

# Converging universes: 20 years of human rights and drug policy at the United Nations

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General view of the Human Rights Council. Credit: UN Photo by Pierre Albuoy, CC BY-NC-ND 2.0

## Executive summary

In recent years, the historical isolation between the United Nations (UN) drug policy and human rights bodies has eroded significantly, and with accelerating speed. The human rights consequences of drug policies have become an unavoidable – if fractious – topic in global drug policy debates, and human rights bodies routinely monitor the impacts of drug responses.

The growing convergence between the UN human rights and drug policy regimes is the result of 15 years of progress across the whole UN environment, with contributions from Geneva, Vienna, and New York-based bodies reinforcing and encouraging one another. Civil society has been a constant and necessary presence, broadening the horizon of what is possible, transmitting key information across the UN system, and consistently advocating for change.

Despite some reluctance to engage in drug-related discussions up until the 2010s, the Geneva-based human rights system has become gradually more influential in pushing for this alignment. The first call for convergence between the two regimes came from Geneva, in 2008. Since then, a large number of UN human rights bodies have regarded drug policies to be under their mandate, including the Human Rights Council, the Office of the UN High Commissioner for Human Rights (OHCHR), special mandate procedures, and human rights treaty bodies.

A parallel shift in priorities also took place in Vienna – at least initially. The first, and so far only, resolution dedicated to human rights at the Commission on Narcotic Drugs (CND) was adopted in 2008, thereby legitimising human rights within the agenda of the CND. In the following years, Member States began to incorporate human rights language into plenary statements; new resolutions on topics closely aligned with a human rights approach were adopted. In 2014, the International Narcotics Control Board (INCB) finally condemned the use of the death penalty for drugs offences, discarding its long-standing refusal to acknowledge human rights violations connected to drug control.

These changes were hard fought by progressive Member States and civil society alike. The 2016 UN General Assembly Special Session (UNGASS) on drugs provided an opportunity to accelerate the inclusion of a stronger human rights narrative in drug policy debates across the UN system. This included establishing human rights as a new pillar of the global response to drugs, and the adoption of the strongest negotiated language to date. In part, this progress was due to the unprecedented involvement of UN human rights bodies in the preparations for the Special Session following the first-ever Human Rights Council resolution on drugs in 2015.

The 2015 Human Rights Council resolution was mobilised Geneva-based bodies to increase their attention to drug policies after the UNGASS. Since then, OHCHR has remained steadfastly engaged on the drugs issue, while there has been ever increasing attention from special mechanisms. In parallel, the recommendations provided by human rights treaty bodies have gained in systematicity and ambition. Recent developments such as the announcement of a forthcoming new General Comment on drug policies by the Committee on Economic, Social and Cultural Rights (CESCR), show that this trend will intensify in the future.

The constraints imposed by consensus-based drug policy making and the strong coordination of conservative Member States have blocked progress on human rights language at the CND. Human rights have nonetheless gained visibility and influence at the Commission, thanks to constant pressure from civil society, the increased presence of the OHCHR and human rights mechanisms in Vienna, and the now constant references to human rights by vocal Member States. The centrality of human rights to drug responses is also recognised within the UN System Common Position on drugs, which was adopted by the Chief Executives Board composed of the heads of 31 UN entities in November 2018.

2022 might have marked a turning page in consensus-based policy making on drug-related matters at the UN. First-ever votes took place at both the CND (albeit on a procedural matter), and at the UN General Assembly, where a substantial majority of Member States supported new and

strong human rights language in the yearly drugs resolution. Whether the international community is truly ready to finally end the long-standing consensus on UN drug policy on a regular basis remains to be seen. However, this does open the door for new possibilities in global drug policy debates, and shows that a majority of countries now unequivocally support a greater role for human rights and human rights bodies.

## Introduction

The international drug control regime is at a crossroads. Features that have been essential to its functioning for more than 60 years, such as the prohibition of the non-medical use of scheduled substances or consensus-based decision making, are now not only questioned but openly challenged by some Member States. At the same time, the devastating human rights abuses connected to drug control have now become central to drug policy debates, at both national and international level.

In the last 15 years, the UN human rights institutions based in Geneva have had a key role in documenting these concerns, and putting them at the forefront of the global agenda. This has led to a greater – if still insufficient – attention to the human rights dimension of drug policies at the CND itself, and in the UN bodies in Vienna. As this paper explains, the long-standing division between drug policy bodies in Vienna and human rights bodies in Geneva – the two ‘parallel universes’ – has eroded dramatically in recent years, as the international drug control regime has come increasingly into question.

When the United Nations was created, the promotion of human rights was enshrined as one of its key ‘purposes’.<sup>3</sup> In 1945, this was a radical departure from most prior international arrangements, as it placed the protection of human dignity at the centre of a new global framework for international relations. But this goal has historically competed against many others, and in some cases the fit has been problematic. This is indeed the case of the drug control regime.

In 2008, the UN Special Rapporteur on the right to health famously noted that the UN human rights institutions based in Geneva and the drug control regime based in Vienna behaved as if they existed in ‘parallel universes’, ignoring each other’s existence.<sup>4</sup> This briefing paper will show how these parallel universes have started to converge – thanks to the relentless work of civil society, human rights experts, and like-minded Member States.

In Geneva, human rights experts and treaty bodies have consolidated an ever-growing body of recommendations concerning drug policies, and the Human Rights Council has influenced global drug policy debates with resolutions touching on drugs and human rights. In Vienna, we have seen an increasing role for human rights in the debates, as well as the adoption of resolutions on topics aligned with a human rights approach, such as stigma and marginalisation, gender-sensitive policies, specific harm reduction interventions and access to controlled medicines. Crucially, progress has been driven by breaking the wall between the Geneva and Vienna fora, through critical moments such as the process leading to the 2016 UNGASS<sup>5</sup> and the adoption of the 2018 UN System Common Position on drugs.<sup>6</sup>

This briefing paper highlights how the increasing involvement of UN human rights entities in drug policy debates has paved the way towards drug policy debates that incorporate health, human rights and development considerations. But this capacity for driving change has not been exhausted, and there is still significant space for greater involvement and stronger contributions by UN human rights institutions, to ensure that drug policies no longer operate in a silo, disconnected from the UN system.

The balance of priorities within the UN system is always evolving, and change is often marked by the relationship between institutions. As the prohibitionist consensus established by the UN drug conventions comes under increasing pressure, a robust engagement by the UN human rights system within drug policy debates can be instrumental in shaping a multilateral response to drugs that truly serves the welfare of humankind.

## Box 1. Convergence matters: Changing frameworks to reform policies

Drug policy making grounded on international human rights law and standards entails different goals and priorities than those derived from the prohibitionist perspective enshrined in the international drug conventions. Inevitably, it also entails different policies on the ground. Key amongst these changes is the acknowledgement that punitive drug policies have consistently failed to achieve their stated objective of eradicating the illegal drug market, as well as the recognition of the negative consequences of the approach.

The serious and systematic human rights impacts of punitive drug control have been well documented by UN entities, from the Office of the High Commissioner for Human Rights (OHCHR)<sup>7</sup> to the International Narcotics Control Board (INCB)<sup>8</sup> the UN Office on Drugs and Crime (UNODC)<sup>9</sup> - though not consistently in this latter case, as we shall see – as well as by civil society.<sup>10</sup> To mention but a few, these include:

- The ongoing use of the death penalty for drug offences
- Extrajudicial killings connected to drug control
- The denial of life-saving and gender-sensitive harm reduction and drug dependence treatment services
- Billions of people living in countries with little to no access to palliative care and pain relief
- Violence against subsistence farmers targeted by forced eradication of crops destined

for the illegal drug market, pushing them further into poverty and marginalisation

- Disproportionate punishments for drug offences, with one in five people in prison across the world incarcerated for a drug activity
- Criminalisation, police harassment and violence against people suspected of drug use
- The ongoing use of compulsory drug detention and rehabilitation centres for people who use drugs
- Cases of torture, ill-treatment and arbitrary detention.

These abuses have particularly targeted historically marginalised populations who are often absent from global and national debates. And they have been going on for decades.

Although not directly mandated by the UN drug control conventions, many of these human rights abuses are linked to State policies that are greatly influenced by the punitive framework promoted in the treaties.<sup>11</sup> This is especially the case with the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>12</sup> As has been argued elsewhere,<sup>13</sup> these norms generate structural ‘human rights risks’. Framing drug policy through a human rights lens would minimise these risks and ensure that government efforts are grounded in a supportive approach focusing on health, gender equity, social and racial justice, inclusion and care.

## Parallel universes and isolation: 1945 to 2008

Human rights are inseparable from the UN system established in 1945, in reaction to the horrors of World War II.<sup>14</sup> The UN Charter identified the ‘encouragement of respect for human rights’ as one of its four key purposes. The adoption of the Universal Declaration of Human Rights in

1948 was hailed as a defining moment for the new global regime. Although the UN’s role in promoting human rights has ebbed and flowed since 1945, in recent decades, respecting, protecting and fulfilling human rights have been identified as one of the three pillars of the UN – one of its reasons for existence.<sup>15</sup> The UN budget for human rights work multiplied fivefold between 1992 and 2018.<sup>16</sup>



Eleanor Roosevelt of the United States holding a Universal Declaration of Human Rights poster in Spanish. Credit: United Nations Photo, CC BY-NC-ND 2.0.

