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The international control of illegal drugs and the U.N. treaty regime: Preventing or causing human rights violations?

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THE U.N. TREATY REGIME: PREVENTING OR CAUSING
HUMAN RIGHTS VIOLATIONS?

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Part I. Initial Considerations

The international drug control regime has come under a lot of pressure for an alleged lack of focus on its main objective: the preservation of the health and welfare of mankind. A main point of criticism focuses on the failure to sufficiently take human rights into account in drug control efforts. Rightfully or not, it has been contended that the UN regime focuses too much on criminalization and punishment and not enough on education and harm reduction. Especially in academia and by non-governmental organizations, discordant voices have been raised which advocate a new approach to international drug policy, putting more emphasis on liberal mechanisms rather than on repressive measures.\(^1\) It is true that the current control regime sets out a comprehensive strategy for the control of psychoactive drugs and that it creates binding international obligations\(^2\), i.e. upon ratification a State becomes obliged to bring its domestic laws in line with the treaty obligations concerned (\textit{pacta sunt servanda}). This entails that States are required to act coercively to prevent the illegal production, trafficking and consumption of dangerous psychoactive substances. Therefore the drug control regime has been labelled a ‘prohibitionist regime’ with an undue

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emphasis on punishment and law enforcement (however, it must be noted that the Preamble of the 1961 Single Convention\(^3\) recognizes that ‘the medical use of narcotic drugs continues to be indispensable for the relief of pain’ and that the use of psychoactive substances has benefits under special circumstances).

In any case, this paper does not deal with the pros and cons of legalizing illegal substances, but focuses on the existing legal framework which bans addictive psychoactive substances that are deemed to have serious harmful effects. The paper will attempt to answer the question whether the international control regime is still serviceable in light of recent trends on the illegal drugs markets and whether the regime is up to the standards of modern human rights law. In a first step, the set-up of the international control system will be outlined in order to give an overview of the situation (Part II). The second step will be to summarize recent trends in global drug markets and to assess the impact of the control system on illicit manufacturing, trafficking and consumption (Part III). The substance of the article then focuses on the criticism directed at the United Nations and the drug control bodies for maintaining the system unchanged in face of human rights violations by Member States in the so-called ‘war on drugs’ (Part IV). Finally, the article makes the argument that, if construed correctly, the legal framework in place is serviceable to reach the desired objectives.

**Part II. The International Drug Control System**

**A. International Drug Control Law**

International drug control, administered under the auspices of the United Nations, rests on three pillars: The Single Convention on Narcotic Drugs as amended by the Protocol (1972)\(^4\), the

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CONVENTION on Psychotropic Substances and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Its status in international law is noteworthy as the system is virtually universal: every State of the world is party to at least one of the conventions, including 184 State Parties to the Single Convention; 183 State Parties to the 1971 Convention and 184 State Parties to the 1988 Convention. Drugs in the meaning of the conventions include psychoactive substances comprising two major categories: narcotic drugs (especially opium and opium alkaloids, cocaine and cannabis products) and psychotropic substances (amphetamines, barbiturates and hallucinogens). Alcohol, despite its psychoactive effect, is not included in the respective conventions and therefore falls outside the scope of international drug control.

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

1. International Drug Control Efforts before 1960

Concerted drug control efforts have evolved over a period of more than 100 years. At the end of the 19th century, the increased consumption of psychoactive substances such as morphine, heroin and cocaine and the globally unregulated market for these substances led to serious concerns in the

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7 The concrete substances under control are specified in the schedules of the Single Convention and the 1971 Convention.
United States. However, for other colonial powers, such as the United Kingdom or the Netherlands, narcotic drugs—and especially opium—were a commodity of enormous economic significance. For example, the export of Indian opium to China created significant revenues and ultimately led to the two Opium Wars between Britain and China (1839-42 and 1857-60) in which Britain defended the interests of British merchants in the region.

Opium consumption was at an all time high when the United States convened an international opium conference in Shanghai in 1909. Due to its relative lack of overseas possessions and a slim trading presence in Asia, the United States had no genuine interest in maintaining the global opium market. Therefore the US approach emphasized that the prohibition of opium was a moral question, however, other countries were not ready to concede a total ban on opium trade. They preferred controlled trade over a complete prohibition. Owing to these discrepancies in strategic interest, no final agreement (besides a set of non-binding resolutions) was reached at the Shanghai conference. But, in retrospect, the conference proved to be crucial because it paved the way for a follow-up conference in The Hague in 1911. These follow-up negotiations resulted in the 1912 International Opium Convention. In addition to opium and morphine, also cocaine and heroin were included as controlled substances and the main principles stipulated in the convention are still valid today. For example, the axiom that the manufacture, trade and use of narcotic drugs should be limited to medical and scientific purposes governs the control system to this day. Under the 1912 Opium Convention, national governments were required to enact laws to control the production and distribution of narcotic drugs.

Yet, due to the mentioned differences in strategic interests between the participating governments, the 1912 Opium Convention was only ratified by China, Norway, The Netherlands, the US and Honduras before the outbreak of World War I. This changed when the Convention was imposed on the losing powers of the war by linking the ratification of the Opium Convention to the

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11 International Opium Convention, January 23, 1912, 8 L.N.T.S. 187 [hereinafter 1912 Opium Convention].
12 1912 Opium Convention, supra note 11, Arts. 9 and 10.
INTERNATIONAL DRUG CONTROL

Versailles Peace Treaty of 1919. Thus, by the mid-1920s close to 60 States were party to the 1912 Opium Convention. Furthermore, in the aftermath of World War I the League of Nations assumed responsibility for overseeing the Opium Convention and specialized bodies—in particular the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs—were created under its auspices. This proved to be a strong foundation, on which a comprehensive international drug control system was successively established.

A further cornerstone was established some years later with the 1925 Geneva Opium Convention and the Agreement Concerning the Manufacture of, Trade in, and Use of Prepared Opium. Now States were required to annually submit to the newly established Permanent Central Opium Board (PCOB) statistics on the production of opium and coca leaves. The obligatory control system included mandatory import certification and export authorisation by governments. But, unfortunately, the system failed to prevent legally manufactured drugs from seeping into the illegitimate market. The 1931 Convention for Limiting the Manufacture and regulating the Distribution of Narcotic Drugs tried to remedy this shortcoming by restricting the quantity of manufactured drugs available in each country to medical and scientific needs. The PCOB was given additional powers for controlling countries that exported or imported beyond their stated manufacturing volumes or consumption needs. One more major drug control treaty was concluded in the inter-war period: the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs. It is noteworthy for States agreeing on the implementation of provisions into their domestic laws on severe punishment, for, inter alia, the production, trafficking, and sale of illicit

13 Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 225 C.T.S. 188.
14 According to Art. 23 (c) League Covenant (Covenant of the League of Nations, June 28, 1919, 225 C.T.S. 195), the Members of the League ‘entrust the League with the general supervision over the execution of agreements with regard to … the traffic in opium and other dangerous drugs’.
16 Agreement Concerning the Manufacture of, Trade in, and Use of Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337.
17 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 139 L.N.T.S. 301 [hereinafter 1931 Convention].
18 Convention for Limiting the Manufacture and regulating the Distribution of Narcotic Drugs, supra note 17, Art. 14.
20 meaning particularly imprisonment.
substances. Arts 7 to 10 introduced a further novelty by dealing in great detail with extradition for drug related crimes. Overall, the inter-war drug control system achieved considerable success in limiting and screening the production and trade of narcotic drugs.

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

In 1948, the Paris Protocol supplemented the 1931 Convention and provided for bringing under international control drugs outside the scope of the 1931 Convention. This measure was much needed, because of the rise of ‘designer drugs’ (in particular opiate derivatives with harmful effects, such as methadone or pethidine), which had been developed to evade international restrictions. Hence, the 1948 Paris Protocol was thought to eliminate loopholes by introducing the “similarity concept” into drug legislation—in order to prevent drug manufacturers from evading legislation by producing analogues of prohibited drugs. Art. 1 (1) Paris Protocol accordingly states that the Protocol applies to all drugs with similar harmful effects and abuse liabilities as the drugs specified in Art. 1 (2) 1931 Convention. A new opium protocol was signed in New York in 1953. The intention behind the protocol was to eliminate the overproduction of opium by authorizing only seven States to produce opium for export (Bulgaria, India, Iran, Greece, Soviet Union; Turkey and Yugoslavia). However, because of the increasing complexity of the drug control system, the international community felt an increasing need to consolidate into one single treaty the numerous

21 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, supra note 19, Art. 2.
22 BUXTON, supra note10, at 16-17.
24 Protocol Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the protocol signed at Lake Success, New York, on 11 December 1946, November 19, 1948, 44 U.N.T.S. 277.
25 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of, Opium, June 23, 1953, 456 U.N.T.S. 56.
conventions which had been introduced since the initial Opium Convention of 1912. This led directly to the drug control regime still in force today.


The main underlying objectives of the Single Convention—besides the codification into one multilateral treaty of the existing laws—were the streamlining of the control mechanisms and the extension of existing controls.\(^{26}\) The Single Convention was intended as a final and definitive document that supersedes all previous treaties, i.e. terminates and replaces them.\(^{27}\) Covered by the Single Convention are, inter alia, the definitions of the substances under control; the framework for the operations of the drug control bodies; reporting obligations of Member States regarding manufacture, trade and consumption of controlled substances; actions to be taken against illicit traffic and penal provisions. The scope of the Single Convention includes the classic plant-based drugs, such as opium, heroin, cocaine, and cannabis. It consists of 51 articles and two schedules; over 100 illicit substances are placed on the four schedules, with drugs being grouped according to their perceived dependence-creating properties.\(^{28}\)

The Preamble stipulates that ‘addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind’. Art. 4 (c), the central operational provision of the convention, manifests the prohibitionist approach by stipulating that ‘the Parties shall take such legislative and administrative measures…to limit exclusively to medical

\(^{26}\) BUXTON, supra note 10, at 22; ADOLF LANDE, COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961 at 74, U.N. Sales No. E.73.XI.1 (1973).

\(^{27}\) Single Convention, supra note 4, Art. 44. A party to the Single Convention cannot, on the basis of article 44, refuse to carry out control provisions of an earlier treaty to which it is still a party so long as this treaty is not terminated in accordance with its own terms, or as long as all Parties to this treaty have not accepted the Single Convention. This will generally not cause any difficulties because the Single Convention is compatible with earlier treaties and took over the substance of most of the rules of the earlier treaties, see LANDE, supra note 26, at 457.

\(^{28}\) Schedule I contains substances that are subject to all control measures under the convention, e.g. heroin, cocaine and cannabis. Schedule II includes substances which are used for medical purposes, and that are deemed to require less stringent control, e.g. codeine. Schedule III includes pharmaceutical preparations perceived not to lead to abuse or ill effect, e.g. products with a very low dosage of opium. Schedule IV contains substances which in small amounts may be allowed for medical and scientific research.
and scientific purposes the production, manufacture, export, import distribution of, trade in, use and possession of drugs’. However, it must be noted that medical purposes include veterinary and dental purposes and that the meaning of the term ‘medical purpose’ may change and is not exclusive to a use permitted under the system of ‘Western medicine’. 

Art. 2 Single Convention deals with control measures for the respective substances: the action of two agencies, the WHO and the CND, is required to put a narcotic drug under control. Firstly, the WHO must make a finding as to whether a substance has the dangerous properties for a particular regime. Then the CND has the choice between acting in accordance with the recommendation of the WHO, or taking no action at all.

Countries allowing the cultivation of coca bushes and opium poppies were required to establish national monopolies and to subsequently centralise and phase out the cultivation and production; the ultimate goal of these efforts being a full international prohibition of the non-medical use of these substances. In regard to manufacturing, trade and distribution, and international trade of controlled narcotic drugs, a strict licensing system and extensive control measures are prescribed to the Parties. Under Art. 39, parties are allowed to adopt laws including

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29 It is one of the major achievements of the Single Convention that it ended exceptions permitted under earlier treaties, subject only to transitional provisions of limited local application and duration pursuant to Art. 49 Single Convention (see LANDE, supra note 26, at 110).

