

The 'Fifth Stage' of Drug Control:
International Law, Dynamic Interpretation and Human Rights

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Abstract

Human rights violations occurring as a consequence of drug control and enforcement efforts are growing concerns among both civil society and multilateral organisations. In many cases, these violations are driven by domestic and/or international attempts to meet the obligations enshrined within the three United Nations drug control conventions, creating a situation where seeking to fulfil the requirements of the UN drug treaties encourages or justifies policies and practices that violate international human rights law. This raises questions of treaty interpretation, and the appropriate balancing of concomitant obligations within these two legal regimes. This thesis poses the question of how the international law of drug control should be interpreted within the context of international human rights law.

Tracing the evolution of international drug control law since 1909, and through what it identifies as four chronological stages, it explores the historic tensions within the regime between what are described as its humanitarian aspirations and the suppression of a common human behaviour as a form of ‘evil’, and the resulting impacts on human rights. Drawing from this history, it explores the object and purpose of the United Nations drug treaties, adopting a teleological approach to the question of treaty interpretation. Building upon this approach, as well as that of the International Court of Justice and of international human rights courts and bodies, it makes the case that international drug control law must be interpreted in an evolutive or dynamic fashion that considers treaty obligations in light of present day conditions and developments in international law. In doing so, this thesis posits the development what it calls a ‘fifth stage’ of drug control, a dynamic, human rights-based interpretative approach emerging from the engagement between the two regimes. Drawing

upon illustrative examples from the jurisprudence or proceedings of domestic, regional and international legal bodies, it concludes by exploring basic principles for resolving tensions and conflicts between the two regimes in manner that safeguards human rights.

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Chapter One - Drug Control, Human Rights and ‘Parallel Universes’

1.1 Background and Context

1.1.1 Quincy Wright and the ‘Three Stages’ of Drug Control

Writing in the *American Journal of International Law* in 1924 on ‘the opium question’, Professor Quincy Wright described what he termed the ‘three stages’ of international drug control contemporary to that era. The ‘first stage’ Wright described as beginning in 1729, continuing up until the early 1900s. This period might today be characterised as the pre-multilateral era of drug control, during which time a handful of States adopted what were essentially national or bilateral measures on drugs. In 1729, Chinese Emperor Young Cheng issued the first edict prohibiting the smoking of opium.¹ It is also from this year that the earliest records exist of a European opium trade, in this case conducted by the Portuguese.² The first stage of drug control was characterised by the monopoly trade in opium by the British East India Company from 1773, which led to the important role of opium within international affairs in the eighteenth century.³ This period saw the increase in domestic opium production in China, and attempts by China to stop British opium imports into the country, leading to the first and second Opium Wars fought between the countries in the

¹ Quincy Wright, ‘The Opium Question’ (1924) 18/2 *American Journal of International Law* 281.

² Kenneth W Makowski, ‘Narcotics Regulation: A Study in Irresolution’ (1960-1961) 34 *Temple Law Quarterly* 310, 311.

³ William M Hepburn, ‘International Legislation on Social Questions’ (1931-1932) 9 *New York University Law Review* 310, 321.

mid-1800s.⁴ It was the first of these wars that lead to the cession of Hong Kong to England in 1842.⁵ It also included the negotiation of numerous treaties and trade agreements intended to suppress or restrict the opium trade, particularly among and between China, Great Britain, France and the United States.⁶

Wright's 'second stage' covers what was essentially the first phase of multilateral efforts in drug control, when control measures 'became a matter of international law, but without a specific international supervisory machinery'.⁷ Beginning with the International Opium Commission in Shanghai in 1909, and the subsequent resolutions emerging from that meeting, and continuing into 1912, with the convening of the second International Opium Conference at The Hague. The International Opium Convention that emerged from the Hague conference codified the resolutions adopted in 1909 into the first truly international treaty on drug control. Over the ensuing years, efforts were made to encourage other States to ratify the treaty and to participate in the newly created international regime it defined.⁸ These efforts included the Treaty of Versailles, ending the first World War, Article 295 of which committed the High Contracting Parties who were not already Parties to the 1912 convention to ratify the treaty within a year. Furthermore, Article 295 specified that in the case of those Powers that were not yet State Parties to the Opium Convention, the ratification of the Treaty would itself 'be deemed in all respects equivalent to the ratification of the Convention and to

⁴ Frank Dakota, Lars Laamann and Zhou Xun, *Narcotic Culture: A History of Drugs in China* (University of Chicago Press 2004) chap 3.