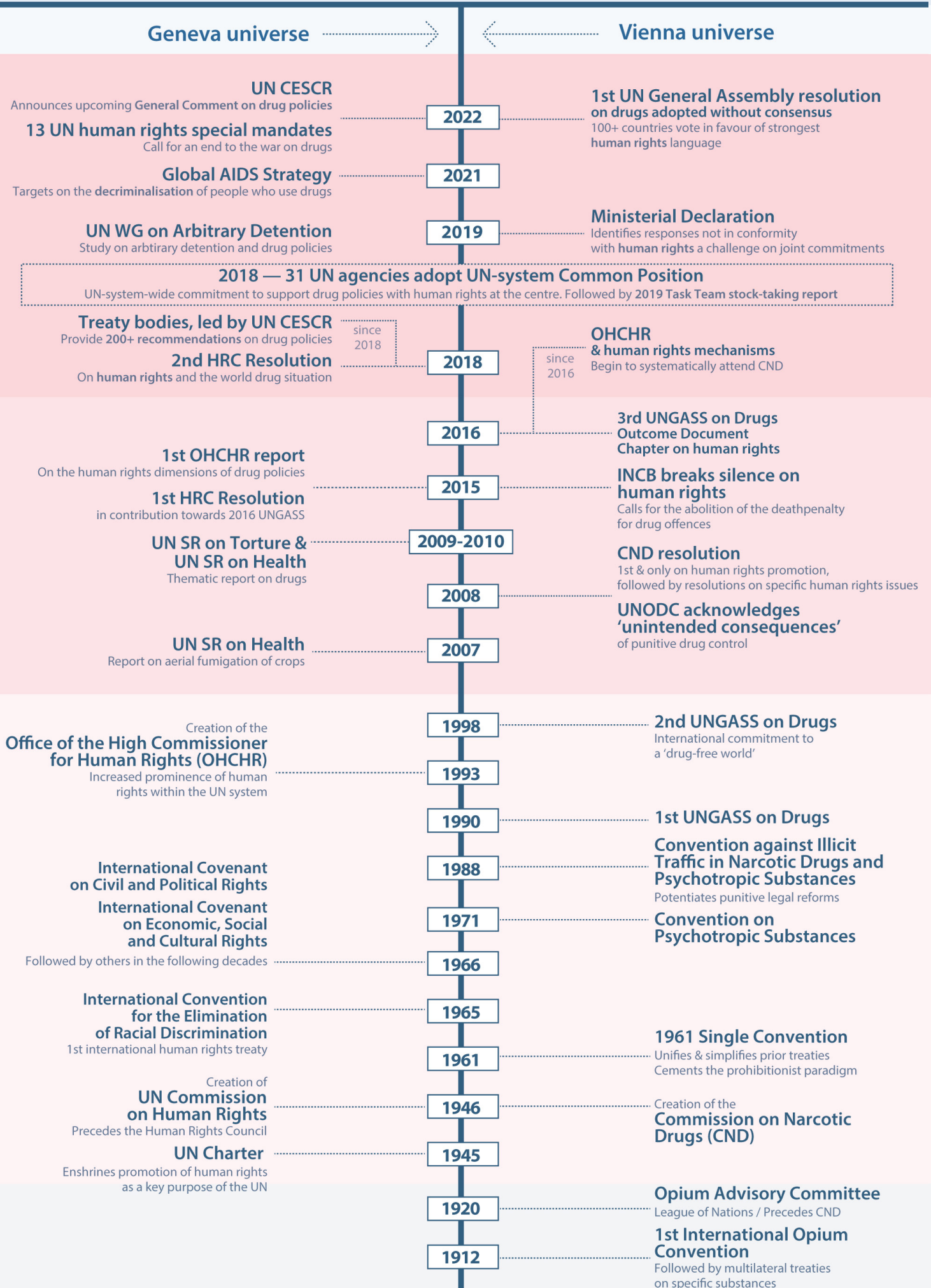
In contrast, the drug control bodies nested within the UN were explicitly framed as a continuation of the pre-existing international institutions. In 1946, the Economic and Social Council (ECOSOC) established the UN Commission Narcotic Drugs (CND) as a successor to the Opium Advisory Committee of the League of Nations, with a formalised transfer of responsibilities.<sup>17</sup> The international drug control treaties that had been developed since 1912 remained in force, in large part consolidated within the 1961 Single Convention on Narcotic Drugs and expanded in 1971 and 1988, all overseen by the CND.

While the international human rights regime is a unique fruit of the UN system, the drug control regime is a transplant.

Starting in the 1960s, both the human rights and drug control regimes grew in reach and strength, following a parallel course of normative development through the adoption of cornerstone treaties. However, important differences remained. The two key instruments of the international 'Bill of Rights' – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – sought to develop the rights enshrined within the Universal Declaration of Human Rights into international treaty-based law. In contrast, the 1961 Single Convention on Narcotic Drugs constituted 'a legal instrument of continuity'<sup>18</sup> connected to the pre-UN world, though shifting the goal of multilateral approaches to drugs towards prohibition, including with international provisions for criminalisation.<sup>19</sup>

# Converging universes

## Human rights and drug policy at the United Nations



After two decades of slow progress, the development of the UN human rights regime gained momentum after the end of the Cold War, eventually leading to the creation in 1993 of the Office of the United Nations High Commissioner for Human Rights (OHCHR). Paradoxically, the expansion of the human rights system coincided with the intensification in the US-driven global 'war on drugs', which was reflected at UN level, and exacerbated the human rights impacts of drug control.

In 1988, the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances made it mandatory for signatory states to criminalise all activities related to illegal drug supply, while still allowing for some flexibility for States to adopt alternatives to punishment for use and possession - a flexibility that initially many Member States and the INCB itself refused to recognise. The treaty gave rise to a wave of legal reforms, which imposed draconian punishments for drug offences, led to crowding prisons worldwide,<sup>20</sup> and promoted the imposition of the death penalty for drug offences, even while exactly in the same years the abolitionist cause was incorporated to international law through the second Optional Protocol to the ICCPR. Thus, the international community intensified the 'human rights risks'<sup>21</sup> inherent to drug control.

Political support for this hard-line approach was expressed in the Political Declaration adopted at the 1998 UNGASS on drugs, which sought to achieve a 'world free of drug abuse' and committed countries to eradicate all crops destined for the illegal market within 10 years. In private, many countries were not convinced by the feasibility of this approach,<sup>22</sup> and yet, this objective would become a constant feature within international commitments for the following decade. Both the 1988 Convention and the 1998 Political Declaration did recognise a place for human rights within drug control, but they did so in a vague, rhetorical, and largely non-consequential way.<sup>23</sup>

Such was the situation when Paul Hunt, then UN Special Rapporteur on the right to health, declared in 2008 that the UN human rights and drug control regimes needed to 'cease to behave as in parallel universes'.<sup>24</sup> On the one hand, the UN

human rights system, ever growing in ambition and reach and now one of the 'pillars' of the UN, turned a blind eye to the human rights impacts of drug control. On the other hand, while quasi-universal in its formal adherence, the international drug control regime was losing the political momentum of the 1980s and 1990s, as the 'drug free world' revealed itself to be an unachievable goal, and a major driver of human rights violations. It is in this context that the convergence of the universes inevitably began to take place.

## The force of (human rights) gravity: 2008 to 2016<sup>25</sup>

It was the 51<sup>st</sup> session of the CND in 2008 that marked a shift in UN discussions on drugs, with the human rights discourse finally – albeit timidly – making its way to Vienna. In celebration of the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights, and for the very first time in its history, the CND negotiated a resolution on 'the promotion of human rights in the implementation of the international drug control treaties', under the leadership of Uruguay and with support from a number of EU countries (in particular Italy and the UK), and Switzerland.<sup>26</sup>

Inevitably, the resolution was faced with considerable resistance from various Member States and the final text was drastically watered down, exposing the frailties of the CND's consensus-driven processes and unwillingness by many to consider the application of human rights standards to their drug control efforts.<sup>27</sup> Thailand, for instance, stressed that 'If we bring in the issue of human rights within CND, it will disrupt the tradition of consensus', while China declared: 'discussion of political issues such as human rights are inappropriate at CND's'.<sup>28</sup> Although mentions of the OHCHR or the Human Rights Council were deleted from the final text of the resolution, it did request the UNODC to 'work closely with the competent United Nations entities, including the United Nations human rights agencies'.<sup>29</sup> This effectively created a mandate for the United Nations Office on Drugs and Crime (UNODC) to work with the OHCHR, and ensure that human rights would be brought again to the CND.

The new focus on human rights within the Commission was likely triggered by the quickly approaching 10-year review of the 1998 Political Declaration to be held in March 2009, just a year later, in a context where civil society advocates were already raising concerns over the human rights devastation caused by drug policies worldwide. Ahead of the 2008 CND session for instance, the Canadian HIV/AIDS Legal Network, IDPC, the Beckley Foundation, Harm Reduction International, and Human Rights Watch had produced a key report entitled ‘Recalibrating the regime: The need for a human rights-based approach to international drug policy’, highlighting the multiple ways in which drug law enforcement was impacting on human rights, and providing various recommendations to ‘prevent the

ongoing subversion of human rights protection in the name of drug control’.<sup>30</sup> Similarly, the Canadian HIV/AIDS Legal Network, Harm Reduction International, IDPC and Open Society Institute were putting pressure on UN agencies to speak out in favour of a human rights-based approach to global drug policy.<sup>31</sup>

Also in 2008, the then UNODC Executive Director, Antonio Maria Costa, published a landmark report which, for the first time, openly acknowledged the negative ‘unintended consequences’ of drug control, including in terms of human rights, suggesting the need for national-level reforms.<sup>32</sup> Importantly, when presenting the report, Mr. Costa concluded: ‘Although drugs kill, I don’t believe we need to kill because of drugs.