30 LANDE, supra note 26, at 111.

31 Art. 2 Single Convention offers a synopsis of the various regimes which the Single Convention provides for different categories of drugs by citation of the relevant articles and in some cases by giving the substantive rules themselves, see LANDE, supra note 26, at 49.

32 Single Convention, supra note 4, Art 3(3) to Art. 3(6).

33 Single Convention, supra note 4, Arts, 23 and 26.

34 Single Convention, supra note 4, Art. 29. The term ‘licence’ is used for two kinds of government authorisation: a) for the authorisation to manufacture drugs (para. 1); b) for that to use a particular premise or establishment for that purpose (para. 2). Any State enterprise authorized to manufacture drugs is automatically licensed to do so as this term is used in the Single Convention, and therefore exempted from the formal requirement of a manufacturing licence, see LANDE, supra note 26, at 317.

35 Single Convention, supra note 4, Art. 30. A general authorisation to trade in everything is not sufficient. There must be a special authorisation to trade in drugs, e.g. a licence to trade in pharmaceuticals or chemicals. The licence to undertake the wholesale or retail trade in drugs may be granted to an individual, to a partnership or a corporate body, see LANDE, supra note 26, at 329.

36 Single Convention, supra note 4, Art. 31. Two legal obligations are established: a) not knowingly to permit the export of drugs except in accordance with the laws and regulations of the importing country and b) not knowingly to permit exports of drugs which would exceed the import limits of the importing country, see LANDE, supra note 26, at 348.
more strict or severe measures of control than those provided by the Single Convention if they deem them desirable or necessary.\textsuperscript{37}

The Single Convention of 1961 was in 1972 amended by a Protocol. Triggering the push for a protocol was the objective to further strengthen the international drug control system. This was to happen by, for example, introducing provisions on technical and financial assistance\textsuperscript{38} and on the establishment of regional centres for scientific research and education to combat illicit use and traffic in drugs\textsuperscript{39}. The newly established Art. 22 (2) provided for the seizure and destruction of illicitly cultivated opium poppies and cannabis. In addition to that, the 1972 Protocol modified the penal provisions by providing for extradition provisions similar to those in the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.\textsuperscript{40}


In the late 1960s, the technical advances in the manufacture of synthetic drugs led to an unregulated global market for psychotropic substances (such as amphetamines, barbiturates and hallucinogens). After careful analysis, the CND concluded that the existing drug control system was limited to narcotic drugs and that the Single Convention was not applicable to psychotropic substances.\textsuperscript{41} Nonetheless, the international community felt that a control mechanism over those substances was urgently needed and the CND was called upon to draft a convention which would bring those substances under control.

The 1971 Convention consists of 33 articles and four schedules.\textsuperscript{42} It is fair to say that it is based on the Single Convention and its general purpose is (similar to Art. 4 of the Single

\textsuperscript{37} Parties which apply ‘more strict or severe’ measures may do this by either imposing controls in addition to those required by the Single Convention or by replacing measures with more strict and severe ones, see \textcite{Lande26}, at 449.

\textsuperscript{38} Single Convention. \textcite{supra} note 4, Art. 14bis.

\textsuperscript{39} Single Convention. \textcite{supra} note 4, Art. 38bis.

\textsuperscript{40} See Single Convention, \textcite{supra} note 4, Art. 36(2)(b)(ii). The Single Convention’s offences are deemed to be included in existing extradition treaties and in the absence of an extradition treaty the Single Convention can be used as such.


\textsuperscript{42} The controlled psychotropic substances are categorized in a similar fashion to narcotic drugs under the Single Convention.
In the 1971 Convention in respect to narcotic drugs) that the manufacture, trade and use of psychotropic substances under control shall be limited to medical and scientific purposes. Any substance included in the schedules must be licensed by the government for manufacture, trade and distribution. However, compared with the strict controls imposed on plant-based drugs under the Single Convention, the 1971 Convention imposes a somewhat weaker control mechanism. Similar to the control mechanism of the Single Convention, the WHO recommends whether a drug should be put under control. But, the CND is not bound by the recommendation of the WHO. It may (provided always that the WHO has made and communicated its findings on control measures) place the substance concerned under a control regime, change the control regime or free a substance from a control regime—contrary to the recommendations of the WHO. This obviously leads to much wider discretion of the CND under the 1971 Convention than under the Single Convention.

Detailed provisions deal with licences, prescriptions, and warnings on packages and advertisements. Concerning prescriptions the main difference between the Single Convention and the 1971 Convention is that under the 1971 Convention a medical prescription is, in general, required for the use by an individual in regard to all psychotropic substances or preparations (under the Single Convention a medical prescription is only required for certain drugs in its Schedule I).

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[43] Art. 5 1971 Convention refers to Art. 7, which prohibits all use of those substances ‘except for scientific and very limited medical purposes’. It is however hardly possible to define exactly for all parties and for all time what ‘very limited medical’ use means, see ADOLF LANDE, COMMENTARY ON THE CONVENTION ON PSYCHOTROPIC SUBSTANCES at 139, U.N. Doc. E/CN.7/589, U.N. Sales No. E.76.XI.5 (1976).

[44] This was due to concerns raised at the negotiations by the North American and European pharmaceutical industry, see JELSMA, THE CURRENT STATE OF THE DRUG POLICY DEBATE 14 (Support text for the First Meeting of the Latin American Commission on Drugs and Democracy, 2008).

[45] Decisions of the CND providing for changes in the schedules or for terminating wholly or partially an exemption of a preparation authorised by a party require a two-thirds majority of the members, see LANDE, supra note 43, at 33.


[47] 1971 Convention, supra note 5, Art. 8. While the system of governmental authorisations referred to as ‘licence or other similar control measure’ applies only to substances in schedules II, III, and IV, a similar system (on stricter terms) applies to all activities involving substances in schedule I, see LANDE, supra note 43, at 168.

[48] 1971 Convention. supra note 5, Art. 9. The article covers the substance of Art. 30 (2)(b) Single Convention and spells out some details which are only implied in more general provisions in the Single Convention, but on the other hand it does not contain a specific provision concerning prescriptions ‘written on official forms to be issued in the form of counterfoil books’, see LANDE, supra note 43, at 181.

[49] 1971 Convention. supra note 5, Art. 10. The purpose of the article is to assist retail distributors, physicians and the parties themselves in avoiding an improper use of psychotropic substances, see LANDE, supra note 43, at 192.
According to Art. 10 of the 1971 Convention, directions for use, including cautions and warnings, need to be given only if they are necessary for the safety of the patients using them. What is necessary for the safety of the user is left to the judgment of the Party concerned.\(^{50}\) Advertisements to the general public for psychotropic substances shall be prohibited; this includes newspapers, television and radio, but not announcements in technical journals, eg published specifically for medical practitioners.\(^{51}\)

In Art. 20 the 1971 Convention also addresses measures to be taken against the abuse of psychotropic substances, including treatment, education, rehabilitation and social reintegration.\(^{52}\) It is acknowledged that a system of penal sanctions and administrative control alone is not sufficient to keep drugs from victims and should therefore not form the sole subject of international cooperation against drug abuse. However, the penal provisions are similar to those in the Single Convention (but without the extradition provisions which were added to the Single Convention by the 1972 Protocol).\(^{53}\)


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

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\(^{50}\) LANDE, supra note 43, at 192.

\(^{51}\) LANDE, supra note 43, at 194.

\(^{52}\) The terms of Art. 20 were kept in general terms so as to present guidelines for the policies to be adopted by the governments, rather than mandatory rules requiring the adoption of specific measures, see LANDE, supra note 43, at 331.

\(^{53}\) For details on the penal provisions and a comparison with the Single Convention, see LANDE, supra note 43, at 347-53.
I NTERNATIONAL D RUG C ONTROL

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

The main accomplishment of the 1988 Convention is that it extends controls to the entire market chain—including precursors at the beginning of the chain to anti-money laundering measures at the end of the chain. The Convention consists of 34 articles (together with an annex containing two lists of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances) and aims at strengthening compliance with the established drug control system. Member States are required to co-operate and to co-ordinate their efforts in preventing global drug trafficking. However, some States were worried that the Convention could be misused for other political objectives. Art. 2 (2) therefore clarifies that ‘the Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States’.

While under the Single Convention member States are obliged to make trafficking in drugs ‘punishable offences’, Art. 3 of the 1988 Convention goes a step further and obliges Parties to make them ‘criminal offenses’. According to Art. 3 (2) this includes the possession, purchase or cultivation of drugs for personal consumption. Nevertheless, States are allowed to provide for alternatives to punishment (e.g. treatment, education or rehabilitation) in cases of a minor nature.

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55 A precursor is a compound that participates in the chemical reaction that produces another compound. In the context of psychoactive substances for example acetic anhydride is a substance which is essential in the refinement of morphine to heroin.

56 See 1988 Convention, supra note 6, Preamble.

57 Art. 2 (2) reiterates the principles enshrined in Art. 2 (1) and (7) UN Charter. A party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment including temporary or limited operations. It also prohibits the exertion of pressure in a manner inconsistent with international law, see GILMORE, supra note 54, at 45.

58 The underlying philosophy embodied in Art. 3 is that improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition for enhanced co-operation. While the 1988 Convention seeks to establish a common minimum standard for implementation, nothing prevents parties from adopting stricter measures than those mandated in the text of the Convention, subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights (GILMORE, supra note 54, at 49).
and personal consumption.\textsuperscript{59} Furthermore, States are called upon to introduce domestic legislation to prevent drug related money-laundering. Although money-laundering was in principle already a punishable offence under the Single Convention, the provisions of the 1988 Convention are much more precise. Art. 3 (1) (b) establishes drug related money-laundering as a criminal offense, and, in targeting criminal proceeds, the Convention asks State Parties to confiscate proceeds from drug related offences\textsuperscript{60} and to empower courts to seize bank and financial records.\textsuperscript{61}

As has already been mentioned, the establishment of a control system for precursor chemicals was a novelty to the drug control regime. According to Art. 12, the manufacture, transport or distribution of precursor chemicals should be deemed criminal offences.\textsuperscript{62} This is reflected in the extension of criminal offences for which extradition can be sought: they include the offences of drug related money-laundering and the manufacture, transport and distribution of equipment and precursor chemicals.\textsuperscript{63}

Some confusion was created by Art. 14 (2), which stipulates that measures adopted to prevent illicit cultivation of narcotic plants ‘shall respect fundamental human rights and take due account of traditional licit uses, where there is a historic evidence of such use’. Some States\textsuperscript{64} tried to interpret this as an acknowledgement that ‘traditional licit uses’ still existed and had to be taken into account.\textsuperscript{65} However, the Single Convention had already outlawed the traditional habits of cocoa

\textsuperscript{59} 1988 Convention, supra note 6, Art. 3(4). Treatment will typically include individual counselling, group counselling. Treatment facilities may prescribe pharmacological treatment such as methadone maintenance. Further treatment services may include drug education, training in behaviour modification, etc. The ability to remain drug free may also be fostered by rehabilitation and reintegration programmes, such as the provision of further education, job placement and skill training (GILMORE, supra note 54, at 87-88).

\textsuperscript{60} 1988 Convention, supra note 6, Art. 5 (1). In considering Art. 5 it is important to recall the state of legal development in 1988. Only during the 1980s began States to develop comprehensive domestic legislation dealing with the proceeds of drug trafficking and other organized crime and with related matters such as money-laundering. As a result there was some uncertainty about the amount of detail that would be appropriate and the preliminary draft of the Convention went into considerable detail, while the final text is much more flexible in style (see GILMORE, supra note 54, at 115).