⁵ Makowski (n 2) 311.

⁶ Wright, 'The Opium Question' (n 1) 281-285.

⁷ Herbert L May, 'Narcotic Drug Control' (1951-1952) 29 *International Conciliation* 491, 497.

⁸ Wright, 'The Opium Question' (n 1) 281-285.

the signature of the Special Protocol...for bringing the said Convention into force'.⁹ Similar clauses were also inserted into other peace treaties at the conclusion of the war.¹⁰

Wright's 'third stage' begins with the foundation of the League of Nations in 1920, and is characterised by an increased commitment to international cooperation in drug control, and the creation of a 'permanent international control machinery'.¹¹ This is reflected in the adoption of Article 23(c) of the Covenant of the League of Nations, which 'intrust[s] the League with general supervision over the execution of agreements with regard to traffic in...opium and other dangerous drugs'.¹² This third stage sees increased and expanded multilateral efforts to control opium and other drugs, including the creation of new supervisory bodies under the auspices of the League, the adoption of new resolutions, a growing number of States agreeing to come into the regime and, in the decade after Wright's article was published, the adoption of new international treaties under the supervision of the League that expanded the scope of international legal obligations in this area.¹³

Using the evolutionary stages posited by Wright in 1924, this thesis will examine what might reasonably be called the 'fourth stage' of international drug control, namely the system established by the international community after 1945, supervised by the United Nations. At the level of international law, the UN period is marked by the drafting and ratification of

⁹ Peace Treaty of Versailles 1918, art. 295.

¹⁰ Adolf Lande, 'The Adjustment of the International Opium Administration to an Eventual Dissolution of the League of Nations' (1945) 45 *Columbia Law Review* 392, 396.

¹¹ May (n 7) 497.

¹² Covenant of the League of Nations (adopted 28 April 1919) (Covenant) art 23(c).

¹³ Wright, 'The Opium Question' (n 1) 285.

three new conventions that incorporate and expand upon the previous League of Nations instruments.¹⁴ It includes the creation of new and invigorated supervisory bodies, and increased State participation in the regime to the point where the treaties today enjoy near universal ratification. However, this fourth stage of drug control differs in several ways from the League of Nations era that preceded it. In addition to the developments described above, the fourth stage of international drug control is marked by the increased use of penal laws to suppress drugs,¹⁵ resulting in what the United Nations Office on Drugs and Crime describes as the negative ‘unintended consequences’ of the regime.¹⁶ Despite the robust nature of the modern international drug control system, and the near universal ratification of the core instruments, the demand for and consumption of the drugs prohibited by the treaties remains high.¹⁷ As a result, the negative unintended consequences of this fourth stage regime are many, and include the creation of huge criminal markets for drugs, controlled by cartels that often use violence and the corruption of State officials to maintain their vast profits, destabilising weak States; untold billions of dollars spent each year in largely ineffective drug interdiction efforts, at the expense of public investment in health, education and social

¹⁴ International Opium Convention (adopted 19 February 1925) 81 LNTS 319 (1925 Convention); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (adopted 13 July 1931) 139 LNTS 303 (1931 Convention); Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936) 198 LNTS 301 (1936 Convention).

¹⁵ Neil Boister, ‘The Interrelationship between the Development of Domestic and International Drug Control Law’ (1995) 7 African Journal of International and Comparative Law 906, 913 (Interrelationship).

¹⁶ UN Commission on Narcotic Drugs, ‘Making Drug Control “Fit for Purpose”’: Building on the UNGASS Decade: Report by the Executive Director of the United Nations Office on Drugs and Crime as a contribution to the review of the twentieth special session of the General Assembly’ (7 March 2008) UN Doc No E/CN.7/2008/CRP.17 (Fit for Purpose).

¹⁷ See, for example, UN Office on Drugs and Crime, ‘World Drug Report 2013’ (2013) United Nations, New York.

services; exploding prison populations in many parts of the world, often driven by the prosecution of drug offences; and millions dead from, and many millions more infected with, HIV as a result of sharing of syringes for injecting drug use.¹⁸ Another of the unintended consequences of the fourth stage of drug control is the negative impact of the regime on human rights.

