first two.

If general rules of international law apply, then the first source of human rights obligation for the drug control entities is customary human rights law, in particular norms of *jus cogens*. Indeed, the International Law Commission made clear its support for this conclusion, stating that “it is apparent that ... peremptory norms of international law apply to international organizations” and that “it can hardly be maintained that

drugs policy in Prime Minister's questions, 25 March 2009 <transform-drugs.blogspot.com/2009/03/mp-calls-for-impact-assessment-of-drugs.html>, 26 May 2009.

⁸² Committee of the Whole, *Debates on Res. 51/12, 51st Session of the CND*, March 2008 (unrecorded).

⁸³ Cf. e.g., the fact that the UN Human Rights Committee examines the implementation of the ICCPR in Kosovo on the basis of a ‘State report’ prepared by UNMIK; see UN Docs. CCPR/C/UNK/1, 13 March 2006, CCPR/C/SR. 2383/Add. 1, SR. 2384, SR. 2385.

⁸⁴ *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, Advisory Opinion, I.C.J. Reports 1949, p. 174.

⁸⁵ *Ibid.*, p. 179.

⁸⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 20 December 1980, International Court of Justice, Advisory Opinion, I.C.J. Reports 1980, p. 73.

⁸⁷ See, for example, the Statute of the Special Criminal Court for Sierra Leone, 2000.

⁸⁸ See *supra* note 86, pp. 89–90.

states can avoid compliance with peremptory norms by creating an organization”.⁸⁹

The second is the constituting documents of the relevant bodies, which broadens greatly the human rights obligations of the drug control entities from those of customary law. The CND and UNODC are bound by the human rights principles enshrined in the UN Charter, the constitution that establishes ECOSOC (the governing body of CND) and the Secretariat (of which UNODC is a department). The content of the human rights protections envisaged by the Charter may be identified in the international bill of human rights, or at the very least, the Universal Declaration, adopted to “give expression” to those obligations.⁹⁰

In both cases there are negative and positive obligations. At the most basic level, the drug control bodies should act with due diligence to ensure that they do no harm. But beyond this negative obligation, it is also recognised that international organisations have a duty “to protect the customary international human rights of everyone in their control to the extent that their functions allow them to fulfil such a duty”. This includes both the negative obligation to respect human rights, and also the positive obligation to protect and fulfil them.⁹¹ While the duty to protect certainly includes protection from the crimes of drug traffickers and other third parties, the duties to respect and fulfil also include the protection of people who use drugs, farming communities, and, indeed, traffickers, from human rights violations carried out in the name of drug policy. In the context of the Charter, member states have pledged themselves to co-operate with the organisation towards the promotion of human rights.⁹² This must imply a complementary and positive obligation on the part of the UN and its agencies.

The INCB differs from UNODC and CND in that it is an independent treaty body made up of individual experts, rather than a UN agency or inter-governmental body. Nonetheless, it is also bound by norms of customary international law and its own constituent documents – the drug conventions. In this regard, the 1988 Convention specifically recognises the need for crop eradication programmes to “respect fundamental human rights”.⁹³ Human rights are therefore already and expressly part of the Board’s mandate, at least in the context of cultivation. As a ‘quasi-judicial’ body, it must also be the case that there is a positive obligation on the Board to apply all relevant international

⁸⁹ (1980) II:2 *Yearbook of the ILC* p. 56.

⁹⁰ *Explanatory Note by the Secretary-General on the Human Rights Council* (A/59/2005/Add.1), para. 7.

⁹¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006), p. 68.

⁹² Articles 55 and 56.

⁹³ Article 14(2).

law to its deliberations, rather than interpreting the drug conventions in isolation.

In addition to these sources of law, the drug control entities should also act with due diligence to avoid complicity in human rights abuses perpetrated by others. It has been recognised that an international organisation may be complicit in human rights violations, where the organisation has the same obligations as the principal perpetrator.⁹⁴ Applying the test for corporate complicity adopted by the OHCHR, tolerating or knowingly ignoring human rights abuses may also amount to complicity.⁹⁵

This is a complex area and one requiring detailed study. We must consider the capacity of international organisations to bear human rights responsibilities as there is no point asking too much of organisations that have no ability to live up to such demands. This requires detailed analysis of each type of entity, the ‘people in their control’ and their respective capacities.⁹⁶ What is clear is that mainstreaming human rights across the work of the three main drug control bodies is not just good public policy. It is required to fulfil international legal obligations.

VIII. THE DRUG CONTROL ENTITIES AS HUMAN RIGHTS MECHANISMS

We are not set up for human rights, so we will not talk about human rights

Secretary of the INCB, 2007⁹⁷

Operationalising human rights mainstreaming is fraught with political and practical difficulty. But this is no excuse for inactivity. We have already discussed human rights outcomes and scrutiny of process, but an even more progressive view may be taken – that the drug control entities have themselves distinct roles as human rights mechanisms. Conceptually, this is not so radical an idea and is arguably already within their respective mandates. The question, however, is where they can add value given their respective roles, expertise, strengths, and limitations.