\textsuperscript{61} 1988 Convention, supra note 6, Art 5 (3). The purpose is to deprive offenders of the advantages offered by bank secrecy. Covered are also other ‘financial’ records (a category that has considerably increased in size and importance with the growth of the financial service industry) and ‘commercial’ records (e.g. shipping lines, insurances), see GILMORE, supra note 54, at 122.

\textsuperscript{62} The INCB and CND are the bodies responsible to monitor and act in regard to the precursor control regime.

\textsuperscript{63} 1988 Convention, supra note 6, Art. 6 (1) in conjunction with Art. 3 (1).

\textsuperscript{64} E.g. Bolivia and Peru.

\textsuperscript{65} GILMORE, supra note 54, at 296.
chewing and opium smoking. The maximum transitional period granted by the Single Convention ended for opium in 1979 and for cannabis and the cocoa-leaf in 1989. Thus, it is clear that the drug conventions, including the 1988 Convention, do not provide for a production of these controlled drugs for a ‘licit traditional use’. Such a conclusion is underpinned by Art. 14 (1) of the 1988 Convention, which points out that ‘any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances … under the provisions of the 1961 Convention’.  


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

The Political Declaration is notable for various reasons, but particularly so for linking for the first time the illicit production and trafficking of drugs with terrorism and arms trafficking. States were called upon to consider the documents agreed on at UNGASS when formulating

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66 For a detailed discussion of the drafting history of Art. 14 see GILMORE, supra note 54, at 294-301.
67 For a summary of the development of the global illicit drug markets see Part III below. For a an in-depth analyses of the cocaine and heroin markets over the last 20 years, see Claudia Costa Storti and Paul De Grauw THE COCAINE AND HEROIN MARKETS IN THE ERA OF GLOBALIZATION AND DRUG REDUCTION POLICIES 20 INTERNATIONAL JOURNAL OF DRUG POLICY 488 (2009).
69 Political Declaration, supra note 68, paras. 11 and 12. Indeed there seems to be evidence that Al Qaeda and other terrorist and guerrilla groups generate earnings from both the production and early stage trafficking of drugs, see PETER REUTER & FRANZ TRAUTMANN, A REPORT ON GLOBAL ILLEGIT DRUG MARKETS 1998-2007 24 (2009).
national drug strategies. Moreover, they were encouraged to report biennially to the CND on their efforts to meet the goals of the action plans.\(^\text{70}\) However, in contrast to the three drug conventions, the Political Declaration does not set up a system for monitoring compliance with the declaration and the accompanying action plans. Art. 20 of the Political Declaration solely declares that the CND will analyse the reports that it obtains from member States and use them for the enhancement of cooperation, but there is no formal sanction system foreseen in the Political Declaration. It thus remains a soft instrument.

At the time, UNGASS was a necessary step to encourage countries to renew and strengthen their commitment to international drug control. The year 2008 was envisaged as a target date by which measurable results of the implementation of the action plans were to be achieved, and indeed, considerable success was achieved in reducing the cultivation of coca in South America and opium in some regions of South-East Asia. But these achievements were overshadowed by the rapid expansion of opium production in Afghanistan. Overall the problem of global drug abuse did not improve significantly during the UNGASS period.\(^\text{71}\) Based on the review, the CND at its 52\(^{\text{nd}}\) session in 2009 considered further action and adopted a new political declaration\(^\text{72}\) and action plan.\(^\text{73}\) The new action plan addresses novel trends in drug trafficking, such as the use of information technology, and calls for better regulation of online-pharmacies and enhanced intelligence exchange and judicial co-operation.

**B. United Nations Drug Control Bodies**

In order to complete the overview of the functioning of the admittedly complex control regime, some remarks are warranted on the agencies co-ordinating and developing international drug

\(^\text{70}\) Most notable are the UNGASS Action Plan on International Cooperation on the Eradication of Illicit Drug Crops and on Alternative Development; the Action Plan against Illicit Manufacture, Trafficking and Abuse of Amphetamine-Type Stimulants and their Precursors; and the Action Plan on the Control of Precursors.

\(^\text{71}\) For a more detailed analysis of the developments during these years see Part III on trends in global illicit drug markets (with further references).


policies. Compliance with the drug control system outlined in the preceding chapter is managed (rather than enforced) by the United Nations. Three bodies carry out the United Nation’s main activities in this area: the CND, the INCB and UNODC. Other UN related agencies are also involved, on the periphery, in administering the global drug control effort, most notably the WHO and UNESCO.\textsuperscript{74}

\textbf{1. Commission on Narcotic Drugs (CND)}

The CND is a functional commission of ECOSOC and the central policy-making body concerning all drug related matters in the UN. It was created by ECOSOC at its first session in 1946\textsuperscript{75} and, although initially composed of 15 States, membership increased over time to 53.

According to Para. 2 Resolution 9(I), the CND’s tasks include (a) to assist ECOSOC in exercising powers of supervision over the application of international conventions and agreements dealing with narcotic drugs; (b) to carry out functions formerly entrusted to the League of Nations Advisory Committee in Traffic on Opium and Other Dangerous Drugs; (c) to advise ECOSOC on all matters pertaining to the control of narcotic drugs and prepare such draft international conventions as may be necessary; (d) to consider what changes may be necessary in the existing machinery for the international control of narcotic drugs and submit proposals thereon to ECOSOC; and (e) to perform such other functions relating to narcotic drugs as ECOSOC may direct.

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

\textsuperscript{74}WHO and UNESCO are mainly involved in harm reduction and education efforts on the demand side.
Furthermore, special functions are assigned to the CND under the drug control conventions. Most important in the catalogue of competencies is the CND’s supervision of the classification of controlled substances. Its authority to decide—on the basis of recommendations by the WHO—whether a drug is listed on, deleted from, or transferred to the schedules, is powerful.\(^{76}\) Similarly the CND decides pursuant to the 1988 Convention on the recommendation of the INCB, on placing precursor chemicals on the convention’s list of controlled substances. Whereas general decisions of the CND—as those of any other functional commission of the UN system—remain subject to approval by the ECOSOC or the General Assembly\(^ {77}\), this is not the case when the CND decides on amending the schedules annexed to the conventions. Although a decision on amending the schedules is not subject to an initial review by ECOSOC or the General Assembly\(^ {78}\), the CND’s powers are restricted by the right of any party to file an appeal against such a decision. ECOSOC may then confirm, alter or reverse the decision of the CND.\(^ {79}\) Recently the position of the CND has been strengthened by the mandate to receive reports on States’ efforts to meet the goals agreed upon at the UNGASS.\(^ {80}\)

2. International Narcotics Control Board (INCB)

The INCB differs from the CND and UNODC in that it is an independent treaty body rather than an UN agency.\(^ {81}\) Notably, it is not purely an inter-governmental body, as the members are elected by ECOSOC from candidates proposed by governments and the WHO. However, they do not represent governments, but act in their personal capacity as experts on drug related matters.\(^ {82}\)

\(^{76}\) Concerning the role of the WHO in this process see above Part II, A. 2. (for narcotic drugs) and II. A. 3. (for psychotropic substances).

\(^{77}\) Single Convention, supra note 4, Art. 7.

\(^{78}\) Single Convention, supra note 4, Art. 3(9).

\(^{79}\) Single Convention supra note 4, Art. 3(8) and 1971 Convention, supra note 5, Art. 2(8).

\(^{80}\) Political Declaration, supra note 68, para. 20; the reports are to be submitted biennially and are analyzed by the CND in order to enhance the co-operation in combating the world drug problem.

\(^{81}\) For a comparison of the INCB with the UN human rights treaty bodies see BARRETT, supra note 2.

\(^{82}\) Originally the INCB consisted of 9 members, the 1972 Protocol extended membership to 13 members. At least three members must have a medical, pharmacological or pharmaceutical background and are nominated by the WHO, see Single Convention, supra note 4, Art. 9 (1).
The INCB was established as the monitoring body for the implementation of the Single Convention. Today it monitors the implementation of all three drug conventions and is concerned with the monitoring and screening of the production, trade and use of licit and illicit drugs. To this end it works closely with national governments to ensure that adequate supplies of drugs are available for medical and scientific uses, and that weaknesses in national approaches to combating the production, trafficking and use of illicit drugs are identified. The INCB collects and administers the statistical data for drug production, trade and consumption; a measure aimed at helping governments to establish a balance between (licit) supply and demand.\(^\text{83}\) The main task in this regard is the administration of the estimates and statistical returns systems.\(^\text{84}\) States have an obligation to report their statistical data at certain deadlines, and, if they fail to submit estimates, the INCB might establish the estimates for them.\(^\text{85}\) If the INCB has objective reason to believe that the aims of the convention are being seriously endangered by a party (e.g. if a State is under the risk of becoming a centre of the illicit cultivation or production of narcotic drugs) the INCB may request the State to explain the condition and it may propose the opening of consultations or the initiation of a study.\(^\text{86}\) The mandate of the INCB includes entering into a continuing dialogue with governments relating to their obligations under the drug control conventions and ultimately, if all measures of cooperation with the respective government fail, the INCB may recommend that other States stop the import and export of drugs to and from a country that fails to explain properly its activities.\(^\text{87}\) However, the authority is much weaker than that of the INCB’s predecessor, the Permanent Central Board, which actually could impose sanctions on States.\(^\text{88}\) Although the INCB does not have the

\(^{83}\) The statistical data at the disposal of the INCB is collected and published in the annual report, which is submitted to ECOSOC through the CND, see Single Convention, *supra* note 4, Art. 15 and 1971 Convention, *supra* note 5, Art. 18. The reports shall also be communicated to the State Parties and be published by the UN-Secretary General and the INCB is mandated to make additional reports as it considers necessary.

\(^{84}\) Single Convention, *supra* note 4, Arts. 12 and 13. The Parties to the Single Convention are under Art. 19 required to furnish estimates on quantities of drugs to the INCB (under the 1971 Convention similar obligations exist in regard to psychotropic substances, see 1971 Convention, *supra* note 5, Art. 16 (4)).

\(^{85}\) Single Convention, *supra* note 4, Art. 12 (3) and (4).

\(^{86}\) Single Convention; *supra* note 4, Art. 14 (1) and (2); 1971 Convention, *supra* note 5, Art. 19(1).

\(^{87}\) Single Convention; *supra* note 4, Art. 14 (4); 1971 Convention, *supra* note 5; Art. 19(2).

\(^{88}\) See also BARRETT, *supra* note 2, at 27.
power to administer sanctions, it may well censure States which it judges not to be in compliance; such censure may have a positive effect in itself on compliance with the control regime.

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

The set-up of the apparatus carrying out United Nations programmes and initiatives on drug control has changed frequently over recent decades. In 1991 the secretariat of the INCB (but not the Board itself) and the functions of the Division of Narcotic Drugs (DND) and the UN Fund for Drug Abuse Control (UNFDAC) were integrated into the UN Drug Control Programme (UNDCP). A further streamlining took place in 1997, when UNDCP was merged with the Centre for International Crime Prevention to form the UN Office for Drug Control and Crime Prevention (UNODCCP). This agency finally became the UN Office on Drugs and Crime (UNODC) in 2002. With a staff of about 500 worldwide, UNODC is a rather small office, but carries out important activities.

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

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89 For example, a Caribbean Regional Drug Law Enforcement Training Centre was established in Kingston/Jamaica in 1996. The main focus of the Centre’s activities is strengthening of local and regional drug control bodies. Similar projects are carried out all over Asia, Africa and Latin America.
C. Regional Initiatives and Co-operation on Drug Control

The United Nations guided international drug control effort must be put into perspective by acknowledging that it does not operate in a vacuum. In fact, it is interdependent with unilateral efforts at the domestic level and with numerous bilateral initiatives (for example between the United States and various Latin American countries\(^\text{90}\)). Additionally, regional and sub-regional co-operation on drug control takes place on all continents. To a considerable extent these multilateral efforts are also supervised by the United Nations through the CND. Five subsidiary bodies have been established, in which the Heads of National Drug Law Enforcement Agencies (HONLEA) co-ordinate and strengthen their efforts in drug law enforcement activities.\(^\text{91}\) The HONLEA bodies meet annually to identify policy and enforcement issues and to establish respective working groups.