Bolivian President Evo Morales holds a coca leaf at the 2012 session of the Commission on Narcotic Drugs. Credit: UNIS Vienna, CC BY-NC-ND 2.0



The UN drug conventions have left it to individual states to deal with health care and crime retribution, in relation with the specific cultural and judicial contexts. Mindful of this, today I propose that Member States extend the concept of harm reduction to include the need to give serious consideration to whether the imposition of capital punishment for drug-related crimes is a best practice.<sup>33</sup> As will be discussed in Box 5, this stands in stark contrast with the refusal by the current UNODC Executive Director, Ms. Ghada Waly, to discuss the human rights dimension of drug policy, which is particularly noticeable in the World Drug Report.<sup>34</sup>

As argued by Lines and Hannah, both this report and CND Resolution 51/12 ‘played a major role in legitimatizing what was, prior to 2008, a topic largely seen as illegitimate with both the drug control and human rights regimes’.<sup>35</sup> And they certainly influenced the debates at the 2009 high-level segment and the negotiations of the 2009 Political Declaration and Plan of Action on drugs, marked by increasing awareness within the international community of the need to consider human rights language in the proceedings. Breaking with a traditional focus on reducing demand and supply via punitive policies, calls were made by various Member States in favour of alternatives to punishment, more proportionate sentencing, prevention of discriminatory measures against people who use drugs, the need to ensure access to treatment and harm reduction services, and the rights of Indigenous peoples.<sup>36</sup> And yet, ‘human rights’ remained such an alien concept in Vienna at the time that, at the 2009 high-level segment a group of NGOs took it upon themselves to share leaflets entitled ‘Ten ways drug policy affects human rights’,<sup>37</sup> and ‘Ten reasons why human rights is an issue for CND’ to provide basic information about how drug control was violating human rights.<sup>38</sup> Months later, similar leaflets were circulated at the 12<sup>th</sup> session of the Human Rights Council since ‘drug policy’ remained as alien a concept in Geneva as ‘human rights’ was in Vienna.<sup>39</sup> The role of civil society at the 2009 high-level segment and their role in helping to shape the debates through a human rights perspective should not be underestimated.<sup>40</sup>

In the years that followed, human rights concerns related to drugs and drug policy became

more prominent in CND resolutions, including in the context of HIV prevention, alternative development, drug use prevention, gender-sensitive drug policy, and access to controlled medicines.<sup>41</sup> But it was the announcement that another UN-GASS on drugs would take place in 2016 that pushed human rights into the spotlight. The 57<sup>th</sup> session of the CND in 2014, which coincided with the mid-term review of the 2009 Political Declaration, saw fierce debates taking place on human rights issues. A number of countries called for greater exploitation of the flexibilities in the interpretation of the UN drug conventions to put the twin issues of public health and human rights at the centre of international drug policy, while many States made strong statements to condemn the ongoing use of the death penalty for drug offences. Going even further, and with a rare call to reform the UN drug control treaties, Ecuador urged Member States to frame drug policy as a human rights, public health and social inclusion issue.<sup>42</sup> Unfortunately, such calls did not feature particularly strongly in the 2014 Joint Ministerial Segment, but the debate over human rights had certainly advanced compared to previous CND sessions.

The fact that the INCB – the UN entity in charge of supporting Member States in implementing the UN drug control treaties – had traditionally refused to engage in human rights discussions, considering it as being outside of its mandate, did not help move the issue forward.<sup>43</sup> Things slowly started to change in 2014, when the INCB made its first ever public statement against the death penalty for drug offences and dedicated the thematic chapter of its Annual Report for 2014 to human rights (see Box 2). In parallel, building on its 2008 landmark report ‘Making drug control “fit for purpose”’ and in response to increasing civil society pressure, the UNODC also started expanding its work on human rights, including with a guidance document in 2012 on the ‘promotion and protection of human rights as part of the work of the Office’, and participation in joint UN statements in favour of the abolition of the death penalty and the closure of compulsory drug detention and rehabilitation centres.<sup>44</sup> However, despite these positive steps forward, both entities remained timid on human rights considerations and failed to truly embrace and promote a human rights framework for drug policy.

## Box 2. The INCB's shifting positions on human rights: A tentative journey<sup>45</sup>

Prior to 2014, the Board stubbornly refused to engage in any discussions associated with human rights violations committed in the name of drug control, deeming the issue to be beyond its mandate.<sup>46</sup> (The Board's 2007 Annual Report, focusing on the issue of proportionality as it relates to drug offences, was a notable exception to this trend).<sup>47</sup>

While the INCB ignored the broad range of human rights abuses committed in the name of drug control, the Board went as far as to criticise those countries seeking to shift away from overly punitive drug control, expressing concerns over Portugal's decriminalisation policy or Canada and Switzerland for operating safe injection rooms - going against advice given by the Legal Affairs Section of the UN Drug Control Programme in 2002 that had found drug consumption rooms to be compliant the UN drug control treaties.

This led many NGOs to strongly criticise the INCB's stance on human rights. At the annual informal dialogue with the INCB at the 2012 CND, a representative from Harm Reduction Coalition asked the INCB President: 'Is there no atrocity large enough that you will not step outside your mandate to condemn it?'. To which Mr. Ghodse replied: 'No. 100% not'.<sup>48</sup>

It was in 2014 that the INCB started to open up on human rights. At the London launch of its Annual Report, INCB President Raymond Yans made the first ever statement condemning the use of the death penalty, in response to an NGO question on the matter. The following year the President's foreword to the INCB Annual Report for 2014 included a call for the abolition of the death penalty, stressing that 'drug control measures do not exist in a vacuum; in their implementation of these measures, States must comply with their human rights obligations'.<sup>49</sup> The report's thematic chapter also contained a strong focus on human rights.

Since then, the INCB has become more vocal within its Annual Reports, public statements (including at the CND) and alerts on a growing

range of human rights issues, including access to controlled medicines, proportionality of sentencing, extrajudicial killings, access to health services for people who use drugs, and even decriminalisation and drug consumption rooms. In its Annual Report for 2018, the INCB took another step in the right direction, concluding that 'The fundamental goal of the three international drug control conventions, namely, to safeguard the health and welfare of humanity, includes ensuring the full enjoyment of human rights'. And since 2020, the INCB has issued statements on International Human Rights Day – a clear message that drug policy and human rights are indeed strongly interconnected.

Despite these positive developments, there is a long way to go before the INCB can be said to have integrated attention to the human rights impacts of drug control in a systematic and comprehensive manner. To name but two examples, the Board continues to shy away from criticising countries for their highly militarised drug law enforcement, or from reflecting on the tension between the rights of Indigenous peoples and drug control. To embed human rights within its interpretation of the treaties, it is essential that the INCB work more closely with civil society, as well as UN human rights entities in Geneva. Reconsidering the composition of the INCB may also be necessary: with three members of the INCB being nominated by the World Health Organization (WHO), it would be reasonable to consider an additional nomination by the OHCHR to bring a stronger human rights focus in the work of the Board.

Nonetheless, even if all of those changes were to be made, INCB would continue to face major structural limitations that are putting the Board in an awkward situation vis-à-vis human rights. The fact remains that the global drug control and human rights regimes are not always complementary, which means that there are fundamental frictions between the two regimes which will need to be addressed before the INCB is able to fully embrace a human rights approach to drug policy.

In the meantime, in Geneva various UN human rights entities began raising serious concerns over the devastating human rights toll of drug control. Starting in 2001, the UN Committee on the Rights of the Child recommended that no criminal penalties be imposed on children for drug use. In 2007, the then UN Special Rapporteur on the right to health, Paul Hunt, underscored the health impacts of aerial spraying to destroy drug crops.<sup>50</sup> Two years later, the UN Special Rapporteur on Torture dedicated an entire section of his annual report on drug policy,<sup>51</sup> while the OHCHR released its first ever statement calling for a focus on ‘human rights and harm reduction in international drug policy’.<sup>52</sup> In 2010, the entire annual report of the Special Rapporteur on the right to health focused on the negative impacts of drug control on health.<sup>53</sup>

From 2011 to 2015 the position of the bodies charged with monitoring the implementation of the key international human rights treaties also began to shift, with increased attention devoted to drug policies, and a more nuanced understanding of the human rights implications of drug control itself. In prior years, the treaty body that had shown a consistent interest in drug policies was the Committee on the Rights of the Child (CRC). The only core UN human rights treaty that specifically mentions drugs is the Convention on the Rights of the Child, with Article 33 committing Member States ‘to protect children from the illicit use of narcotic drugs and psychotropic substances’ and to ‘prevent the use of children in the illicit production and trafficking of such substances’. Because of this, the majority of CRC recommendations centred on the prevention of drug use, including through anti-drug laws. But since 2011 the Committee started to broaden its interpretation of this provision, first by introducing frequent recommendations for Member States to develop ‘youth-friendly’ harm reduction services, and secondly by underscoring the impacts of drug laws on children, highlighting cases of violence, ill-treatment, and arbitrary detention.<sup>54</sup>

At the same time, from 2011 onwards, other treaty bodies showed an increased interest in drug policy, particularly the Committee on Economic Social and Cultural Rights (CESCR). While still retaining language on ‘fighting drug use’<sup>55</sup> or

‘combatting (...) the inflow of narcotic drugs’<sup>56</sup> the Committee began to include calls for the adoption of a ‘human rights-based approach to drug use’,<sup>57</sup> stressing the need to provide opioid agonist therapy,<sup>58</sup> harm reduction services, sanctioning discrimination in access to health services,<sup>59</sup> and expressing concern over compulsory treatment and detention.<sup>60</sup>

In 2014, CESCR was joined by the Human Rights Committee in recommending that Member States ‘adopt a human rights-based approach in addressing the problems of drug use’,<sup>61</sup> and highlighting the obligation to provide opioid agonist therapy to alleviate withdrawal symptoms for people deprived of liberty.<sup>62</sup> A large proportion of these recommendations were provided while reviewing Eastern Europe and Central Asian countries. They were prompted by the sustained efforts of civil society advocates from the region in documenting and reporting on human rights violations against people who use drugs<sup>63</sup> - showing once again the leading role of civil society in much of the progress made in recent years.