1.1.2 Human Rights in Drug Control's 'Fourth Stage'

One need only scratch the surface of domestic and international efforts to control illicit drugs during the United Nations era to see the potential for human rights concern. Indeed, drug control and enforcement activities are prime areas for the abuse of human rights, not least because, as noted by Barrett and Nowak, the very indicators of 'success' of drug control efforts – number of criminal offences prescribed; number of people arrested and successfully prosecuted; number of people in detention; number of traffickers executed; number of people in drug treatment (whether voluntarily or involuntarily); number of hectares of crops destroyed; number of successful military operations against insurgents or criminal gangs – are also indicators of human rights risk, if not actual evidence of human rights violations.¹⁹ As a result, the negative human rights consequences of the fourth stage of drug control are mammoth, spanning all regions of the world, and include the execution of up to 1,000 people

¹⁸ UN Commission on Narcotic Drugs, 'Fit for Purpose' (n 16) 10-12.

¹⁹ Damon Barrett and Manfred Nowak, 'The United Nations and Drug Policy: Towards a Human Rights-Based Approach' in A Constantinides and N Zaikai (eds), *The Diversity of International Law: Essays in Honour of Professor Calliope K. Kpufa* (Martinus Nijhoff 2009) 468.

annually for drug offences;²⁰ the arbitrary detention of up to half a million people worldwide under the guise of ‘drug treatment’;²¹ the denial of due process rights and rights to consent to treatment in the context of drug cases;²² and the denial of the right to health to millions of people who inject drugs by legally prohibiting access to effective HIV prevention measures.²³

The negative unintended consequences on human rights also highlight another unique aspect of the fourth stage of drug control: that the international law of drug control during the United Nations era has developed alongside of, and in parallel with, the modern system of international human rights law, beginning with the Universal Declaration of Human Rights in 1948. Despite the contemporaneous development of these two international legal regimes, in practice there has been little cross fertilisation between the two. The United Nations drug control system has rarely considered the human rights impacts of the regime, and the human rights system has rarely considered drug control efforts within its mandate. In practice, this gap means that human rights violations in the name of drug control largely occur in the

²⁰ See Patrick Gallahue and Rick Lines, ‘The Death Penalty for Drug Offences: Global Overview’ (International Harm Reduction Association 2010).; Patrick Gallahue, ‘The Death Penalty for Drug Offences: Global Overview 2011’ (International Harm Reduction Association 2011).

²¹ See, for example, Richard Elliott, Rick Lines and Roxanne Schleifer, ‘Treatment or torture? Applying international human rights standards to drug detention centers’ (Open Society Foundations 2011) 3.

²² See, for example, Juhi Gupta, ‘Interpretation of Reverse Onus Clauses’ (2012) 5/1 NUJS Law Review 49.; Drug Policy Alliance, ‘Drug Courts are Not the Answer: Towards a Health Centered Approach to Drug Use’ (Drug Policy Alliance 2011).; Joanne Csete, ‘Costs and Benefits of Drug-Related Health Services’ in J Collins (ed) *Ending the Drug Wars: Report of the LSE Expert Group on the Economics of Drug Policy* (LSE Ideas 2014) 75-76.

²³ See, for example, UN General Assembly, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ (6 August 2010) UN Doc No A/65/255, paras 50-58 (Special Rapporteur Health 2010).

absence of human rights scrutiny, and in some cases are even justified by States on the basis that the abusive policies or practices are supported under the UN drug control treaties. The current status quo prompted the former Special Rapporteur on the right to the highest attainable standard of health, Paul Hunt, to conclude that ‘[i]t is imperative that the international drug control system...and the complex international human rights system that has evolved since 1948, cease to behave as though they exist in parallel universes’.²⁴

Within the United Nations system, nowhere is the disconnect between the ‘parallel universes’ of drug control and human rights more apparent than on the 26th of June each year. On 7 December 1987, the UN General Assembly declared June 26th as the International Day Against Drug Abuse and Illicit Trafficking.²⁵ This date was chosen as it coincided with the closing of the International Conference on Drug Abuse and Illicit Trafficking, which met earlier that year to agree the final text of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.²⁶ This third UN drug treaty, which was adopted in 1988, obligates States Parties to implement strict penal sanctions to punish drug offences. However, 26 June 1987 was also the date that the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force.²⁷ Ten years later, in December 1997, the General Assembly commemorated this achievement by

²⁴ Paul Hunt, ‘Human Rights, Health and Harm Reduction: States’ Amnesia and Parallel Universes’ (International Harm Reduction Association 2008) 9.