But, regional organizations and action plans have also been launched outside the UN system. Although these initiatives oftentimes co-operate with UNODC on some level, they are not directly affiliated with the UN. For example, the European Council in December 2004 endorsed a European Union Drugs Strategy. This was followed by two successive Drugs Action Plans, which aimed at strengthening cross-border co-operation with third countries and international organizations.\(^\text{92}\) In Asia, members of ASEAN and China endorsed an action plan ‘Drug Free ASEAN 2015’\(^\text{93}\), as a part of which the respective States plan to improve their bilateral and regional co-operation. In South America, the Inter-American Drug Abuse Control Commission (CICAD)

\(^{90}\) See Kal Raustiala, *Law, Liberization and International Narcotics Trafficking* 32 N.Y.U.J.Intl.L.&Pol. 89, 110–11 (1999). The United States provides substantial assistance to many producer States, especially in South America. One tool employed by the United States in an unilateral effort is the certification procedure: each year the President submits to Congress a report identifying the major drug producing and drug transit countries. The president also identifies every country of that list that failed demonstrably to make substantial efforts to adhere to substantial international counternarcotics agreements. Decertification may entail the loss of US economic aid. However, the decertification of a producer or transit country does not affect humanitarian, counternarcotics or any other assistance that is vital to US interests.

\(^{91}\) The CND subsidiary bodies include: HONLEA Europe; HONLEA Latin America and the Caribbean; HONLEA Asia and the Pacific; HONLEA Africa; and the Subcommission on Illicit Drug Traffic and Related Matters in the Near and Middle East.


was established in 1986 under the framework of the Organization of American States (OAS).\textsuperscript{94} Furthermore, a Permanent Commission for the Eradication of the Illicit Production, Trafficking, Consumption and Use of Illicit Narcotic Drugs and Psychotropic Substances was established for Central America in 1993. Also the African Union has recently taken action by adopting in 2008 a Plan of Action on Drug Control and Crime Prevention.\textsuperscript{95} An important inter-regional drug control initiative worth mentioning is the Paris Pact Initiative. It is a partnership of more than 50 countries and international organizations aimed at combating the trafficking and consumption of Afghan opiates and focuses on enhanced border control and law enforcement on the drug trafficking routes from Central Asia to Europe. In addition to the mentioned high-level institutions and programmes, various other regional and bilateral initiatives have been installed, e.g. in the field of intelligence sharing, joint investigations and the establishment of permanent task forces.

**Part III. The State of Affairs: Trends in Global Illicit Drug Markets**

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

**A. Production**

Due to the fact that in many instances the cultivation and production of drugs takes place in remote places and concealed settings, it is extremely hard to estimate the quantities of drugs produced. This explains why UNODC and other institutions are very careful with statistical data concerning drug production and pronounce that it is impossible to accurately determine the level of global production and whether it has increased or decreased over recent years. However, estimates are possible and figures in the 2009 World Drug Report indicate that the overall production of illicit

\textsuperscript{94} For the achievements of CICAD in the fields of alternative development and demand reduction see its various action plans, available at <http://www.cicad.oas.org/EN/BasicDocuments.asp>.

drugs did not increase over the last decade, for some drugs there might even be a slight decline in production levels.

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

In regard to cocaine, production has fluctuated around a fairly constant level, with a slight downward trend since 2001. Production is confined to three countries: Colombia, Peru and Bolivia. While the conditions for the production of cocaine considerably deteriorated in Peru and Bolivia during the 1990s (e.g. due to aggressive eradication efforts and interception of air smuggling), the intensifying civil war in Colombia made it the principal location for the production of cocaine. In

98 However, it might be seen as a success of the system that the overwhelming majority of the worldwide illicit production of opium is contained to a single country and a few provinces in that country.
1995 Colombia accounted for about 22% of the total cocaine production, this figure had risen to
60% by 2007 (although it had peaked at almost 80% in 2000).

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

B. Consumption

The situation concerning global demand for illicit drugs is even harder to measure than the
production side. This is due to the fact that most countries lack reliable monitoring systems. In any
case, UNODC estimates that the drugs problem is contained to less than 5% of the adult world

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99 Making Drug Control ‘Fit for Purpose’, supra note 97, at 8.
100 U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2009, at 174, U.N. Sales No. E.09.XI.12
(2009) [hereinafter WORLD DRUG REPORT 2009].
101 WORLD DRUG REPORT 2009, supra note 100, at 174.
population and that problem drug users are limited to about 0.6% of the global adult population.\textsuperscript{102} As for consumption patterns, it can be stated that, although drug use has declined in some countries, the global number of drug users has expanded over the last decade.\textsuperscript{103} The changes in consumption patterns have been uneven. In Western countries the use of heroin has drastically declined, and to some extent also the use of cocaine and cannabis might have declined in the latter years of the 2000s. The United States has traditionally been the most important market for cocaine, however, there now is a decline in estimated US prevalence, which is partly absorbed by a substantial expansion of the cocaine market in some European countries such as Great Britain and Spain. Outside of North America and Europe, cocaine use remains on a low level.

A rising problem of heroin and opium abuse is observed in developing countries in Eastern Europe, Africa and Asia. A serious epidemic of opiate use has been reported in Russia and bordering Central Asian countries. The supply increase from Afghanistan seems to be the factor primarily responsible for this development. In contrast, in the Golden Triangle, where a massive production decline has been reported over the last decade, also the consumption of opiate abuse declines.\textsuperscript{104} China and India, countries with a long history of opiate addiction, have high absolute numbers of heroin users. But, in relation to the huge population of these countries, the prevalence level is rather low. The country with the most severe opiate abuse problem, although statistical data is rare, might be Iran.\textsuperscript{105}

Cannabis use has stabilized in countries in which it had a high prevalence rate before the 1990s.\textsuperscript{106} For countries in which cannabis use was not well established before the 1990s the upwards trend only began to decline by the mid 2000s after it had been steadily rising before. In the major transitional countries\textsuperscript{107} cannabis use remains generally low, although some of these countries (e.g. India) have a tradition of the use of cannabis in religious ceremonies. Finally, in regard to ATS

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\textsuperscript{102} UNODC estimates that only about 25 million problem drug users exist, see \textit{Making Drug Control ‘Fit for Purpose’}, supra note 97, at 3.
\textsuperscript{103} \textit{REUTER \& TRAUTMANN}, supra note 69, at 11.
\textsuperscript{104} \textit{Making Drug Control ‘Fit for Purpose’}, supra note 97, at 9.
\textsuperscript{105} \textit{REUTER \& TRAUTMANN}, supra note 69, at 30.
\textsuperscript{106} Eg United States, United Kingdom, Canada and Australia.
\textsuperscript{107} China, India and Brazil.
the trend in consumption is hard to quantify (as with the production). The problem seems to be most acute in South-East Asia.\textsuperscript{108}

In summary, at least in countries which have a functioning monitoring system in place—especially in North America and Western Europe—the trends in drug consumption are somewhat encouraging. The number of illicit drug users worldwide is dominated by the number of people using cannabis. In 2007, an estimated 160 million cannabis users face a total of just 40 million users for the other drugs combined (ATS, cocaine and heroin). According to UNODC the problem of illicit drug use is contained to a rather small user group compared to the consumption levels of legalized psychoactive drugs such as tobacco or alcohol.\textsuperscript{109} In regard to the change of drug consumption patterns in the UNGASS period (1998-2008), Reuter and Trautmann observe as the main trends that: (1) there has been a decline of cannabis and heroin use in Western countries; (2) there has been an expansion of heroin markets in Russia and its neighbouring countries; (3) the growth of the cocaine market in Western Europe roughly compensated for the decline in the US market; and (4) ATS use has stabilized, although the estimates are not very exact.\textsuperscript{110}

\textbf{C. Revenues}

The markets for illegal psychoactive substances are markets that are subject to the laws of economics and the rules of supply and demand. In theory, drug control efforts generate scarcity, boosting the prices out of proportion to the production costs. This, again in theory, helps to keep illegal substances out of the hands of potential addicts, but the high prices allow traffickers to generate huge profits.\textsuperscript{111} In reality, cocaine and heroin prices have sharply declined in major

\textsuperscript{108} \textit{Making Drug Control ‘Fit for Purpose’}, supra note 97, at 9.  

\textsuperscript{109} Alcohol and tobacco are each used by about 30\% or even more of the adult population. Mortality statistics associated with illicit drugs, tobacco and alcohol show that worldwide annually about 5 million deaths are caused by tobacco, 2 million deaths are caused by alcohol and about 200,000 deaths are caused by abuse of illicit drugs, see \textit{Making Drug Control ‘Fit for Purpose’}, supra note 97, at 4.  

\textsuperscript{110} \textsc{Reuter & Trautmann}, supra note 69, at 31.  

\textsuperscript{111} \textsc{World Drug Report 2009}, supra note 100, at 165.
markets over the last 30 years (especially between 1980 and 1990). The price decline has led to a drop in retail revenue as well. UNODC estimates that cannabis is generating the highest revenues of any drug. It estimated the sales revenue in 2003 at $322 billion and the wholesale revenues at $94 billion. Estimates of other agencies are significantly lower, but it is clear from these figures that the illicit global drug market is a multi-billion dollar enterprise. The annual trade in cocaine from Colombia to Europe and the US is estimated around €6 to €9 billion. For heroin, a rough calculation by Reuter and Trautmann suggests that the global total heroin trade does not exceed €20 billion annually. However, as with production and consumption, it is hard to estimate total revenues accurately.

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

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112 Retail prices for cocaine and heroin have fallen to less than half their levels of 1990, see Costa Sorti & De Grauwe, supra note 67, at 488. This can be seen as a desirable result because lower prices reduce criminal revenues and thereby reduce incentives for drug related crimes. But on the other hand lower prices might lead to new users or heavier and more frequent use by existing drug users.

113 See for example REUTER & TRAUTMANN, supra note 69, who estimate the size of the cannabis retail market in 2005 for the major regions (North America; Western Europe and Oceania) being close to only US$ 34 billion.

114 This includes transportation costs, payoffs, compensation for trafficking risks, see REUTER & TRAUTMANN, supra note 69, at 32.

115 REUTER & TRAUTMANN, supra note 69, at 33.

116 REUTER & TRAUTMANN, supra note 69, at 33.

117 Even though this might not hold true for the United States, where the drug distribution system seems to be organized separately and independent of other racketeering organizations.
involved in the cultivation of the plants, the ‘mules’ transporting the drugs, and the low level dealers in consumer countries. While actual producers and refiners make about 1% to 2% of the total, the rest is payment for the distribution labour.\textsuperscript{118} A significant amount goes to retailers in consumer countries, while the main beneficiaries are high-level traffickers in the producing countries.\textsuperscript{119}

One would imagine that supply containment policies have increased retail prices and reduced consumption and production. This is not the case, and a crucial role is played by the liberalization of (licit) markets and its influence on the illicit drugs markets. The global economic liberalization of the last decades undermines and runs counter to efforts controlling the trafficking in illicit drugs, because illicit trade is intrinsically tied to licit trade.\textsuperscript{120} Raustiala identifies numerous ways in which international economic liberalization facilitates drug trafficking: (1) it lowers the price of legal inputs in drug production; (2) it improves the infrastructure of trade, lowering transport costs and expanding access and distribution; (3) it increases the volumes of goods in commerce, making the hiding of drugs easier and overtaxing customs officers; (4) it facilitates money-laundering and legal investment, and thereby helps drug traffickers hide and clean their profits.\textsuperscript{121} Ultimately, it is argued, globalization offsets the effects of supply containment policies: it lowers intermediation margins, and as a result lowers retail prices, thereby stimulating consumption—at the same time it increases prices obtained by producers, tending to increase production.\textsuperscript{122}

\textsuperscript{118} The major economic consequence of the illicit trafficking of drugs is that they create illegal incomes. Laundering illegal profits is an essential part of drug trafficking, therefore strategies to control the illicit drug markets must include strategies on hindering money-laundering. The 1988 Convention established the means to move beyond arrest and seizure. But it has been argued that international co-operation and anti-trafficking measures must also make better use of the U.N. Organized Crime Convention (United Nations Convention against Transnational Organized Crime, November 15, 2000, 2225 U.N.T.S. 209).
\textsuperscript{119} \textsc{Reuter \& Trautmann}, \textit{supra} note 69, at 59.
\textsuperscript{120} Raustiala \textit{supra} note 90, at 143.
\textsuperscript{121} Raustiala, \textit{supra} note 90, at 116.
\textsuperscript{122} Costa Storti \& De Grauwe, \textit{supra} note 67, at 495.
Overall, and keeping purely theoretical models of explanation aside, it seems that revenues from illicit drug trafficking have declined recently because retail prices have fallen for all major drug types\textsuperscript{123} and production quantities have been more or less stable.