## The 2016 UNGASS on drugs: A watershed moment

In 2015, UNGASS preparations were in full swing at the 58<sup>th</sup> session of the CND, with a segment dedicated to planning for the Special Session. Human rights featured prominently in the discussions, as they were one of the ‘cross-cutting issues’ of the UNGASS, alongside health, crime, new challenges, threats and realities, and development. This, in and of itself, was a major win for those who had been advocating for more visibility to be given to human rights for decades, and who finally saw a real breakthrough. And it gave a mandate for UN human rights entities to step in and play a more significant role in international drug policy debates.

In anticipation of the Special Session, the Human Rights Council adopted its first ever resolution on drugs and human rights at its 28<sup>th</sup> session in 2015.<sup>64</sup> Led by a core group of Member States focusing on drug policy, with Switzerland at the helm,<sup>65</sup> the resolution instructed the OHCHR to prepare a study on the ‘impact of the world drug



Civil society roundtable at the 2016 UNGASS. Credit: Steve Rolles

problem on the enjoyment of human rights’ and called for a thematic session dedicated to the issue. The resolution showcased the influence that Human Rights Council can have on global drug policy debates, with three tangible outcomes. Firstly, the resolution resulted in a landmark OHCHR report on the human rights consequences of drug policies – the first ever.<sup>66</sup> Secondly, it directed the High Commissioner to contribute to the preparatory work of the 2016 UNGASS. Lastly, the resolution created space within the agenda of the human rights system to explicitly consider the human rights impacts of drug policies, and resulted in greater involvement by human rights mechanisms in drug policy debates, including the UNGASS.

The ground-breaking OHCHR ‘Study on the impact of the world drug problem on the enjoyment of human rights’,<sup>67</sup> which received contributions from 24 Member States and over 40 NGOs,<sup>68</sup> constitutes the first comprehensive analysis of human rights and drug policy by a UN entity – one that the UNODC had never produced. The report addressed issues as diverse as the right to health (including access to harm reduction and treatment services), access to controlled medicines, the prohibition of arbitrary arrest and detention and of torture, the right to life and ongoing use of the death penalty and extrajudicial killings for drug offences, the right to a fair trial and due process, the prevention of discrimination, the rights of the child, and the rights of Indigenous peoples. This analysis was a far cry from the basic understanding of the human rights consequences of drug

control that the UN system possessed in 2009. The OHCHR report was submitted as their official contribution for the UNGASS, and was used as the basis for discussions at the Human Rights Council thematic day on drugs and human rights – the first Council roundtable discussion ever held on this topic – in September 2015.

Under the leadership of the then UN Special Rapporteur on the right to health Dainus Puras, Special Procedures and treaty bodies also made two substantive contributions to the UNGASS process: one being an open letter to the UNODC Executive Director coinciding with the CND inter-sessional meeting on the UNGASS in December 2015,<sup>69</sup> the second being a joint statement to the President of the UN General Assembly launched days prior to the UNGASS by the Special Rapporteur on the right to health, the Special Rapporteurs on summary, arbitrary or extrajudicial executions and on torture, the Working Group on Arbitrary Detention, and the Committee on the Rights of the Child.<sup>70</sup>

Unfortunately, most contributions from UN human rights mechanisms failed to make it into the UNGASS Outcome Document, which was adopted by consensus on the first day of the Special Session in April 2016, as a final text had already been agreed upon in Vienna even before the session had started. The joint statement of the UN Special Procedures concluded that: ‘in our opinion, the text fails to sufficiently articulate the binding nature of human rights obligations in the context of international drug control and

continues to embrace the harmful concept of a “drug-free world”. ‘While specific human rights content could not be agreed during the closed negotiations and is thus absent from the outcome document’, the statement continued, ‘we would like to remind States that they remain legally bound by their obligations to respect, protect, and fulfil human rights including while developing and implementing their responses to drugs’.<sup>71</sup>

Complaints also arose from Member States themselves as they deplored the fact that the Outcome Document had failed to specifically mention ‘harm reduction’, decriminalisation, the rights of Indigenous peoples, or to condemn the use of the death penalty. Immediately after the document had been adopted by consensus at the UNGASS opening session, the EU (on behalf of its then-28 Member States and 28 additional countries) declared that ‘imposing the death penalty for drug offences is against norms of international law, *specifically Art. 6 Para 2 of the International Covenant on Civil and Political Rights*’ (emphasis added). The mere fact that a large group of Member States referred to one of the most important human rights conventions in the framework of the international drug control regime was a welcome development.

Again, civil society was instrumental in pushing the debate forward throughout the UNGASS process, engaging with policy makers with concrete recommendations on human rights language to support the negotiations of the UNGASS Outcome Document; creating space for strategising with like-minded Member States in Vienna, Geneva and New York; mobilising UN entities (including those dedicated to protecting human rights) to participate in the debates; and coordinating to ensure a strong and diverse voice for NGOs and groups most affected by punitive drug policies.<sup>72</sup>

While the UNGASS Outcome Document remains disappointing in some aspects, it is the very first time that a high-level, consensus-based political document on drugs includes a pillar dedicated to human rights, as well as thematic chapters on health, access to controlled medicines and development. The new structure represented a critical step forward for framing drug policy away

from the traditional three pillars of demand reduction, supply reduction and international cooperation at UN level. And although the Outcome Document does not reflect some critical human rights issues, it does include the strongest negotiated language to date on due process, arbitrary detention and the prevention of torture.<sup>73</sup> Interestingly, this language does not include the usual caveats that have become common practice in order to maintain the international ‘consensus’ on drugs (such as ‘where appropriate’ or ‘in line with national legislation’), and provides concrete, agreed guidance for governments to follow in order to align their drug control efforts with their human rights obligations.

The debates at the UNGASS also featured widespread and unprecedented calls from Member States on a number of human rights concerns: 139 States mentioned the need to ensure better access to controlled medicines, 47 States explicitly called for a human rights-based approach to drug control, 45 States expressed support for harm reduction, 38 called for more proportionate sentencing for drug offences, 34 condemned capital punishment, and five explicitly promoted decriminalisation.<sup>74</sup> Even though these were inevitably countered by statements from more conservative States, such a wealth of statements on a range of human rights issues would have simply been unthinkable just a few years prior to the UNGASS.

Even more unprecedented was the participation of Zeid Ra’ad Al Hussein, the then UN High Commissioner for Human Rights, in the roundtable on drugs and human rights. There, he expressed his ‘intense frustration’ from ‘the acute realisation that while the needle is moving... [it] could be moving much faster. Faster for those who through personal use or dependency upon drugs see their human rights violated by criminal justice systems that punish without due consideration given to the growing understanding of the issues and challenges in all their dimensions’. ‘We hope’, he concluded, that ‘the Special Session serves as a further platform to inject the urgency we need to bring to the subject, given the knowledge that we now have and can apply to this foundational challenge of our times in strict conformity with human rights law’.<sup>75</sup>

Importantly, the UNGASS was also a catalysing moment for real political change at national level – with a human rights discourse promoted by a group of Member States that is now counterbalancing the traditional ‘war on drugs’ rationale. Again, it was in great part thanks to civil society that the progress made at the UNGASS reflected – and in some contexts accelerated – the meaningful changes happening on the ground, including with more countries moving towards decriminalisation, expanding access to and funding for harm reduction services, and more jurisdictions adopting legally regulated markets for cannabis.<sup>76</sup>

The legacy of the UNGASS in putting human rights front and centre in international drug policy debates cannot be underestimated. While the Special Session clearly showed its limitations in fundamentally reframing drug control as a human rights issue, it certainly constituted a watershed moment and created the momentum for further and more refined debates on the interrelationship between drugs and human rights, and for the urgent need for national reform and a re-think of the international drug control treaties.

## Accelerating convergence: Beyond the 2016 UNGASS

While the 2016 UNGASS did not change the international legal framework on drugs, it did introduce a ‘new language and narrative’,<sup>77</sup> and a re-consideration of the ‘drug-free world’ rhetoric. As a politically negotiated text, the Outcome Document provided legitimacy for centering health and human rights in drug policy debates, pushing the global drug control regime towards a better alignment with the key purposes of the UN system. And the introduction of new themes inevitably opened the door for new actors to take the stage.