The Commission on Narcotic Drugs may be seen as the central inter-governmental *forum* for ensuring that human rights are fully taken into account in the context of drug policy. It is, after all, a commission

⁹⁴ Clapham, *supra* note 91, p. 110.

⁹⁵ OHCHR, *The Global Compact and Human Rights: Understanding the Sphere of Influence and Complicity*, Briefing Paper, December 2004, p. 6.

⁹⁶ Clapham, *supra* note 91, pp. 68–69.

⁹⁷ UN Press Conference, 7 March 2007, <webcast.un.org/ramgen/ondemand/press-conference/2007/pc070307am.rm>, 26 May 2009.

established to deal specifically with drug policies. In the context of the *erga omnes* nature of human rights, Andrew Clapham has noted that “the United Nations Organization may legally employ any and all measures appropriate under the UN Charter to deal with human rights violations. These measures may include: the discussion of the situation by the UN Secretary-General; discussion by the Security Council; and *debates in other UN organs*”.⁹⁸ The CND must be considered an appropriate forum, if not *the* appropriate forum, for these discussions in the context of drug policy. As the governing body of UNODC, the CND also has an important role to play in ensuring that the UNODC has appropriate human rights direction.

In its legal affairs, technical assistance and capacity building work, the UNODC has significant expertise, in co-operation with other UN agencies, to assist governments in addressing their drug control activities in ways that comply with human rights obligations. Progress must begin with the incorporation of human rights into strategies and in project documents, something that is not currently systematic in UN drug control activities and strategies.⁹⁹ This includes adding human rights abuses as identified risks, including human rights treaties ratified by the relevant state as well as national human rights laws in the ‘legal context’, and incorporating clauses requiring specific human rights outcomes.

Mechanisms for ensuring the minimisation of human rights risk and the maximisation of positive human rights outcomes may also be employed. Conducting human rights impact assessments (HRIA) as a standard element of every project proposal may be an avenue for this. HRIA include a wide range of activities intended to identify and manage human rights risk and to evaluate human rights impact, positive and negative, throughout the life of each project. Activities include:

- Initial, predictive risk assessments;
- Consultations with affected communities and civil society;
- Baseline surveys and ‘human rights situation analyses’;
- Incorporating human rights into the management of the project, including training for managers where required; and
- Adopting a human rights approach to indicators in the measurement of the success or failure of projects.

This is a relatively new and developing area and not without its difficulties, but one which could be of significant value for the UNODC, including to protect target populations from abuse and UNODC

⁹⁸ Clapham, *supra* note 91, p. 98 (emphasis added).

⁹⁹ See, for example, the projects ‘Interdiction and seizure capacity building in Viet Nam’, project No. AD/VIE/03/G55; and ‘Development of cross border law enforcement co-operation in East Asia’, project No. AD/RAS/99/D91; and *UNODC Strategy for 2008–2011* (E/CN.7/2007/14–E/CN.15/2007/5), 9 February 2007. Though the strategy deals with many related issues, human rights never appear.

employees from accusations of complicity, and to operationalise positive human rights objectives.

Finally, UNODC must speak out publicly against human rights violations taking place in the context of drug policies in specific countries. This is something that the UNODC is currently very reluctant to do, and while staff safety in certain countries must be taken into account, there is little to prevent the UNODC from using its position to highlight these situations.

As always, independent oversight is an important aspect of a treaty-based system. There have been calls to the effect that the INCB remain within the strict parameters of its mandate.¹⁰⁰ This is understandable given the Board's questionable approach to drug policy. But we suggest an alternative view, that the INCB has an important role in ensuring not only that the drug conventions are applied, but applied in full conformity with human rights. This means expanding the Board's mandate, rather than limiting it, and it demands an invigorated Board membership. But the potential of an independent treaty body geared specifically towards drug policy and human rights cannot be ignored. There are a number of arguments that support this role within the Board's existing mandate. First, as argued above, human rights law applies to a wide range of areas related to the drug conventions. Second, the 1988 Convention makes clear the need for human rights to be respected in relation to crop eradication. Third, the commentary to that convention notes that stricter measures than those provided for in the convention must be "subject always" to international human rights law, placing this squarely within the remit of the Board.¹⁰¹ Fourth, the commentary to the 1961 Convention (which created the INCB) notes that it does not impose any restrictions on the type of observations and recommendations the INCB may make.¹⁰² And finally, the Board already appears to accept this aspect of its mandate. Its 2007 annual report began with a chapter on the principle of proportionality and stated that lack of respect for human rights can undermine the implementation of the drug conventions.¹⁰³ If the conventions may be undermined by lack of respect for human rights, then the Board, as part of its work, must consider human rights violations.

A final comment is warranted on the working methods of the three drug control bodies, in particular the CND and INCB. At present, those methods are the antithesis of a rights based approach.

¹⁰⁰ See for example, International Drug Policy Consortium, *The International Narcotics Control Board: Current Tensions and Options for Reform*, 7 February 2008, p. 8, referring to the INCB's 'mission creep'.