Part IV. Human Rights and International Drug Control Law

The statistical data summarized in the preceding section can be read in two ways: either as a success (that the global drug problem has been contained) or as a failure (that the drug problem has not been solved). Whichever interpretation one endorses, it is obvious that drug control is not an end in itself. The ultimate objective is rather to improve public health and to limit human suffering. The prevalent strategy to combat drug related dangers with a ‘war on drugs’ has—in some countries—led to extreme actions such as military operations against farmers, chemical fumigation of illegal crops and wholesale imprisonment of drug users. As the statistical data indicates, drug production and consumption has not been substantially reduced by employing these strategies. Moreover, it is argued that the international drug control regime as an integral cornerstone in the ‘war on drugs’ abets human rights abuses, worsens international security and builds barriers to sustainable development.\textsuperscript{124} The Latin American Commission on Drugs and Democracy, an initiative formed by former presidents Gaviria (Colombia), Zedillo (Mexico) and Cardoso (Brazil) to evaluate the effectiveness and impact of the war on drugs in Latin America, came to the conclusion that ‘prohibitionist policies based on the eradication of production and on the disruption of drug flows as well as on the criminalization of consumption have not yielded the expected results’ \textsuperscript{125}

\textsuperscript{123} For indexed prices of the major drugs on the European market between 2001-2006 see REUTER & TRAUTMANN supra note 69, at 34.


\textsuperscript{125} Latin American Commission on Drugs and Democracy, Drugs and Democracy: Toward a Paradigm Shift, at 5, available at <http://www.drogasedemocracia.org/Arquivos/livro_ingles_02.pdf> [hereinafter Drugs and Democracy: Toward a Paradigm Shift].
A. Domestic Implementation of the Drug Control Conventions

An increasing number of States, non-governmental organisations and scientists, are concerned that the drug conventions, despite the impact that they carry, are not flexible enough to allow for an individually tailored approach taking special socio-economic features of different States into account. The Latin American Commission on Drugs and Democracy states its concern that 'the search for more efficient policies, rooted in the respect for human rights, implies taking into account the diversity of national situations and emphasizing prevention and treatment'.\(^{126}\) Indeed the implementation of the conventions into domestic law prompts concerns because some of the most vulnerable groups of society are affected by the drug conventions: drug addicts (who are vulnerable to discrimination and poverty anyway) and farmers in developing countries (who cultivate illicit crops and often do not have an economically sound alternative).

As a matter of fact, the ambiguous approach to drug control has on occasion led to the occurrence of serious human rights violations. States subscribing to a restrictive interpretation of their obligations under the drug conventions tend to implement laws that are beyond the treaty requirements. But, when assessing the influence of the drug conventions on domestic policies of States, it must be borne in mind that they are only one, although a considerable, factor out of many. Things are further complicated by the fact that the international drug control regime faces a twofold problem: while on the one hand some States work, to the extent that human rights are violated, with very repressive drug control legislation and enforcement, different States on the other hand apply liberal drug policies which have a potential to run counter to the objectives of international drug control. This dichotomy is a direct result of the autonomy of domestic legislation and is integral to the conventions. On a more basic level it is part of the principle of sovereign equality under international law. Governments are left with ample room for interpretation and they are presented a

\(^{126}\) *Drugs and Democracy: Toward a Paradigm Shift, supra* note 125, at 6.
huge degree of freedom when formulating individual drug control policies.127 The latitude is, of course, not unlimited as treaty obligations must be obeyed bona fide.

The international drug control regime is dedicated to controlling global drug flows and States must implement laws towards this common end. Therefore the complete legalization of substances currently under control seems not to be a valid option under the international control regime—whether legalization would be a solution for the problems related to drug abuse is debated anyway.128 Be that as it may, the point to be made is that the drug control conventions do not contain provisions that meticulously dictate to Member States what actions are to be taken without granting them sufficient leeway for implementing individual policies.129 The most troublesome measures on the domestic level are arguably carried out outside the mandatory framework of the conventions. As will be demonstrated, it is in fact the obligation of each party to one of the conventions, and of the international community as a whole, to remedy unwelcome effects of the global drug control regime and to prevent grave human rights violations from happening.

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127 Bewley-Taylor, supra note 1, at 173. The leeway arguably even includes the de facto legalisation of certain ‘soft’ drugs, such as cannabis. Further latitude is provided by terms such as ‘medical purposes’, which might have different meanings at different times in different nations, see SYAMAL KUMUR CHATTERJEE, LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL, 356-57 (1981).

128 Just as repressive methods have harmful effects, so the absence of control might also have a negative effect on public health, see JELSMA, supra note 44, at 2-3. UNODC, in the 2009 World Drug Report, argues that legalisation would have a counterproductive effect: the consequence of making currently illegal substances legal would likely result in an increase in their popularity to levels of licit addictive substances such as alcohol or tobacco. While developed countries might be able to deal with this, the burden would be placed on developing countries, which would likely be afflicted by new problems the way they are currently afflicted by growing alcohol and tobacco problems, see WRLD DRUG REPORT 2009, supra note 100, at 164. Antonio Maria Costa, the executive director of UNODC, has labelled legalization efforts as ‘drug neo-colonialism’ which would open the ‘floodgates of a public health disaster in the Third World’ (see Antonio Maria Costa, Speech at the 53rd Session of the Commission on Narcotic Drugs: International Drug Policy, An Unfinished Architecture (March 8, 2010), available at <http://www.unodc.org/documents/frontpage/CND_Costa_Speech_08_03_10.pdf>). For an assessment of the impacts of drugs on development (productivity, health, violence, and corruption) see Merrill Singer Drugs and development: The global impact of drug use and trafficking on social and economic development 19 INTERNATIONAL JOURNAL OF DRUG POLICY 467, 472-75 (2008). Singer concludes that both legal and illegal drugs are a threat to development and contribute to the maintenance of social inequality because of their effect of hindering development (at 476).

129 See the discussion of certain provisions of the conventions in Part. IV. C. 2.
**B. Unintended Consequences of International Drug Control Policies**

Dissatisfaction with the UN drug control system is on the rise and a consensus has formed that the focus of international drug control policies needs to be shifted because the repressive approach has not resulted in the desired effects of cessation of the production and consumption of harmful psychoactive substances. The system, being a prohibition regime focusing on control of the production of psychoactive substances that are deemed to be harmful, has over time developed side-effects that were not foreseen (at least in their magnitude) when it was established. The Secretary-General of UNODC in a position paper presented in 2008 admitted that the application of the drug control system has had several ‘unintended consequences’.\(^{130}\)

The main unintended consequence identified by UNODC is the enormous black market for illicit drugs that evolved in order to get the prohibited substances from producer to consumer. A second unintended consequence is the occurrence of a policy displacement, meaning that public funds were in a lot of cases drawn into law enforcement and public security instead of into public health (even though ‘the health and welfare of mankind’ is recognised in the Preamble of the Single Convention as the overarching concern of drug control policy). As a consequence, public health has been placed in the background, while public security oftentimes was seen as the primary and most effective way of containing the global drug problem.\(^{131}\) The third unintended consequence is geographical displacement; it concerns the phenomenon that stricter controls in one place lead to an increase in production in another place (the heavily increased opium production in Afghanistan, which is directly connected with the decrease in the Golden Triangle is evidence of this: the supply control success in one region directly led to the displacement of the problem to another region, in this case to Afghanistan). A fourth unintended consequence is substance displacement, i.e. if one

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\(^{130}\) Even though this has been generally praised as a step in the right direction, the term ‘unintended consequences’ is euphemistic considering the effects of the war on drugs in some regions of the world. For the detailed explanation of the five identified unintentional consequences, see *Making Drug Control ‘Fit for Purpose’*, supra note 97, at 10-11.

\(^{131}\) An additional problem in this context is, that the framing of the narcotics problem as an issue of criminality instead of public health, and the application of ‘zero tolerance’ policies obviously make the use of regulatory tools like cost-benefit analysis difficult, see Raustiala, *supra* note 90, at 140.
drug is controlled by reducing either supply or demand, users and suppliers move to another psychoactive substance with similar effects but less stringent controls. The fifth and final unintended consequence identified by UNODC is the way that the drug control system perceives and deals with users of illicit drugs: due to strict domestic laws, these people oftentimes find themselves excluded and marginalized from society.

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

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

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

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132 This phenomenon might explain the increasing popularity of ATS.
133 All references cited in this paper, including the UN agencies, seem, in general at least, to agree on this premise.
134 JELSMA, supra note 44, at 4.
135 Drugs and Democracy: Toward a Paradigm Shift, supra note 125, at 8.
136 Because changing the existing system is almost impossible against the will of the influential States backing the current drug control approach (eg United States, China, Japan), it has been discussed whether
Although the drug control regime has been developed in a relative vacuum, the conventions might allow for an interpretation which remedies the shortcomings of the system and grants enough flexibility for States to fulfil their domestic and international obligations, especially in the context of human rights.

1. Respect for Human Rights as a binding obligation under the United Nations Charter

Today, one of the principal aims of international law is the protection of the human rights of the individual. If one shares the—progressive, but sustainable—view that the UN Charter is the quasi-constitution of the international community (in the sense that it is a set of rules of international law which takes precedence over other norms because their existence is a precondition to the validity of the latter), then the axiom of protection of human rights as a binding obligation on all States can be derived from the UN Charter itself. That a comparison of the UN Charter with the ‘ideal type’ of constitution (in the sense of Max Weber’s methodology) reveals a similarity sufficiently strong to attribute a constitutional quality to the UN Charter, is, for example, demonstrated by Fassbender. Along the same line, Franck notes that the four characteristics of perpetuity, indelibleness, primacy and institutional autochthony relate the UN Charter more proximately to a constitution than to a mere normative contractual arrangement.

Conceptually, the United Nations—and thus each of its Member States through Art. 56 in conjunction with Art. 55 (c) UN Charter—is committed to the respect for, and promotion of, human

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137 According to Henkin, ‘human rights are those liberties, immunities and benefits with by accepted contemporary values all human beings should be able to claim ‘as of right’ of the society in which they live’, see Louis Henkin, Human Rights, in MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. 2 II, 886 (Rudolf Bernhardt ed., 1995).
140 FASSBENDER, supra note 139, at 180.