²⁵ UN General Assembly, ‘International Conference on Drug Abuse and Illicit Trafficking’ (7 December 1987) UN Doc No A/RES/42/112, para 5.

²⁶ UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95 (1988 Convention).

²⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 (Torture Convention).

designating the 26th of June as the International Day in Support of Victims of Torture, ‘with a view to the total eradication of torture and the effective functioning of the Convention’.²⁸

The ensuing years have illustrated how uncomfortably these two United Nations commemorative dates sit together, as some States choose to ‘celebrate’ the International Day Against Drug Abuse and Illicit Trafficking by staging the execution of drug traffickers, most visibly in China where the executions are often public and *en masse*.²⁹ In fact, in the decade following the entry into force of the 1988 drug convention, the number of States legislating to impose capital punishment increased by fifty per cent,³⁰ this during a period when scholars were documenting an overall downward trend in the use of the death penalty worldwide.³¹ There is a case to be made that the increase in States prescribing capital punishment for drug offences came as the direct result of the ratification of the 1988 Convention, which created international obligations for States to impose punitive domestic laws and penalties for drug offences. That the above executions are explicitly carried out to mark the International Day Against Drug Abuse and Illicit Trafficking, despite the fact that the UN human rights system has concluded that the death penalty for drug offences constitutes a violation of international

²⁸ UN General Assembly, ‘UN International Day in Support of Victims of Torture’ (18 February 1998) UN Doc No A/RES/52/149.

²⁹ Rick Lines, ‘A “Most Serious Crime”? The Death Penalty for Drug Offences and International Human Rights Law’ (2010) 21 *Amicus Journal* 21.

³⁰ See, Rick Lines, ‘The Death Penalty for Drug Offences: A Violation of International Human Rights Law’ (International Harm Reduction Association 2007) 7.; Rick Lines, ‘A “most serious crime”? International Human Rights Law and the Death Penalty for Drug Offences’ (18th International Conference on the Reduction of Drug-Related Harm, Warsaw, 15 May 2007).

³¹ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge University Press 2002) 19.; Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (4th edn, Oxford University Press 2008) 13-18.

human rights law,³² illustrates ‘the contradictions faced by the United Nations as it seeks to protect and expand human rights while also acting as the international community’s guarantor of conventions to control licit and illicit drugs’.³³

Given that June 26th marks the International Day in Support of Victims of Torture, this disconnect between human rights and drug control is also illustrated by the increasing international documentation of the infliction of torture, or other forms of cruel, inhuman or degrading treatment in the name of ‘drug treatment’.³⁴ In March 2012, a group of twelve United Nations agencies – including the Office of the High Commissioner for Human Rights, the World Health Organization, the UN Office on Drugs and Crime and UNICEF – released a joint statement calling for the closure of all compulsory drug detention and rehabilitation centres, where many such abuses have been documented.³⁵ The UN Special Rapporteur on torture has also raised specific concern about ‘a number of areas where torture and ill-treatment occur as a direct or indirect result of current approaches to drug control’,³⁶

³² See generally, Lines, ‘A “Most Serious Crime”?’ (n 29).

³³ Emma Bonino, ‘Crimes without Victims: Appropriate Policy Responses to Drug Use’ in *Protecting the Human Rights of Injection Drug Users: The Impact of HIV and AIDS* (Open Society Institute 2005) 17.

³⁴ See generally, Elliott, Lines and Schleifer (n 21).

³⁵ International Labour Organisation; Office of the High Commissioner for Human Rights; United Nations Development Programme; United Nations Educational, Scientific and Cultural Organisation; United Nations Population Fund; United Nations High Commissioner for Refugees; United Nations Children’s Fund; United Nations Office on Drugs and Crime; United Nations Entity for Gender Equality and the Empowerment of Women; World Food Programme; World Health Organisation; and Joint United Nations Programme on HIV/AIDS, ‘Joint Statement: Compulsory drug detention and rehabilitation centres’ (March 2012).