Before the 2016 UNGASS, the forces that fuelled convergence were mainly found in the drug policy making bodies in Vienna and occasionally New York, with important contributions from Geneva. After the 2016 UNGASS the rate of progress in Vienna slowed down, while entities within the UN human rights system took the lead in exploring the linkages between human rights and drug policies. More frequent and more ambitious

outputs by Geneva-based entities on the human rights impacts of drug policies were accompanied with a new development – for the first time, human rights bodies started to systematically engage with, and contribute to, the CND and other drug policy making fora. If like-minded actors in Vienna stood ready to welcome these contributions, it could open interesting possibilities for a modernisation of the global drug control regime.

## Acceleration: drug policies gain ground in Geneva

In the build-up to the 2016 UNGASS, the three key spheres within the UN human rights system – the Human Rights Council, comprised of Member States; special procedures mandates reporting on a wide variety of themes and countries; and treaty bodies mandated to monitor States’ implementation of the core international human rights treaties – began to recognise the human rights impacts of drug policies. This dynamic has accelerated to unprecedented levels since 2016, with progress most clear where civil society has been able to intervene in the debates.

The UN human rights system operates at scale. With interwoven mandates touching on a large, pressing, and expanding set of topics, the human rights impacts of drug policies cannot and should not be at the centre of Geneva at all moments. But the human rights regime should consistently pay attention to drug policies, and – most important of all – it should be in a position to influence global drug policy making.

In that regard, while the Human Rights Council is the entity in which progress has been more uneven and unequal (see Box 3 on UPR), its interventions have possibly had the broadest impact, leveraging up the attention of the whole human rights system towards drug policies. Since 2016, the Council has only adopted one resolution concerning the human rights impacts of drug policies – Resolution 37/42, adopted in March 2018.<sup>78</sup> Resolution 37/42 was explicitly framed as a contribution to the process leading up to the 2019 Ministerial Segment, just as Resolution 28/28 in 2015 had been a contribution to the 2016 UNGASS. Beyond this parallel, important differences between both texts should



General view of the Human Rights Council. Credit: UN Photo by Pierre Albuoy, CC BY-NC-ND 2.0

be noted – with a marked improvement in the 2018 resolution. Resolution 28/28 had a procedural focus and was almost apologetic in tone; it avoided substantive references to drug policies and human rights, and limited itself to introducing drug policies within the agenda of the OHCHR and the Council – already a huge step forward in itself. While still deferential to the CND, the 2018 resolution departs from the 2015 text by introducing substantive language on the role of human rights in the development of drug policies, on the need to address the root causes of the drug phenomenon, on the urgency of mainstreaming a gender perspective in drug policies, and encouraging the increased involvement of human rights mechanisms in drug policy debates. In another important departure, it explicitly encouraged human rights mechanisms ‘to continue, within their respective mandates and through the appropriate established channels with the Commission on Narcotic Drugs, their contribution to addressing the human rights implications of the world drug problem’.

Another consequential development at the Human Rights Council took place in the following year, when the recurring resolution on arbitrary detention came to the floor. In 2019, the final text adopted by the Council without a vote included an extraordinary item – a request for the UN Working Group on Arbitrary Detention to produce a study on arbitrary detention relating to drug policies.<sup>79</sup> According to the resolution, the report was to be submitted to the Council and brought ‘to the attention of the Commission on Narcotic Drugs’.<sup>80</sup> As we shall see, this was an important move to increase the involvement of human rights mechanisms at CND.

Since 2016, special procedures have regularly reflected on the human rights impacts of drug control in their reporting and statements,<sup>81</sup> though often in a partial manner. The Human Rights Council’s request for a specific thematic report by the Working Group on Arbitrary Detention created political and financial space for a serious review of drug policies with regards to the mandate of this expert group. For over a year, the Working Group engaged in consultations with all relevant stakeholders, including a series of in-person and virtual meetings with civil society and affected communities, in which evidence of the human rights impacts of drug control was explored. 20 Member States and 27 civil society organisations sent contributions to the report.<sup>82</sup> The resulting study on arbitrary detention and drug policies<sup>83</sup> constitutes a comprehensive analysis of drug policies under international human rights law appertaining to personal liberty, and develops human rights standards and recommendations on issues such as compulsory and coerced treatment, or the decriminalisation of drug use and possession for personal use. The study also reviews the overuse of pretrial detention, the imposition of capital punishment, and discriminatory approaches to drug control, among many others.

Recognising the unique place of its own study within global drug policy discussions, the Working Group has taken upon itself to present the study at all levels of policy making, including at the CND. At the same time, it has sought to increase the engagement of other special procedures with drug policies. The proactive stance of the Working Group resulted in a joint statement by

13 special mandates at the occasion of the 2022 ‘International Day Against Drug Abuse and Illicit Trafficking’, calling on the international community to end the ‘war on drugs’ and to promote policies rooted in human rights.<sup>84</sup> The joint statement is particularly significant because it represents the so far highest level of interest by UN human rights experts on drug policies, and because it was the first time that UN entities reflected on the harms brought about by drug control on

this International Day – which had traditionally been used as a celebration of the prohibitionist *status quo* and to exhort more effort in this vein. It is unlikely that this would have been achieved without to the Human Rights Council resolution three years earlier.

But the study by the Working Group on Arbitrary Detention also illustrates the challenges of engagement at the Human Rights Council without

### Box 3. No priority for drugs at the Universal Periodic Review

One of the symptoms of the insufficient priority given to the human rights impacts of drug policies at the Human Rights Council is the little attention so far paid to drugs in the context of the Universal Periodic Review (UPR).

Research by Hannah and Lines<sup>85</sup> shows that only 0.15% of all recommendations provided during the 1st (2008-2011) and 2nd (2012-2016) UPR cycles concerned drug policies. During the 2nd cycle, a majority of the 55 drug-related recommendations focused on promoting punitive approaches to drugs. In its review of Mexico, for example, Cuba recommended that the country ‘increase its efforts in the war on drugs at all levels’, while Botswana recommended that Norway ‘strengthen[s] efforts to reduce drug abuse’. Out of the 18 recommendations focused on aligning drug policies with human rights, a majority concerned the death penalty and extrajudicial killings.

Some progress was made during the 3rd cycle of the UPR (2017-2022). According to the UPR recommendations database hosted by UPR Info,<sup>86</sup> in this cycle Member States provided 77 drug-related recommendations. A majority of them (41) promoted a better alignment of drug policies with human rights, and only 24 recommendations promoted punitive responses, thus reversing the trends of the prior cycles. However, a closer look at the recommendations reveals that 31 were made as part of the review of the Philippines alone, due to the horrific human rights abuses committed as part of Duterte’s ‘war on drugs’. Of

the other recommendations, 48% encouraged a punitive response to drugs, while only 38% focused on the human rights dimension of drug policies. Furthermore, when delegations provide concrete policy recommendations on drug policies and human rights, in almost all cases they refer to either the death penalty or to extrajudicial killings, with only one recommendation encouraging decriminalisation and harm reduction,<sup>87</sup> and another recommendation urging an end to compulsory drug detention<sup>88</sup> (both of them provided by Portugal). This shows again that most delegations are not yet prioritising engaging with the human rights impacts of drug policies beyond these two areas.<sup>89</sup>

During the UPR, Member States only have 90 seconds to share observations and recommendations regarding the country under review. Because of this time constraint, delegations are only able to provide a few recommendations for each review, which means that the UPR is an exercise in prioritisation – a deeply political exercise, which is normally informed by issues such as the workplan of each delegation (with some delegations prioritising certain themes consistently throughout each UPR cycle), and the perceived urgent human rights topics within each country under review. The relatively low number of recommendations on the human rights impacts of drug policies at the UPR is thus a clear symptom of the lower political priority so far allocated to this topic at the Human Rights Council.



clear Member State leadership. To the knowledge of the authors, since the resolution on arbitrary detention in 2019 no other resolution with a clear reference to drug policies has been debated or adopted at the Council, with the exceptions of the 2019 and 2020 resolutions on the human rights crisis driven by the anti-drugs campaign in the Philippines. When the study on arbitrary detention and drug policies was presented at the Council's 47th session in June 2021, it was received with vociferous critiques by some delegations, questioning the credibility of civil society contributions (Egypt), accusing it of ignoring the need to combat drug use (Saudi Arabia, Pakistan, and the Philippines amongst others), describing the report as an attempt to rewrite international law to the detriment of the drug conventions (Russia), and accusing the Working Group of stepping on the

mandate of the UNODC and the CND (China, Cuba and the Philippines). The influence of human rights in drug policy making was clearly resented, and resisted. Several countries supported the work of the special mandate, including through a joint statement<sup>90</sup> of the Core Group of delegations that had led on the 2015 and 2018 resolutions on drug policies. However, when the new periodic resolution on arbitrary detention was negotiated in July 2022, after heated negotiations no language welcoming or noting the existence of the study on drug policies was included in the final text, and in the interactive dialogue with the Working Group only Cuba referred to the study – to criticise it.