Consequently it follows that the purposes as enshrined in the Charter are to be obeyed throughout.\footnote{The Preamble and Arts. 1 and 2 UN Charter form the indivisible core of the UN Charter and whilst human rights are not a principle (Art. 2 UN Charter) but a purpose of the United Nations (Art. 1 UN Charter), they form a constitutional requirement of the organization and its membership, see Katarina Mansson, Reviving the ‘Spirit of San Francisco’: The Lost Proposals on Human Rights, Justice and International Law to the UN Charter, 76 NORDIC JOURNAL OF INTERNATIONAL LAW 217, 232 (2007).} Summa summarum, it is widely acknowledged that a minimum standard of human rights obligations exists that no State can ignore with simple reference to its domaine réservé.\footnote{See, for example, THORSTEN STEIN & CHRISTIAN VON BUTTLAR, VÖLKERRECHT 360 (12th ed. 2009).} Of the same tenor is Kälin and Künzli’s statement that, in view of the fact that virtually all States are members of the United Nations, the Charter may be taken as the legal foundation of the universality of human rights.\footnote{WARD KALIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 39 (2009).}

However, the human rights clauses of the UN Charter admittedly have several defects: besides giving no indication of the rights protected (apart from non-discrimination), they also do not provide for an enforcement mechanism—unless violations constitute a threat to peace under Chapter VII UN Charter.\footnote{DUGARD, supra note 138, 311.} These shortcomings must be contemplated in the historical context. The Charter lacks a clear definition of the term ‘human rights’, but it nevertheless introduced principles and policies which were innovative at the time of its drafting in 1945.\footnote{Farrokh Jhabvala, The Drafting of the Human Rights Provisions of the UN Charter, XLIV NETHERLANDS INTERNATIONAL LAW REVIEW 1, 31 (1997).} The implementation of these principles alone was a major achievement of the negotiations at the San Francisco conference and helps explain the lack of a more sophisticated and elaborate structure of the Charter in this context.
respect. Instead, the substance of the vague human rights obligations in the UN Charter was later spelled out in nine core human rights treaties promulgated under the auspices of the United Nations. Most important are the Universal Declaration of Human Rights\footnote{Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/RES/3/217A (Dec. 10, 1948). Art. 25 of the Universal Declaration states that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’.}, the International Covenant on Civil and Political Rights\footnote{International Covenant on Civil and Political Rights, December 19, 1966, 999 UNTS 171 [hereinafter ICCPR].} and the International Covenant on Economic, Social and Cultural Rights\footnote{International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3 [hereinafter ICESCR].}. The ICCPR and the ICESCR—while being legally binding on their parties—cannot be said to be truly universal, because so far only 165 States signed or acceded to the ICCPR and 160 State have signed or acceded to the ICESCR. In regard to the Universal Declaration of Human Rights—being not a treaty, but a non-binding resolution of the General Assembly—the argument has been made (although far from being undisputed) that its provisions are customary international law and are therefore binding on all States.\footnote{Norms form part of customary international law where they constitute evidence of a general practice accepted as law, i.e. customary international law is based on state practice and opinion iuris. For a discussion on which human rights norms form part of customary internal law see KALIN & KUNZLI, supra note 146, at 67-72.}

Be that as it may, it remains important to prove that the UN Charter itself serves as the base of universal human rights obligations, because, as will be demonstrated shortly, Art. 103 UN Charter invokes the primacy of the UN Charter in the event of a conflict between obligations under the Charter and any other international agreement.\footnote{The primacy of human rights goes so far that the UN Security Council cannot take decisions which clearly violate human rights, see Marten Zwanenburg, United Nations and Humanitarian Law para. 44, in MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed.), available at <www.mpepil.com>.} The concretisation of human rights obligations in the main human rights treaties is necessary to fill the rather vague obligations of the Charter with life, but reference to these treaties cannot solve the problem of primacy in the event of a conflict between two highly sophisticated treaty regimes such as, in this case, the human rights regime on the one hand and the drug control regime on the other hand. Such a problem can—without resorting...
to the even more disputed principles of *ius cogens* and obligations *erga omnes*\(^{154}\), which will not be considered here—only be solved by reference to the Charter.

The drug control conventions contain very limited provisions relating to human rights—despite a stated concern for the health and well-being of mankind. But this does not mean that the system is free to work without human rights oversight. Hence, the question remains which system is to take precedence in case of an irreconcilable clash between human rights obligations and commitments under the drug control conventions.

As hinted, the answer lies in the hierarchy of norms. Drug control is part of the ‘international economic, social, health and related problems’, the international co-operation on which is a purpose of the United Nations.\(^{155}\) Drug control, however, is not explicitly mentioned in the UN Charter. This is an important deviation from the Covenant of the League of Nations, which specifically mentioned drug control in Art. 23 (c), which explicitly entrusted the League of Nations with the general supervision over the execution of agreements with regard to ‘the traffic in opium and other dangerous drugs’. Drug control under the UN Charter is a subset of the higher aims of the organisation and its members.\(^{156}\) It does not carry the same weight as respect for human rights—a main purpose of the United Nations.

On the technical level the primacy of human rights over the three drug conventions is derived from the provision of Art. 103 UN Charter, which states that ‘in the case of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement their obligations under the present Charter shall prevail’. This formula includes all obligations which result immediately and directly from the

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\(^{154}\) For the problems involved in trying to identify obligations *erga omnes* and norms of *ius cogens*, see MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997). France, for example, is a persistent objector the principle of *ius cogens* and did for this reason never accede to the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

\(^{155}\) *United Nations Charter*, Art. 1 (3). Arts 55 (b) and 60 UN Charter mandate ECOSOC to promote solutions of international economic, social, health and related problems.

\(^{156}\) BECKLEY FOUNDATION, supra note 9, at 4; coming to the same conclusion that human rights take priority over the international drug control regime, see Rick Lines & Richard Elliott, *Injecting drugs into human rights advocacy*, 18 *INTERNATIONAL JOURNAL OF DRUG POLICY* 453, 455 (2007).
One might want to argue that human rights cannot be seen as a binding obligation under Art. 103 UN Charter because of their status as a ‘guiding light’. Whether respect for human rights forms an obligation under Art. 103 UN Charter is, on the face of it, indeed questionable. However, under Art. 56 UN Charter (which refers to the purposes set forth in Art. 55 (c) UN Charter) all Member States have pledged themselves—and ergo are bound—to take joint and separate action for the achievement of universal respect for, and observance of, human rights and fundamental freedoms. It has been repeatedly stated by the UN General Assembly that Art. 56 imposes a legally binding obligation on States. Further account must be taken of the International Court of Justice’s statement in its Advisory Opinion on South West Africa that ‘a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter’. In this sense, and even though the Court only addresses ‘fundamental’ human rights, to deny respect for human rights the status of a legally binding obligation would be short-sighted, as every Member State of the United Nations is clearly under an obligation not to violate the purposes and principles of the organisation of which it is a member. So even without reference to Art. 103 UN Charter, human rights obligations arguably prevail over specialized treaty regimes such as the drug control conventions.

A different question is of course whether this holds true for all human rights or just for a core of ‘fundamental’ human rights. The question which human rights are to be considered fundamental is complex and lies beyond the scope of this article. But despite manifold uncertainties surrounding the concretisation of human rights, the fact remains that, even though they

160 Jordan J. Paust, The U.N. is bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity, 51 HARVARD I.L.J. ONLINE 1, 5, (2010), speaks of an independent obligation of members of the UN to respect and observe human rights under Article 56. Moreover, certain aspects of Art. 1 UN Charter—and among them the respect for human rights—arguably constitute a legally binding obligation not only under the UN Charter but also under customary international law, see Rüdiger Wolfrum, Article 1, in THE CHARTER OF THE UNITED NATIONS A COMMENTARY 40 (Bruno Simma ed., 1994).
161 However, some human rights which arguably are of particular interest in the context of international drug control will be briefly scrutinized in Part IV. C.2. below.
may not always be completely justiciable, core human rights obligations are legally binding on all UN Member States. Because all Member States to the drug conventions are simultaneously bound by the United Nations Charter the obligation to respect and protect at least fundamental human rights is clearly established and no further resort to vague concepts such as universally binding norms of *ius cogens* or obligations *erga omnes* is needed to explain its precedence over conventional treaty law.

Although human rights serve elementary ends, they must not be seen as an adverse counter-balance to the drug control regime. They rather serve as a substantial part of the regime itself, inherent in all policies because of their status as a fundamental principle protecting human dignity. The International Law Commission’s study group on fragmentation noted in this vein that ‘no treaty, however special its subject matter … applies in a normative vacuum, but refers back to a number of general, often unwritten principles of customary law’.162 This holds especially true in the context of the drug control conventions, which cannot be seen as a self-contained regime apart from the guiding principles of the United Nations under whose systematic framework they operate. Drug control law must be construed in conformity with human rights obligations and, for the above reasons, human rights may take precedence if a fair balancing of interests does not lead to reconciliation of clashing norms.163 The CND and the UN General Assembly have repeatedly acknowledged this by stating that drug control must be carried out in full conformity with the purposes and principles of the United Nations, and, inter alia, human rights.164 In conclusion, all efforts to control harmful psychoactive substances must take notice of the principles guiding the United Nations, including human rights, and must not violate them. It follows that grave human

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163 See BARRETT, supra note 2, at 29; and JELSMA, supra note 44, at 19.

rights violations that stem from drug control efforts must be brought to an end. Such a human rights based approach represents more than ‘added value’, it is a legal obligation.  

2. Interpretation of the Drug Control Conventions in the Light of Human Rights Obligations

Human rights obligations are pertinent in international drug control on both the supply side (e.g. in producer countries in regard to farmers cultivating illegal crops), as well as on the demand side (e.g. concerning drug users in consumer countries). This paper will now undertake to demonstrate that the drug control conventions are structurally fit to take human rights concerns into account. However, it must be emphasised that an in-depth analysis of the technicalities of the discussed rights is not intended. The main purpose of this study is to illustrate that human rights as a purpose of the United Nations may trump conventional drug control law in cases of conflict. That the concept of respect and protection of human rights is an obligation for all UN Member States has been illustrated in the preceding section and it is for a different paper to scrutinise particular human rights and elaborate in-depth on violations in the context of drug control measures. The following remarks provide a few examples of when and how human rights must be taken into account in the context of the drug control conventions. It must, however, not be seen as a comprehensive analysis of these rights in the context of drug control, but rather as proof that it is conceptually possible to do justice to human rights while staying within the mandatory legal framework of the drug conventions.

In regard to the supply side, Art. 14 (2) of the 1988 Convention acknowledges that the measures taken to prevent the illicit cultivation of plants ‘shall respect fundamental human rights’. It is not explicitly stated which methods of eradication are appropriate, but if human rights must be taken into account for determining the appropriateness of a measure, this clearly implies that some measures are problematic. For example, aerial sprayings with herbicides must be evaluated in the

light of human rights, even though the 1988 Convention is silent on aerial spraying and does not prohibit it (but Art. 14 (2) explicitly emphasizes the protection of the environment). Consideration must be given to the fact that aerial spraying not only affects coca plants, but also other crops which are farmed in the vicinity and that some herbicides have a long-term effect which makes it impossible to grow other crops for years after. So, although the use of toxic chemicals may prove highly effective, the risks associated with it need to be weighed.\textsuperscript{166} The impact of aerial sprayings and other such radical eradication efforts might well interfere with the human rights standard set by Art. 11 ICESCR, which stipulates "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions".\textsuperscript{167} Moreover, Art. 12 ICESCR and the right to the highest attainable standard of health might be directly affected, because aerial sprayings with herbicides have an adverse impact on the health conditions of the people living and farming in the concerned area.\textsuperscript{168} Their right to development might also be jeopardized, as forced crop eradication oftentimes deprives farmers of their livelihood and drives them into poverty. But, as this right is highly disputed and far from being universally accepted, a lot of additional questions would be raised.\textsuperscript{169}