³⁶ UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’ (14 January 2009) UN Doc No A/HRC/10/44, para 17 (Nowak Report).

including the use of the death penalty. In his 2009 report, the Special Rapporteur noted with concern that ‘the international drug control system has evolved practically detached from the United Nations human rights machinery’.³⁷ Clearly the gap in law and practice that currently exists between drug control and human rights is one that needs to be bridged.

The disengagement evident at the UN level between human rights and drug control is also reflected in the literature. Writing in 1996, Professor Norbert Gilmore of McGill University noted that ‘little has been written about drug use *and* human rights. Human rights are rarely mentioned expressly in drug literature and drug use is rarely mentioned in human rights literature.’³⁸ Almost twenty years later, the literature examining drug control issues through the lens of international human rights law has grown, but the total body of peer reviewed commentary and analysis in the area would barely rank the issue as a footnote in the broader human rights lexicon. The relative dearth of legal scholarship in the area of human rights and drugs stands in sharp contrast to the many human rights issues engaged by drug control, and the litany of documented human rights abuses resulting from drug enforcement practices. While some of the more recent literature seeks to close this gap, others seek to reinforce it. For example, a 2009 article in *Human Rights Quarterly* makes the case that the death penalty for drug offences is not actually a drug control issue at all, but rather one related to broader rule of law concerns. In an interesting example of the Professor Hunt’s concept of ‘parallel

³⁷ *ibid* para 51.

³⁸ Norbert Gilmore, ‘Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements’ (1996) 12 *Journal of Contemporary Health Law and Policy* 355, 356.

universes' in action, it argues that 'the death penalty [for drugs] issue is not so much of a drug control issue as much as it is an issue of human rights'.³⁹

1.2 Scope and Objectives

1.2.1 Bridging the 'Parallel Universes' of Drug Control and Human Rights

International legal instruments on drug control date back more than 100 years, to the International Opium Convention of 1912.⁴⁰ Since that time, eight other treaties on drugs have been agreed under the auspices of the League of Nations and later the United Nations, and drug control has been the subject of more than one hundred resolutions of the UN General Assembly.⁴¹ The international law of drug control therefore predates by several decades the modern system of international human rights law that has emerged since 1948, and the numerous United Nations and regional human rights treaties that have been ratified subsequently. The lessons of the fourth stage of drug control, and the impacts of these 'parallel universes' on human rights as described above, clearly demands a new paradigm, one that closes the gaps in law and practice, and prevents human rights violations occurring due to drug control and enforcement activities.

³⁹ Saul Takahashi, 'Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues' (2009) 31 Human Rights Quarterly 748, 761.

⁴⁰ International Opium Convention (signed 23 January 1912) 1922 LNTS 189 (1912 Convention).

⁴¹ UN General Assembly, 'Resolutions' <<http://www.un.org/documents/resga.htm>> accessed 15 May 2014.

Despite their differing histories, drug control and human rights treaties today exist as part of a larger common body of public international law. As described by McLachlan, ‘treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.’⁴² Within this larger body of international law, the concomitant obligations between the drug control and human rights regimes interact with one another at various times and in various ways. In many cases, the human rights violations linked to drug control activities are driven by domestic and/or international efforts to meet the obligations enshrined within the three United Nations drug control conventions, creating a situation where seeking to fulfil the requirements of the drug treaties encourages or justifies policies and practices that violate international human rights law. The question, then, is how are States (or international organisations) to resolve situations in which efforts to control drugs come into conflict with obligations to protect and promote human rights? How are these conflicts, whether potential or actual, to be resolved in a manner that is consistent with the obligations of States Parties under both treaty regimes, yet at the same time ensure human rights are protected? Addressing these questions raises issues of treaty interpretation, and the appropriate balancing of obligations within the two legal regimes.

Questions of treaty interpretation, conflict of laws, and of what has come to be known as the ‘fragmentation’ of international law,⁴³ are of increasing interest among international legal

⁴² Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 280.