The progress made at the Human Rights Council and with special mandates has run parallel with an unprecedented increase in the scope and



2019 Human Rights Council side event on the human rights impacts of drug policies. Credit: IDPC

ambition of the recommendations given by human rights treaty bodies. From 2018 onwards, CESCR began to incorporate questions on drug policies in almost all of their country reviews<sup>91</sup>, thus paralleling a similar decision by the Committee on the Rights of the Child in 1996. This interest led to an expansion in the scope and detail of recommendations given to Member States, including providing a first-ever recommendation to decriminalise drug use and possession for personal use as part of a health-based approach to drugs<sup>92</sup> (since 2019 a regular occurrence in CESCR reviews), expressing concerns over a 'predominantly punitive approach' to drugs<sup>93</sup> and over conditioning access to social security on drug testing,<sup>94</sup> calls to adopt a gender-sensitive drug policy,<sup>95</sup> several recommendations on expanding harm reduction services, referring States to the International Guidelines on Human Rights and Drug Policy,<sup>96</sup> or the impact of the international drug control regime on scientific research,<sup>97</sup> including by restricting access to medicinal cannabis.<sup>98</sup> The Human Rights Committee has shown more limited progress. The Committee has made clear that drug offences cannot serve as basis for the imposition of the death penalty

under international law<sup>99</sup> and has expressed concern over compulsory drug detention,<sup>100</sup> as well as - to some extent - the disproportionate punishments imposed for drug activities.<sup>101</sup> However, it has not drawn the connection between these abuses and punitive drug frameworks, nor recommended Member States to decriminalise drug use and possession for personal use. In contrast, the Committee on the Elimination of Discrimination against Women (CEDAW) is an example of how a treaty body can quickly shift its position on drugs, with the support of civil society (see Box 4).

There have also been encouraging, if not yet systematic, developments in other treaty bodies, including findings by the Committee on the Elimination of Racial Discrimination on racial disparity in the enforcement of drug laws in the USA<sup>102</sup> and Singapore<sup>103</sup>, or conclusions by the Committee Against Torture on ill-treatment in Nigeria against people who use drugs at the hands of law enforcement and in 'rehabilitation' centres.<sup>104</sup>

This accelerating trend has culminated in October 2022 with the decision by CESCR to draft a

#### **Box 4. CEDAW: Ebbs and flows of drug policies in a treaty body**

The disproportionate impacts of drug policies on women are well documented. According to UN reports, 35% of incarcerated women worldwide are estimated to be in prison for drug offences, compared to 19% of men.<sup>105</sup> UNODC data also show that only one in five people in treatment are women, although women constitute a third of all people who use drugs.<sup>106</sup> However, CEDAW has not engaged consistently with drug policies.

From 2012 to 2014, the Committee took a leading role amongst treaty bodies with a number of recommendations on women and incarceration, expressing concerns over the disproportionate imprisonment of women for drug activities,<sup>107</sup> and the lack of access to drug treatment and harm reduction for women in detention.<sup>108</sup> However, after 2014, references to this topic became less frequent, and in some instances the Committee fell back to a

prohibitionist rhetoric,<sup>109</sup> in one case presenting women who use drugs as victims rather than agents.<sup>110</sup>

As a direct result of advocacy by organisations such as the International Network of People who Use Drugs<sup>111</sup> and the Women and Harm Reduction International Network, the situation is starting to change. In the past two years, the Committee has moved to recommend the decriminalisation of drug use and possession for personal use, increased access to harm reduction, and the removal of laws that automatically deprive women who use drugs of custody rights, amongst others.<sup>112</sup> This promising shift shows how treaty bodies are sensitive to well-documented advocacy, and illustrates the need for civil society to consistently feed such documentation to the Committee to ensure that this new position is consolidated.

General Comment on drug policies and economic, social and cultural rights – the first time ever that a treaty body will devote this kind of systematic attention to the impacts of drug laws and policies, and a new opportunity to influence political discussions across the UN system, including in Vienna.

## Human rights actors enter Vienna

While interest in drug policy accelerated in human rights bodies, the ground shifted in Vienna – slowly. It is often said that the 2016 UNGASS Outcome Document represents the ‘high point’ of progressive drug policy at UN level.<sup>113</sup> This could, in part, be shown by the significant level of push back against the Outcome Document by conservative Member States only months after its adoption. Since then, the constraints of consensus-based policy making at the CND and the strong coordination of Member States aligned with the ‘drug-free’ status quo has meant that limited progress has been made in the language included in political documents, including in CND resolutions.

Faced with these limitations, disagreements over the role of human rights in drug policies have been largely dealt with through proxy disputes rather than through an explicit debate on human rights. Such proxies included debates over wording (i.e. ‘people who use drugs’ versus ‘people who abuse drugs’ or ‘drug abusers’, ‘world drug situation’ versus ‘world drug problem’), or undeniably important process debates, such as the role of the Task Team charged with implementing the 2018 UN System Common Position on drugs (see Box 6).<sup>114</sup> In this context, one of the most important developments has been the new appearance of human rights actors in Vienna, reflecting the increasing attention given to drug policies by the UN human rights system.

In the past six years, no CND resolution has significantly progressed language on the role of human rights in the development and implementation of drug policies - any attempts to do so were immediately blocked by the demands of an increasingly strained consensus. As a result, while references to human rights in CND resolutions are not rare, they remain ‘vague’ and ‘rhetorical’,<sup>115</sup> with only one recent resolution (on access to affordable drug services) containing operatio-

nal language on human rights, largely borrowed from the UNGASS Outcome Document.<sup>116</sup>

On a more positive note, some clear progress can be seen in resolutions on topics aligned with or adjacent to human rights, such as the promotion of harm reduction services,<sup>117</sup> the specific needs of vulnerable members of society,<sup>118</sup> promoting non-stigmatising attitudes to demand reduction responses,<sup>119</sup> promoting measures to respond to hepatitis C (including harm reduction),<sup>120</sup> preventing the spread of infections from mother to child,<sup>121</sup> and facilitating access to services for ‘people impacted by social marginalisation’.<sup>122</sup> The introduction of themes like stigma and marginalisation is a particularly welcome development, and was a hard win in the context of the CND, where some Member States continue to believe that stigmatising drugs and people who use drugs should form an integral part of drug control efforts. However, while several resolutions on criminal justice reform (alternatives to incarceration and proportionality) were adopted in the pre-UNGASS period, none has been proposed afterwards. Considering that human rights were identified as one of the cross-cutting issues in the 2016 UNGASS Outcome Document, the reality is that Member States have not invested political capital in providing them priority in the negotiation of resolutions - or rather, have been convinced that the search for consensus on any human rights-focused resolution within the CND is pointless.

The 2019 Ministerial Segment exemplifies both challenges and opportunities presented by the CND debates. It was only thanks to intense pressure from civil society - including, among others, IDPC’s 2018 report ‘Taking stock: A decade of drug policy’<sup>123</sup> that received widespread media attention - that the 2019 Ministerial Declaration eventually included a ‘stocktaking’ section that candidly recognises the key challenges faced by the international community regarding drug control. It notably recognises that drug policy responses not in conformity with applicable international human rights obligations ‘pose a challenge to the implementation of joint commitments based on the principle of common and shared responsibility’.<sup>124</sup> This section of the Declaration has been instrumental as it was then used by the CND

## Box 5. The UNODC on human rights: Silence and isolation

The UNODC is the leading UN agency on responses to drugs, crime prevention, and criminal justice. In addition to implementing its own programmes, the UNODC often heads cross-UN initiatives related to drugs, including as a co-sponsor of the Joint UN Programme on HIV/AIDS (UNAIDS), and by leading the Task Team on the implementation of the UN System Common Position on drugs.

In the years leading to the 2016 UNGASS, the UNODC made some progress in acknowledging the so-called ‘unintended consequences’ of drug control. Notwithstanding valuable work at an operational level and on issues such as compulsory drug detention,<sup>125</sup> in recent years the agency’s leadership has taken an increasingly conservative turn, placing the UNODC out of step with the rest of the UN system and with the UN System Common Position on drugs on which it is meant to lead. Certainly, implementing the prohibitionist regime set up by the UN drug conventions in line with the expanding human rights framework is a daunting challenge for a UN agency, and the UNODC is under political pressure by certain Member States to downplay the human rights dimension of drug responses. But this does not justify the steps backwards witnessed in recent years.

There are many recent examples of UNODC’s reticence to acknowledge the human rights violations connected to drug policy. In both 2020<sup>126</sup> and 2021,<sup>127</sup> dozens of civil society organisations addressed a letter to UNODC Executive Director Ghada Waly on the occasion of International Human Rights Day, urging her to mark the date with a statement calling for the reform of drug laws and policies that violate human rights. In both cases, Ms Waly did not release any declaration or even respond to the letter. This stands in contrast with the position of the INCB President, who has in fact published statements on International Human Rights Day for two years in a row now.<sup>128</sup> In 2022, several organisations urged the UNODC to publicly intervene in the case of Nagaenthran K. Dharmalingam, a Malaysian citizen with a learning disability on death row for drug trafficking, who was ultimately executed by the Singaporean

authorities.<sup>129</sup> While other UN agencies had spoken publicly in that case, no response was seen from the UNODC.