\textsuperscript{166} GILMORE, \textit{supra} note 54, at 301.
\textsuperscript{167} On the right to an adequate standard of living and the basic necessities that are covered, see Asbjorn Eide, \textit{The Right to an Adequate Standard of Living Including the Right to Food}, in ECONOMIC SOCIAL AND CULTURAL RIGHTS A TEXTBOOK 133-148 (Asbjorn Eide & Catarina Krause & Allan Rosas eds., 2\textsuperscript{nd} ed. 2009).
\textsuperscript{168} The right to health does not cover everything which involves health, but is one right in a set of human rights that are all important for the protection of people’s health. The core of the right to health can be divided into two categories: one containing elements related to health care and one encompassing elements related to underlying preconditions for health, see Birgit Toebes, \textit{The Right to Health}, in ECONOMIC SOCIAL AND CULTURAL RIGHTS A TEXTBOOK 169, 174 (Asbjorn Eide & Catarina Krause & Allan Rosas eds., 2\textsuperscript{nd} ed. 2009).
\textsuperscript{169} Although the right to development is not universally recognized, the UN General Assembly stated that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (see G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). Alternative development is an important component of a balanced drug control strategy. The aim must not solely be a reduction in illicit crops, but rather broad based development leading to sustainable illicit crop reduction. According to UNODC the farmers’ rights to development and sustainable livelihood are non-negotiable and all measures related to crop eradication must address poverty reduction and the overall improvement in the socio-economic situation of small-farmer households, see \textit{Drug control, crime prevention and criminal justice: A Human Rights perspective, supra} note 142, paras. 48–49. The CND has also urged Member States to ensure that alternative development programmes and eradication measures fully respect international standards and human rights, see U.N. Econ. & Soc. Council, Commission on Narcotic Drugs, \textit{Report on the 52\textsuperscript{nd} Session}, 41-42, U.N. Doc. E/CN.7/2009/12 (March 11-20, 2009). For an overview
As can easily be seen, a whole bundle of human rights might be affected by a single measure. Key to balancing conflicting interests is the fair evaluation of all legitimate concerns. The infringement of human rights is not per se interdicted; human rights may well be affected by a measure with a legitimate aim that is guided by the principle of proportionality (i.e. is necessary and the least intrusive method to meet the aim). Finally, it must be kept in mind that the farmers who cultivate and refine illegal psychoactive substances—despite arguably oftentimes being victims of human rights violations themselves—play a crucial role which is not just passive. Even in the context of human rights guarantees things are not black and white, but there are varying shades of grey.\(^{170}\) The assessment of the legality of a drug control measure must therefore bestow greatest care on all details, and, under distinct circumstances the outcome may be different because achieving a given end may require different strategies in different settings.\(^{171}\) This, however, is not necessarily a bad thing, as it may allow for individually tailored measures, which are better suited to deal with specific situations in different regions than a general ban or permission.

As has been stated above, this paper is not concerned with the technicalities of particular human rights, e.g. the right to health or the even more disputed right to development. The answer as to whether they are violated by a given enforcement measure on the ground or through a particular legislation in the ‘war on drugs’ must be left to a different study. Also the question of their universal acceptance and that of the classification of these rights (and what exactly is derived from such a grouping) cannot be tackled here.\(^{172}\) However, there is much to be said for the argument that universally accepted human rights include at least basic rights protecting the human existence, such as the rights to life, food and shelter.\(^{173}\) In the end, and apart from the examples discussed above,
there can be no serious doubt that a core of universal human rights exists and that these fundamental rights can never be neglected.\textsuperscript{174}

On the demand side, human rights concerns focus on harm reduction\textsuperscript{175}, the treatment of drug users and overly harsh law enforcement practices. Especially law enforcement measures in the ‘war on drugs’ frequently result in human rights violations.\textsuperscript{176} While the specific content of criminal laws and criminal penalties under the drug conventions are left to the discretion of the States, human rights law provides a normative framework, against which criminalization and penalties are to be assessed.\textsuperscript{177} For example, the way drug users are treated during detention can potentially conflict with the provisions against torture and inhumane or degrading treatment and punishment under Arts 7 and 10 ICCPR\textsuperscript{178}, or the right to a fair trial under Art. 14 ICCPR.\textsuperscript{179} Clearly human rights law continues to apply when the international drug conventions request Member States to establish drug related offences as criminal offences in their domestic legislation.\textsuperscript{180} But one must also keep in mind that most of the concepts suggested as an alternative are controversial themselves. This holds especially true for harm reduction initiatives; harm reduction—while helping drug addicts to protect themselves from overdosing and diseases—has not as its objective the prevention

\textsuperscript{174} Bardo Fassbender, Idee und Anspruch der universalen Menschenrechte im Völkerrecht der Gegenwart, in MENSCHENRECHTE ALS WELTMISSION 11, 34 (Josef Isensee ed., 2009).

\textsuperscript{175} There is no single agreed upon definition of the term ‘harm reduction’. The term describes measures taken to reduce the harm caused by drug abuse as opposed to measures aimed at eliminating the abuse itself, see Saul Takahashi, Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues, 31 HUMAN RIGHTS QUARTERLY 748, 764 (2009).

\textsuperscript{176} See for example Alex Wodak Health, HIV infection, Human Rights and Injecting Drug Use, 2 HEALTH AND HUMAN RIGHTS 24, 33-36 (1998).

\textsuperscript{177} Drug control, crime prevention and criminal justice: A Human Rights perspective, supra note 142, para. 13.

\textsuperscript{178} Not every case of infliction of pain or suffering violates the prohibition of torture and inhuman or degrading treatment or punishment. It must be noted that the ill-treatment must reach a minimum degree of intensity. This threshold, however, cannot be determined in the abstract but is dependent on the circumstances involved, see KÄLIN & KÜNZLI supra note 146, at 329.

\textsuperscript{179} ICCPR, supra note 150, Art. 14 (2): ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. The right ensures that criminal convictions can be rendered only by a competent, independent and impartial tribunal. To be considered independent the tribunal must not take instructions from the legislature or the executive in their adjudicatory activities, but must be free from outside influence (see KÄLIN & KÜNZLI, supra note 146, at 451).

\textsuperscript{180} The INCB acknowledges that the obligation to establish criminal offences under the 1988 Convention is subject to each Party’s constitutional principles and its basic legal concepts, this will usually include human rights; see INT’L NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2001, para. 211, U.N. Doc. E/INCB//2001/1, U.N. Sales No. E.02.XI.1 (2002).
of drug abuse itself. 181 Some practices in drug dependence treatment facilities, including deprivation of liberties, may give rise to concerns under Art. 9 ICCPR, which states that ‘everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds in accordance with such procedures as are established by law’. 182 But Takahashi rightfully notes that not every level of involuntariness in the area of drug dependence treatment is in violation of the individual’s rights and that ‘to exclude completely the possibility of any level of coercion would be in many cases to exclude the possibility of the addict overcoming his addiction’. 183 Again, a fair balancing of all concerned rights and interests is needed.

Another point of debate has centred on the drug conventions’ silence on appropriate penalties, leaving this matter to the Member States. The criticism seems somewhat unfounded, as the drug conventions do not per se require a de facto criminalization of personal drug consumption or minor cases of drug offences. 184 According to Art 3(4)(c) of the 1988 Convention ‘in appropriate cases of minor nature, the parties may provide as alternative for conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare’. In regard to possession or use of illicit psychoactive substances for personal consumption, Art. 3(4)(d) in conjunction with Art. 3(2) states that ‘either as an alternative to conviction and punishment or an addition to conviction and punishment … measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender’ may be provided for by State Parties. Importantly, the obligation to criminalize personal consumption is subject to the constitutional principles and the basic concepts of the legal system of a State. 185 If

181 See Takahashi, supra note 175, at 767 with further references (especially the United States seem opposed to harm reduction with the argument that harm reduction efforts undermine the global counter drug efforts).
182 The notion of deprivation of liberty must be interpreted broadly and includes not only arrest, pre-trial detention and imprisonment, but also coercive internment in locked wards of psychic hospitals, see KALIN & KÜNZLI, supra note 146, at 443.
183 Takahashi, supra note 175, at 775 points out that ‘it is disingenuous to pretend that the decision not to undergo treatment is an entirely free one…Decisions made under the influence of drugs are not decisions of the free will, and to base one’s argument on the premise that it is so is to come dangerously close to arguing that there is a right to abuse drugs’.
184 See also Elliott et al., supra note 1, at 114.
185 1988 Convention, supra note 6, Art. 3(2).
enshrined in the constitution or accepted as a basic legal principle—which arguably is the case for all States—fundamental human rights directly interrelate with the obligations under the 1988 Convention and give each State leeway to temper the prohibitionist approach in their drug policies. The framework of the conventions is sufficiently flexible to at least de facto decriminalize personal consumption and minor cases of drug offences. Understood correctly, the international drug control regime is not hostile towards a somewhat liberal approach emphasizing education, treatment and even harm reduction over purely repressive measures. In this spirit, UNODC encourages States to adopt laws that allow for non-custodial alternatives when only a small amount of drugs for personal use is concerned. The argument goes that the incident should be documented, but ‘it is rarely beneficial to expend limited prison space on such offenders’. However, it is also clear that it would be counterproductive to construe human rights law in a way to support a general right to use drugs.

Art. 38 Single Convention exemplifies that the drug control regime is not at all blind to human rights concerns in regard to drug users. It calls upon State Parties to ‘give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts’. Again, although the provision leaves States free to decide what facilities are deemed adequate for such medical treatment, the provision has to be interpreted in light of human rights, and, for example, the right to health might call for access to measures such as clean needles and syringes, drug dependence treatment, and therapies. The right to the highest attainable standard of health is not only concerned in the context of drug abuse treatment, it is also an important factor to be taken into account concerning the licit production and distribution of narcotic drugs and the access to

186 See Part IV. A., on domestic implementation of the drug control conventions.
187 Barrett & Nowak, supra note 124, at 463; Elliott et al., supra note 1, at 114.
188 WOLRD DRUG REPORT 2009, supra note 100, at 167.
189 That these measures are compatible with the drug conventions has been stated by the INCB. It notes that governments should adopt measures that may decrease the sharing of hypodermic needles in order to limit the spread of HIV/AIDS and it also states that the implementation of drug substitution and maintenance treatment does not breach provisions of the drug conventions, see INT’L NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2003, para. 222, U.N. Doc. E/INCB//2003/1, U.N. Sales No. E.04.XI.1 (2004).
controlled medicines.\textsuperscript{190} Governments must assure the adequate availability of narcotic drugs for medical and scientific purposes and have to take all available measures to provide essential medicines (e.g. including opioid analgesics) as part of their obligations under the right to health.\textsuperscript{191}

In a nutshell, human rights are—even though it is not spelled out in the drug conventions—a tacit component of all adequate drug control measures. Human rights law is applicable at all times when Member States enforce domestic control measures based on the conventions. The obligations under the international drug control regime cannot be invoked for a measure that unjustifiably runs counter to human rights, and, as a consequence, such law or enforcement measure is illegal. Thus, extra-judicial killings by law enforcement officers in drug operations, imprisonment without trial, or beatings in detention centres for drug dependence treatment seem clearly prohibited by international human rights standards.\textsuperscript{192} Where the drug conventions fail to give instructions, gaps must be filled and be interpreted in accordance with human rights obligations. While human rights law does not prescribe the content of criminal laws or penalties, it does demand strict scrutiny to ensure that laws do not deny the rights of individuals. Human rights are not a counterbalance to drug control laws, but rather an integral part of them.

\textbf{C. Human Rights Obligations of the Drug Control Bodies}

\textbf{1. Nature and Content of the Human Rights Obligations}

It is fundamental for the acceptance of human rights standards that human rights are anchored in intergovernmental organizations endowed with powers to monitor, report and protect.\textsuperscript{193} So not only States, but according to the UN Charter also the United Nations itself shall promote ‘universal

\textsuperscript{190} In this sense it is part of the right to health care, which includes the provision of essential drugs (Toebes, \textit{supra} note 167, at 177).

\textsuperscript{191} It is estimated that each year tens of millions of patients, including cancer and AIDS patients suffer moderate to severe pain without adequate treatment, see \textit{Drug control, crime prevention and criminal justice: A Human Rights perspective}, \textit{supra} note 142, para. 47.

\textsuperscript{192} \textit{Drug control, crime prevention and criminal justice: A Human Rights perspective}, \textit{supra} note 142, para. 34.

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respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. It would be inconsequent to assume that UN agencies do not have to observe human rights whose promotion the whole organisation was established for, although concrete human rights obligations of the United Nations and its agencies are not explicitly stated. As an international organisation dedicated to promoting universal respect for human rights, the United Nations itself simply cannot disregard human rights. Ergo, not only Member States of the UN, but also agencies of the United Nations are human rights duty bearers.