¹⁰¹ Commentary on the 1988 Convention, p. 49, para. 3.3.

¹⁰² *Ibid.*, p. 199, para. 6.

¹⁰³ *Annual Report for 2007* (E/INCB/2007/1), para. 38.

The INCB has specifically stated that it will not engage with civil society, and conducts the vast majority of its work behind closed doors, despite the fact that it is not required to do so in the drug conventions. Dealings with governments are strictly private, with relevant information being kept from the public, though tax payers cover their expenses through the UN, and even from other States parties to the Conventions (a practice that appears to be *ultra vires* the contractual nature of the treaties). Transparency, accountability and participation at the INCB are therefore weak to the point of absence.

The CND, an inter-governmental body, is weak on civil society engagement, weak on transparency and all but unaccountable for its decisions. There is no NGO liaison office, and no information for NGO participation is published on the relevant website. Summary records of debates are not publicised, and the reports of the annual sessions are extremely limited. Filming of plenary sessions and thematic debates is not permitted and NGOs have been ejected for doing so. Indeed, NGOs may be (and have been) ejected, without explanation, at the request of any member state.

Perhaps most importantly, the CND never votes. No matter how important the issue, including HIV prevention and human rights, voting is not an option that is open to delegates.¹⁰⁴ The ‘spirit of Vienna’, an unwritten agreement between country delegations, means that the desire for consensus has become the demand for unanimity. Accountability for state positions on drug policy matters in this environment is negligible. Progress on human rights when every country has an effective power of veto is next to impossible.

The core human rights principles of transparency and accountability and of participation and empowerment demand that these outdated and inappropriate methods are reformed. Indeed, “[i]f participatory democracy is relevant to the national levels of governments, then why should it not also apply at the international level, where so many decisions which affect people’s lives are now being taken?”¹⁰⁵

IX. CONCLUSION

‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’

Article 28, Universal Declaration of Human Rights

¹⁰⁴ With the sole exception of changes to the schedules of substances under international control.

¹⁰⁵ Philippe Sands, *Lawless World: Making and Breaking Global Rules*, rev. ed. (Penguin, London, 2006), p. 18.

This essay has intentionally raised more questions than it has answered, and yet more questions remain. Perhaps the most obvious omission is the role of the human rights mechanisms in drug policy. This is primarily because their roles should be obvious. The Human Rights Council, OHCHR, the Special Procedures and Treaty Bodies, along with other human rights bodies and mechanisms have clear mandates to address drug policies. In particular, there is a clear protection gap in the human rights system and a need for a new thematic special procedure related to human rights in the context of drug control.

We have not dealt with the question of bringing currently illicit drugs within a legally regulated market akin to that used for alcohol, tobacco or prescribed and over-the-counter pharmaceutical drugs. This is because we have sought to operate within existing international law, and it must be acknowledged that the legal regime for drug control is robust and has near universal ratification. We would note, however, that international consensus is not what it was in 1961, 1971 or 1988. It is not beyond the realms of possibility that one day the drug conventions may be reconsidered. If this were to happen, we submit that a human rights-based approach would still apply as the central aim of any future policies, even if the rights issues involved change. But the question of whether human rights law supports, opposes or is silent on the creation of such a market is an important one that remains to be debated. We would observe, however, that a framework for a rights-based approach must be one that is capable of surviving any amendments to the drug conventions, or, indeed, their revocation.

We have not considered the more hidden agendas of drug policy. In terms of strengthening foreign interests, international power-broking, and maintaining and expanding class and racial divides, drug policy has, thus far, been a roaring success.¹⁰⁶ These agendas pose difficult challenges for human rights advocates. But one of the aims of a human rights-based approach to international drug policy must be, through increased transparency and accountability and utilising human rights as core indicators, to seek to ensure that the United Nations system is not one behind which these agendas may hide.

These questions, and others, remain to be answered. The ‘war on drugs’, however, has raised questions relating to HIV/AIDS, the death penalty, extrajudicial killings, torture, poverty, social exclusion, indigenous peoples’ rights, racial discrimination, conflict, environmental damage and sustainable development – and yet, in decade after decade, it has answered nothing.

¹⁰⁶ Paul Farmer, for example, has referred to the ‘war on drugs’ as “one of the newer ruses for managing inequality and criminalizing poverty”, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (University of California Press, Berkeley and Los Angeles, 2005), p. 183.

The legal framework for the necessary paradigm shift already exists, as does the capacity and expertise to facilitate a move towards a more rights based approach. The political and institutional will, however, does not. Resistance to any such changes from member states and from some within the UN system that hold the *status quo* as sacrosanct is inevitable. But without concerted effort to include human rights law in our thinking on drugs and what we hope to achieve through drug policies, and without the mainstreaming of human rights in the policy objectives and programmatic efforts of the international drug control system, this gap between drug policy and human rights will continue to widen, human rights abuses will continue to fall through, and the United Nations will continue to be seen as part of the drug problem, instead of part of the solution.