Another example of the UNODC’s ongoing silence on the issue of human rights is the fact that the yearly World Drug Report, which is meant to display all relevant information concerning the state of the drug phenomenon, does not contain a single mention of human rights violations in 2021 or 2022, and generally gives little to no attention to the adverse impacts of drug policies themselves, including on issues such as the death penalty, extrajudicial killings, criminalisation, or stigma. Again, this stands in contrast with the increasing level of documentation by UN human rights entities, and even with the INCB’s Annual Reports. Furthermore, although the Annual Report Questionnaire (ARQ)<sup>130</sup> was amended in 2020 to better reflect UNGASS commitments, with more visibility given to access to controlled medicines, gender disaggregation and proportionate sentencing, many human rights questions failed to make it into the final iteration of the ARQ.

By refusing to call for the reform of drug policies that drive human rights abuses, UNODC has placed itself in conflict with the very policy document that it is meant to implement, namely the UN System Common Position on drugs, whose first priority and direction for action is ‘to support the development and implementation of policies that put people, health and human rights at the centre’ (see Box 6). In 2021, the UNODC released its first strategy document in ten years.<sup>131</sup> Upon examining it, IDPC found that it did not quote, mention, or otherwise refer to the Common Position, a shocking omission.<sup>132</sup> And although human rights are mentioned several times throughout the document, they are absent from the ‘key outcomes’ of the strategy. Operational references to policies such as decriminalisation are also ignored, although they have also been endorsed by UN human rights experts, and by agencies such as OHCHR and UNAIDS. The possibility that drug laws could stigmatise, criminalise, or violate the rights of people who use drugs is not acknowledged.

## Box 6. Ensuring coherence: The UN System Common Position on drugs and the International Guidelines on Human Rights and Drug Policy

Some of the most consequential UN initiatives on human rights and drug policies since the 2016 UNGASS have happened outside the policy making bodies in Geneva and Vienna, that is, in spaces where progress is not subject to the constraints imposed by Member States. The two most significant initiatives - with impacts that will be felt for years - are the 2018 UN System Common Position on drugs, and the 2019 International Guidelines on Human Rights and Drug Policies.

The 2016 UNGASS Outcome Document provided a strong mandate to the UN Secretary General and the UN Chief Executives Board (CEB - the body that brings together the heads of 31 UN entities), to improve coherence between different UN bodies on drug policies. Following a long negotiation process, in November 2018 the CEB adopted a Common Position, which commits UN agencies such as the UNODC, UNAIDS, the WHO, UNDP and the OHCHR to speak with one voice and to follow 31 political priorities and directions for action, including on supporting policies that 'place people, health, human rights at the centre'. This includes decriminalisation, harm reduction, proportionate sentencing and more. With the adoption of the Common Position, the Secretary General also created a UN system coordination Task Team mandated to ensure coherent efforts to realise these commitments.<sup>133</sup>

Ahead of the 2019 Ministerial Segment, the Task Team produced an unparalleled data collection report, which aimed to look back at the past decade of evidence on drug policy.<sup>134</sup> Since then, the implementation of the Common Position has unfortunately been fraught with controversy. Member States supporting a conservative approach to drug policies have accused the CEB and the Task Team of

attempting to duplicate or replace the role of the CND as the drug policy making body of the UN,<sup>135</sup> ignoring the fact that the Common Position is a tool to ensure coherence across UN bodies created under the direct mandate of the 2016 UNGASS.<sup>136</sup> In addition, although entrusted with leading the Task Team, the UNODC has been reluctant to express support for the document in public, and does not even mention it in their 2021-2025 strategy. In contrast, UNAIDS and OHCHR have been unflinching in their support for the document. Most problematically, since 2019 the implementation Task Team has lacked a clear agenda; the upcoming mid-term review of the 2019 Ministerial Declaration in 2024 seems to constitute a clear space for this body to contribute to the debates with updated information from agencies across the UN system. Whether it will be mandated, adequately funded, and provided the political space to do so, however, remains to be seen.

In the meantime, the International Guidelines on Human Rights and Drug Policy, developed by the International Centre on Human Rights and Drug Policy (based at the University of Essex) in collaboration with OHCHR, the WHO, UNAIDS, and UNDP and launched in 2019, have become the go-to set of human rights standards on the intersection between human rights and drug policies. In the few years since their release, they have already been used as a basis for decisions by two rulings of the Colombian Constitutional Court,<sup>137</sup> have been supported by the UN Committee on Economic, Social and Cultural Rights<sup>138</sup> and several UN special mandates,<sup>139</sup> as well as by various Member States through side events<sup>140</sup> and statements at the Human Rights Council<sup>141</sup> and the CND.<sup>142</sup> The Guidelines, as well as the Common Position, are also explicitly mentioned in the EU Drug Strategy for 2021-2025.<sup>143</sup>

Secretariat as the basis for a follow-up work plan of CND thematic intersessional meetings for the 2019-2023 period,<sup>144</sup> including one session dedicated to responses not in conformity with human rights obligations, which took place in October 2022.<sup>145</sup> However, a sense of diplomatic fatigue was clearly felt in Vienna in 2019. The language on human rights included in the Ministerial Declaration is mainly a reiteration of the commitments set out in the 2016 UNGASS Outcome Document, with progressive Member States being unable to progress it any further due to the need for consensus, and in some cases dropping the most operational and concrete lines agreed in 2016.<sup>146</sup> In fact, instead of consolidating the gains made at the Special Session, in various instances the language reverted back to that from the 2009 Political Declaration. Calls for reform within the plenary debates were also less numerous than in 2016, with various States that had strongly pushed for the human rights agenda at the UNGASS now having more conservative governments (especially countries like Colombia and Brazil). Nonetheless, the 2019 Ministerial Segment was used as a key opportunity for the publication of two landmark documents of relevance to human rights: the International Guidelines on Human Rights and Drug Policy, and the UN System Common Position on drugs (see Box 6).

With the inability to introduce strong new language on human rights in CND resolutions - and the lack of political will to call for a vote and effectively break the 'Vienna consensus' - the human rights impact of drug policies have been put in the spotlight through plenary statements, where there has been clear progress in comparison to the status quo that had prevailed before the 2016 UNGASS. Language highlighting the importance of human rights have become common in the statements of European countries (including the EU) as well as in the interventions of certain delegations from Latin and North America, and some African countries such as Ghana, often paired with condemnation of the most salient rights violations, particularly the death penalty for drug offences, and extrajudicial killings. While both have been effective wedge issues to express human rights concerns at the CND, it remains to be seen whether Member States will have the

political courage to go beyond these openings, and to address other substantive human rights issues raised by drug policy. To mention one particularly obvious omission: the role of drug laws as a major driver of mass incarceration and arbitrary detention has been largely left unaddressed.

In response to the increasing number of statements referring to human rights, the more conservative delegations have highlighted that the principles of sovereignty and non-interference with the internal affairs of other Member States precludes discussions on the human rights impacts of drug policies – China, Indonesia,<sup>147</sup> Philippines,<sup>148</sup> Singapore,<sup>149</sup> and Turkey being possibly amongst the most vocal in that regard.

Against this background, one of the most interesting developments in Vienna has been the emerging involvement and contribution of UN human rights actors. Until 2016, UN human rights bodies had engaged with CND only sporadically or opportunistically. For decades, the CND held meetings without the active intervention of a representative of OHCHR. The first plenary statement delivered by an OHCHR representative at CND indeed took place in 2016, and engagement intensified in 2018 – in response to the new mandate provided in the Human Rights Council resolution – when the OHCHR delivered three statements, highlighting issues such as the need for data reporting mechanisms to reflect human rights concerns, or the anti-drug campaign in the Philippines.<sup>150</sup> Since then, OHCHR representatives have systematically intervened in every session of the CND, introducing a human rights perspective that had previously been missing. Other human rights mechanisms and experts also followed this trend. As a result, within only five years, interventions at the CND were being delivered by the Chair of CEDAW,<sup>151</sup> the UN Special Rapporteur on the right to health,<sup>152</sup> the Vice-Chair of the Human Rights Committee,<sup>153</sup> the Chair of the UN Working Group on Arbitrary Detention,<sup>154</sup> a member of the Working Group of Experts on People of African Descent,<sup>155</sup> and a member of the UN Committee on Economic, Social and Cultural Rights.<sup>156</sup> This increased involvement has not come without resistance. The OHCHR has regularly faced push back from various Member States, in particular China and Iran,

## Box 7. Backlash against the UN Working Group on Arbitrary Detention at the CND

So far, the high-water mark of involvement at the CND by a human rights body has been set by the UN Working Group on Arbitrary Detention, although facing major resistance from various Member States. After releasing its landmark study on arbitrary detention and drug policies at the request of the Human Rights Council, the Working Group was invited to present the report during the CND reconvened session in December 2021. However, their participation was blocked at the last minute by various delegations, causing outrage amongst missions and observers alike.<sup>157</sup> Coincidentally, the presentation was scheduled to be made on the UN's own International Human Rights Day - showcasing how fragile the purchase of human rights remains at the CND.

The formal rebuke to the human rights system embodied in the decision to prevent a UN human rights body from speaking at the CND resulted in two interesting and simultaneous movements. First, this put the CND in conflict with the Human Rights Council, as the decision to block the Working Group on Arbitrary Detention contravened the Council's mandate that the study would be 'brought to the attention' of the CND; in view of this conflict, the President of the Human Rights Council intervened directly, requesting that the presentation indeed take place. Secondly, a group of Member States and NGOs successfully mobilised to facilitate the intervention of the Working Group at the March 2022 session of the

CND. Interestingly, the fact that the study was subjected to so much controversy ended up raising the profile of the report further, making it more visible than it would have been had the original plan gone ahead unhampered.