The primacy of human rights as a guiding principle in the UN system extends to decisions of all UN organs in that they must fulfil their tasks with respect to human rights. In this spirit, the High-level panel in its 2006 report observed that ‘all United Nations agencies and programmes must support the development of policies, directives and guidelines to integrate human rights into all aspects of United Nations work’. However, it can be argued that the duties owed by the United Nations agencies and programmes transcend the duty to simply ‘promote’ human rights, because the UN is a significant participant in international relations, expanding on the traditional international system of sovereign States. Therefore, all UN agencies are obliged to take a proactive role and actively strengthen the human rights of all people.

In the context of drug control, the influence of the control bodies on global drug policies is reflected in their overall authority concerning the most fundamental matters (as outlined above in

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194 Art. 55 (c) UN Charter.
195 This omission arguably stems from the failure of the drafters of the UN Charter to anticipate a situation in which human rights violations through United Nations actions could have practical significance.
197 Darrow & Arbour, supra note 196, at 457-462. The article goes into great detail in explaining the conceptual sources of the United Nations human rights responsibilities. They can be construed either internally (derived from its own internal constitutional legal order, i.e. the UN Charter), or externally (derived from the status of the United nations as a subject of international law. A third alternative would be that the United nations are bound to the extent that its members are bound (hybrid conception).
198 This also is stated by the General Assembly in its annual resolution on drug control, see eg G.A. Res. 63/197 para. 1, U.N.Doc. A/RES/63/197 (March 6, 2009).
200 On the functions of international institutions and their organs in the context of human rights promotion, see generally HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 669 (3rd ed. 2008).
Part II B). However, it has been criticized that a lack of proper guidance from the drug control conventions results in poor human rights practice among the major bodies, i.e. the CND and the INCB.\(^{201}\) From the principle just outlined it follows that the drug control bodies inherit both—positive and negative—human rights obligations: firstly, they must ensure that they do no harm,\(^{202}\) this is a negative obligation, including the obligation to act with due diligence and to respect human rights; secondly, they are under a positive obligation to protect and fulfil human rights.\(^{203}\) This includes the rights of people who use drugs, farmers who cultivate drugs and even the protection of drug traffickers from human rights violations which are carried out in the name of harsh drug policies.\(^{204}\) Promotion and protection are two sides of the same coin and unduly rigid or categorical distinctions between protection and promotion risk the efficiency of UN actions. As Darrow and Arbour candidly put it: ‘ignoring serious human rights obligations is simply not an option’.\(^{205}\)

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

Given these obligations, why do the drug control bodies seem to pay rather little attention to human rights matters and why is there a lack of United Nations guidance on drug policies which are in compliance with human rights?

The answer is not simple and the main bodies concerned with carrying out the drug policies under the conventions must be scrutinized separately. For example, one of the main issues negatively impacting the work of the CND is that it never puts an issue to vote—despite being empowered to make decisions by majority vote. In effect, every decision can be vetoed because of the custom of voting in consensus. Therefore, if the CND is to take its role seriously, this may have to change. Especially matters concerning sensitive human rights issues will hardly ever be adopted.

\(^{201}\) Barrett & Nowak, *supra* note 124, at 456. However, the connection between human rights and the international drug control regime has repeatedly been stressed by the General Assembly in its annual resolution on ‘International Co-operation Against the World Drug Problem’, see, for example, G.A. Res. 63/197, para. 1, U.N. Doc. A/RES/63/197 (March 6, 2009).

\(^{202}\) Barrett & Nowak, *supra* note 124, at 470.

\(^{203}\) ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 68 (2006).

\(^{204}\) Barrett & Nowak, *supra* note 124, at 470.

\(^{205}\) Darrow & Arbour, *supra* note 196, at 476.
unanimously; the work of the United Nations human rights treaty bodies gives a good example for the tough bargaining and sometimes irreconcilable rifts between different factions. Only by agreeing on majority voting would the CND be able to adopt decisions—including on crucial human rights issues—in which a consensus of all Member States is out of reach.

UNODC, as the lead UN agency on drug control initiatives and programmes, advises and assists governments in their drug control efforts. In this context, awareness for human rights concerns must be further incorporated into UNODC programmes and human rights abuses must be identified as potential risks in drug control enforcement strategies. Tensions arise from UNODC’s role as a research centre on the one hand and an outlet for political messages on the other hand. But its mandate and expertise in the areas of law enforcement, health services and criminal justice perfectly justifies the articulation of a human rights based approach in its operational activities; it is encouraging that UNODC is aware of its unique position and ‘the potential to make a significant move from human rights commitments to implementation’. Steps in this direction have been taken, by, for example using the Human Rights Impact Assessment as a predictive tool for assessing the potential human rights impact of a policy or programme.

The INCB’s situation is slightly different from that of UNODC and the CND (which are subsidiary bodies of ECOSOC and the UN Secretariat), because the INCB is an independent treaty body whose secretariat is administered by UNODC. The Single Convention explicitly states that there are no limits to the recommendations and observations that the INCB may make. Therefore human rights considerations are in the scope of the mandate of the INCB and it has stated in its 2007 annual report that ‘due respect for universal human rights, human duties and the rule of law, is

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206 Barrett & Nowak, supra note 124, at 473; BECKLEY FOUNDATION, supra note 9, at 45.
207 Christopher Hallam and David Bewey-Taylor Mapping the world drug problem: science and politics in the United Nations drug control system 21 INTERNATIONAL JOURNAL OF DRUG POLICY 1, 2 (2010). A problem with UNODC is that it relies heavily on voluntary donations, which gives the main donors great power. The role as an independent agency may be somewhat undermined by this; see JELSMA, supra note 44, at 19.
210 Single Convention, supra note 4, Art. 15(1): ‘The Board shall prepare an annual report on its work…together with any observations and recommendations, which the Board desires to make’.
211 See also Barrett & Nowak, supra note 124, at 471.
important for effective implementation of the international drug control conventions. Non-respect for them can prejudice the ability of the criminal justice system to enforce the law, can lead to discriminatory disproportionate responses to drug offending and can undermine the conventions.\textsuperscript{212}

When the conventions are in danger of being undermined by a lack of respect for human rights, the INCB must consider this as concerning its work. In this context it has frequently been criticized that the INCB conducts most of its work with governments in strict privacy, and that transparency and accountability do not exist.\textsuperscript{213} Indeed, the time might be ripe for a change, including a more open approach to the public in the working procedures of the INCB.

A delicate issue concerns the question whether the drug control bodies can potentially be complicit in human rights violations by other actors if they do not perform their functions to protect and fulfil sufficiently. Such a scenario seems, although the drug control bodies have the duty to act with due diligence to avoid human rights violations by third parties, far-fetched. A situation in which a drug control body could reasonably be accused of complicity (or aiding and abetting) in a human rights violation would have to be grave and its involvement rather direct. It is hard to foresee a scenario where this would be the case. The INCB and the CND may at times be appropriate fora to discuss human rights violations,\textsuperscript{214} but while their mandate includes maintaining a permanent dialogue with governments, it is still limited and their power is soft. A mediatory approach will oftentimes be appropriate to reach the best results in the interaction with reluctant governments. Of course, if there is the danger of collusion, the bodies will have to act and speak out candidly. But, in general, specialized human rights bodies such as the Human Rights Committee or the Human Rights Council, are better suited than the drug control bodies to take action through targeted, strategic interventions within the human rights system.\textsuperscript{215}

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\item[{\textsuperscript{213}}] Barrett & Nowak, supra note 124, at 474 and JELMSA, supra note 44, at 19.
\item[{\textsuperscript{214}}] Barrett & Nowak, supra note 124, at 473.
\item[{\textsuperscript{215}}] The Human Rights Committee has done so in the past and elaborated on human rights violations of a member State carrying out its drug control policies, see Communication No. 1474/2006, Human Rights Committee, U.N. Doc. CCPR/C/91/D/1474/2006 (Nov. 14, 2007), regarding a law prohibiting the possession and use of a narcotic drug. The Human Rights Committee found that the law did not violate the right to
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Alston has noted in the context of the specialized UN human rights treaty bodies that ‘the essential role of each of the treaty bodies is to monitor and encourage compliance with a specific treaty regime, while the political organs have a much broader mandate to promote awareness, to foster respect, and to respond to violations of human rights standards’. The same holds true for the drug control regime and its respective control bodies: the United Nations’ political organs seem to be the better option to tackle thorny human rights issues in comparison to the drug control bodies, which, to work effectively, must maintain good working relations with governments.

Part V. Concluding Reflections

The international drug control system has dramatically evolved over the last 100 years. At the end of the 19th century the global markets for narcotic drugs were unregulated and free trade resulted in serious problems. However, due to a concerted effort by the international community, the licit trade in narcotics had been brought under control in the mid-20th century, and the international drug control system had become one of the most advanced areas of international law. In retrospect, an unavoidable consequence of the international control of narcotic and psychotropic substances was the establishment of illicit markets and the influence of organized crime on these markets. Although the drug control regime in place has played an important role in the efforts to dismantle notorious drug cartels and other organized crime syndicates, the illicit drugs markets prove to be hard—if not impossible—to eradicate. Efforts to this end have in some countries been accompanied by serious human rights violations. However, before ex parte condemning the system, one must keep in mind that it has been installed for a reason.

Although it is true that the global production of illicit drugs has not dropped as much and as rapidly as had been hoped for, a comparison of the global opium production (licit and illicit) at the freedom of religion for an individual who was a member of a religious minority to which the drug was an essential part of the practice of his religion.

217 For a discussion of reports by UN human rights bodies that tackle on the issue of drug control and harm reduction, see Lines & Elliott, supra note 156, at 455.
beginning of the 20th century and in 2007 shows that the overall production declined by 78% over this period—despite the fact that the world population more than quadrupled over this time.\textsuperscript{218}

Considering that opium was the narcotic drug for which the international drug control system had originally been established, this seems to be a remarkable success. It can be concluded that the international drug control system has, at least in some instances, functioned reasonably well in fulfilling one of the main tasks for which it was created, i.e. containing the problem of the illegal production, trafficking and use of psychoactive substances. Containment is, however, not the same as solving the problem completely. Additional steps will have to be taken to further restrict the global problem of drug abuse. Clearly, these steps will have to be taken in accordance with human rights standards as enshrined in the UN Charter and the respective human rights treaties.

The conclusion of this paper is that the drug conventions must, and can, be construed in a human rights friendly way, including a focus away from repressive measures and adding emphasis on education and treatment.\textsuperscript{219} Despite the leeway that each State is given under the conventions in the process of implementing domestic laws, the United Nations through its drug control bodies must take a guiding role. The agencies concerned with drug control, and especially UNODC, have demonstrated a willingness to recalibrate their approach. So the answer to the initial question is: the legal instruments in place can effectively help to prevent human rights violations, if managed correctly. The treaty regime allows for refining the system and taking into account valid concerns without amendments to the drug control conventions. The responsibility to apply the mechanisms in an effective, but appropriate way lies with the main actors, i.e. governments and the drug control bodies.\textsuperscript{220}


\textsuperscript{219} Barrett & Nowak, supra note 124, at 476, come to the same conclusion that the legal framework for a paradigm shift exists, as does the capacity and expertise to facilitate a move towards an approach that takes human rights into account.

\textsuperscript{220} This means that the conventions must be interpreted and implemented in line with the obligations inscribed in the UN Charter, honouring the commitment of all UN Member States to the protection of human rights and fundamental freedoms, see Making Drug Control ‘Fit for Purpose’, supra note 97, at 19. An encouraging sign is also that the CND affirmed in its 2009 Political Declaration the ‘commitment to ensure that all aspects of demand reduction, supply reduction and international cooperation are addressed in full conformity with the purposes and the principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights, and, in particular, with full respect for … all human rights, fundamental