In the end, the actual presentation of the Working Group at the 65th session of the CND gave rise to one of the most meaningful exchanges on human rights ever to take place at a Plenary session of the Commission, with the Chair of the Working Group providing recommendations on issues such as the disproportionate incarceration of women for drug offences, decriminalisation and voluntary treatment, or the involvement of civil society and community organisations in drug policy making,<sup>158</sup> while countries such as China and Singapore defended the use of compulsory drug detention centres and the death penalty.<sup>159</sup>

All in all, the episode showcased how the involvement of the human rights system and the coordination of delegations ready to welcome and receive such contributions at the CND can shift the debates in Vienna and break the isolation between human rights and drug policy making at the UN, marking the path for future progress. However, it also showed that discussions on human rights remain fragile at the CND, and that much more remains to be done to truly embed the international drug policy regime in a solid human rights framework.

which have consistently questioned the inclusion of the rule of law and human rights concerns such as the death penalty in CND discussions.<sup>160</sup>

UNAIDS has also played an important role at the CND, highlighting the human rights abuses perpetrated against people who use drugs, and raising concerns over the ongoing lack of access to life-saving harm reduction services, and the continued criminalisation of people who use drugs.

The inclusion of strong language on harm reduction, stigma and support for decriminalisation in the framework policy documents for the global response to HIV/AIDS adopted in 2021 - the Political Declaration on HIV/AIDS and the Global AIDS Strategy<sup>161</sup> - points to existing space for greater involvement and impact of UNAIDS at the CND. This already started to materialise in the powerful statement by UNAIDS Executive Director Winnie Byanyima at the opening segment of the 65th

CND session, in March 2022, in which she urged member states to ‘value the health and human rights of every person who uses drugs and the dignity of every prisoner’<sup>162</sup>.

## Broken consensus: A new opening for human rights?

Despite these challenges, the prospects for improvement regarding the centrality of human rights in global drug policy debates is hopeful. In addition to the increasing interest and influence of human rights bodies, an undeniable fracture of the UN consensus on drug-related matters has emerged during the 65th session of the CND in March 2022, as well as during the negotiations of the annual drugs ‘omnibus resolution’ at the Third Committee of the UN General Assembly in November 2022.

In March 2022, consensus-based decision making on drug-related matters was broken for the first time in recent history at the CND.<sup>163</sup> This development was closely related to the geopolitical turmoil unleashed by the Russian invasion of Ukraine, less than a month before the session began. When Latvia announced its own candidate to represent the Eastern Europe Group of countries at FINGOV, the administrative body that oversees the finances at the CND - a position for which Russia had already presented a candidate - the Russian delegation rushed to call for a vote, which it lost by a landslide.<sup>164</sup> While the vote itself was on a matter unrelated to human rights or drugs, and driven by broader geopolitical considerations, as the CND session progressed the divide spilled into substantive drug policy debates, with Russia denouncing countries that had moved to legally regulate cannabis, and accusing the anti-war coalition of attempting to destroy the ‘spirit of the CND’. As was pointed out in Box 7, the intervention of the UN Working Group on Arbitrary Detention gave rise to similar divisions.

As 2022 came to an end, vibrant debates on drugs and human rights again broke the well-established ‘consensus’ on drugs, this time on substantive policy grounds. Negotiations of the annual drugs ‘omnibus resolution’ in the Third Committee of the UN General Assembly in New York led, for the first

time in history, to a vote on the contents of the resolution - with 116 votes in favour, 45 abstentions, and only 9 votes against.<sup>165</sup> The resolution will be voted again at the plenary of the General Assembly, after the publication of this paper, but the result is not expected to change.

The inability to reach a consensus on this text was mostly a result of what can only be described as a paradigm shift in the language concerning human rights. While introducing the new text, Mexico (the usual penholder for this resolution) noted that ‘We cannot continue with the bureaucratic inertia of transcribing agreed language, and still hope for different results’.<sup>166</sup> The novelties introduced by Mexico included references to the two 1966 International Covenants, and language welcoming the contribution of specific human rights entities to drug policy debates, including the Human Rights Council, the OHCHR and the Working Group on Arbitrary Detention. Most importantly, the final text includes strong language on specific human rights violations, among them arbitrary detention, police violence, systemic racism, and the rights of Indigenous peoples.

That human rights was one of the issues which pushed the Russian delegation to call for a vote and thus break the consensus on drug matters was made clear by the Russian delegate itself. In the explanation of their country’s vote, the delegate stated that ‘what is new in the resolution is skewed towards the defence of human rights’,<sup>167</sup> a line of argument also shared in informal negotiations. But when it came to a vote, this position was defeated by a very wide margin, showing a clear majority of countries in favour of placing human rights and human rights bodies at the heart of UN drug policy.

Whether the international community is truly ready to finally break the long-standing consensus on UN drug policy on a regular basis remains to be seen. However, this does open the door for new possibilities in global drug policy debates, and shows that a majority of countries now unequivocally support a greater role for human rights within the global debate on drug policy.



## Recommendations for better aligning trajectories

### Recommendations for Member State delegations across the UN system:

- Encourage the engagement of UN human rights bodies, including the OHCHR, special procedure mandates, and human rights treaty bodies, with the human rights impacts of drug policies, including as appropriate through documenting abuses, providing recommendations and guidance, and presenting such contributions. Where possible and appropriate, delegations should seek to include in resolutions and statements calls for reporting and recommendations from such bodies; welcome their contributions; and facilitate their presentation to UN fora such as the Human Rights Council, the Commission on Narcotic Drugs, and the UN General Assembly.
- Ensure that the human rights dimension of drug policies is included in the agenda of all global drug policy convenings, including at the fast-approaching 2024 mid-term review of the 2019 Ministerial Declaration. Human rights should also be a key consideration in global, regional, bilateral, or thematic meetings on topics such as the legal regulation of drugs.
- Introduce new language on human rights in UN resolutions and other negotiated texts concerning drug-related matters, even when that might imply breaking the consensus. At the outset, language and topics can be drawn from the 2022 drugs ‘omnibus resolution’, which has already mobilised a significant majority of Member States. Language may also be drawn from the UN System Common Position on drug-related matters, the International Guidelines on Human Rights and Drug Policy, and the growing body of contributions by UN human rights mechanisms.
- Support, facilitate, and provide funding for the meaningful involvement and contribution of civil society and community organisations in drug policy and human rights in UN fora and processes.
- Support and adequately fund the UN system coordination Task Team for the implementa-

tion of the UN Common Position on drugs, and ensure that the human rights dimensions of drug policies is placed at the forefront of the Task Team’s agenda.

### Recommendations for Member State delegations in Geneva:

- Support initiatives that assert and strengthen the role of the human rights system in addressing the human rights impacts of drug policies. A new resolution on drug policy and human rights at the Human Rights Council is particularly urgent, both to ensure that the human rights system (in particular the OHCHR) contributes meaningfully to the mid-term review of the 2019 Ministerial Declaration in 2024, and to mobilise other actors within the Geneva human rights environment.
- Encourage and support the OHCHR to continue engaging on the human rights impact drug policies, through reporting, participation in the CND, and in other drug policy making fora, and increased coordination with human rights mechanisms and civil society. A future Human Rights Council resolution should call for regular reporting by the OHCHR on drug-related matters, and provide appropriate funding for this work.
- Coordinate across like-minded missions to ensure that the human rights impacts of drug policies become a priority topic, with greater visibility in statements at the Human Rights Council, close attention given to resolutions and events related to drugs, and greater attention given to drug policies in UPR recommendations.
- Encourage special procedure mandates and human rights treaty bodies to report on the human rights impacts of drug policies, and provide recommendations on how to align drug policies with human rights.

### Recommendations for Member State delegations in Vienna:

- Ensure that the human rights dimension of drug policies has a central position within the agenda of CND sessions and meetings, particularly the 2024 mid-term review of the 2019

Ministerial Declaration. The modalities resolution for the 2019 Ministerial Declaration should call for the contributions by entities within the UN system, including explicitly human rights bodies, as well as by civil society.

- Invite and welcome the participation of human rights bodies at CND proceedings, including through the participation of the UN High Commissioner for Human Rights, and the ongoing attendance and contributions of the OHCHR and UN human rights mechanisms.
- Ensure that CND resolutions welcome the contributions made by the UN human rights system on drug-related matters, and include more progressive language on human rights and drug policies adopted in resolutions in New York and Geneva, even if this may lead to a breach in consensus.
- Call on the UNODC to align with other UN entities by placing human rights at the centre of all aspects of its work, including through mainstreaming reporting on the human rights impacts of drug policies (remediating its current ab-

sence within the World Drug Report), stepping up the UNODC's involvement in human rights cases that require urgent action in coordination with OHCHR and civil society, and strengthening its current role as the lead organisation for the Task Team responsible for the implementation of the Common Position on drugs.

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This briefing paper highlights how the increasing involvement of UN human rights entities in drug policy debates has paved the way towards drug policy debates that incorporate health, human rights and development considerations.

**The International Drug Policy Consortium (IDPC)** is a global network of NGOs that come together to promote drug policies that advance social justice and human rights. IDPC's mission is to amplify and strengthen a diverse global movement to repair the harms caused by punitive drug policies, and to promote just responses.

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