⁴³ International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission’ (13 April 2006) UN Doc No A/CN.4/L.682, 208, para 414 (Fragmentation Report).

scholars and practitioners. The appropriate application of Articles 31-33 of the Vienna Convention of the Law of Treaties on interpretation, and the specific application of rules of treaty interpretation within world trade law in order to balance trade obligations with human rights and/or environmental concerns, are but two of the areas that have seen increased academic attention in recent years.⁴⁴ In particular, the work of the Study Group on the Fragmentation of International Law of the International Law Commission has highlighted the complications arising from the ‘manifold’ growth in specialised multilateral treaties over the past fifty years,⁴⁵ and the increasing likelihood that two or more rules or principles of international law will be applicable in respect to specific situations, necessitating a process to determine the relationship between them. However, despite the multiple areas in which drug control laws and activities engage human rights, and the slow yet growing attention among human rights monitors to these concerns, the question of treaty interpretation in this context is largely unaddressed. The primary scholarly works written in the area of international drug control law⁴⁶ do not address the question of interpretation in any detail, if at all. Some attempts have been made in the health and human rights literature to bridge these ‘parallel

⁴⁴ See, for example, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).; Rudiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer Verlag 2003).; Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* Brill Academic Publishers 2003).; Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2008).

⁴⁵ Fragmentation Report (n 43) 10, para 7.

⁴⁶ Neil Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer 2001).; Syamal Kumar Chatterjee, *Legal Aspects of International Drug Control* (Martinus Nijhoff 1981).

universes’, either through recourse to Article 103 of the Charter of the United Nations,⁴⁷ or through conceptualising human rights law as a “normative counterweight” to those harmful aspects of the international legal regime of drug control’.⁴⁸ However, despite their value in advancing discourse on this question, these proposals remain either unsatisfactory or incomplete attempts to address the complexities of treaty interpretation in this context. Other attempts have been made in the public international law literature to grapple with these questions in the context of a single case.⁴⁹ However, such case studies are, by definition, narrow in focus, making them of little general use in assessing broader interpretive questions between the two regimes. As a consequence, the issue of treaty interpretation in the context of human rights and drug control constitutes a significant gap in the literature, one which impedes the development of human rights-based approaches to drug law and policy.

1.2.1 Towards a ‘Fifth Stage’ of Drug Control

This thesis poses the question of how the international law of drug control should be interpreted within the context of international human rights law. It will examine the interplay between the fourth stage of international drug control law and the concomitant development

⁴⁷ See, for example, Damon Barrett, Rick Lines, Rebecca Schleifer, Richard Elliott, and Dave Bewley-Taylor, ‘Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy’ (Beckley Foundation Drug Policy Programme 2008) 1.; Rick Lines and Richard Elliott, ‘Injecting Drugs into Human Rights Advocacy’ (2007) 18 *International Journal of Drug Policy* 453, 455.

⁴⁸ Richard Elliott, Joanne Csete, Evan Wood and Thomas Kerr, ‘Harm reduction, HIV/AIDS, and the human rights challenge to global drug control policy’ (2005) 8/2 *Health and Human Rights* 104, 121.

⁴⁹ Sven Pfeiffer, ‘Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing’ (2013) 5/1 *Goettingen Journal of International Law* 287.

of the regime of international human rights law during the same period. Tracing the evolution of international drug control law since 1909, it will explore the historic tensions within the regime between its often stated humanitarian aspirations on the one hand, and its drive to suppress a common human behaviour as a form of ‘evil’ on the other. Drawing from this history, it will explore the object and purpose of the United Nations drug treaties, and adopt a teleological approach to the question of treaty interpretation. Building upon this approach, as well as those of the International Court of Justice and of international human rights courts and treaty bodies, it will make the case that international drug control law must be interpreted in an evolutive or dynamic fashion that considers treaty obligations in light of present day conditions and developments in international law. In doing so, this thesis posits the development of what it calls a ‘fifth stage’ of drug control, a dynamic, human rights-based interpretative approach emerging from the engagement between the two regimes. Drawing upon illustrative examples from the jurisprudence or proceedings of domestic, regional and international legal bodies, it concludes by exploring basic principles for resolving tensions and conflicts between the two regimes in a manner that safeguards human rights.

1.3 Overview of this Thesis

Chapter two reviews the evolution of the international law of drug control through the ‘three stages’ described by Wright, with a particular focus on the treaties and supervisory organs that define the fourth stage United Nations regime. Beginning with the findings of the Shanghai Opium Commission of 1909 and the subsequent adoption of the International Opium Convention in 1912, it traces the normative development of the drug control regime through the League of Nations period and into the United Nations era. Not intended as a

detailed historical or legal analysis, it instead reviews the normative evolution of the regime in broad terms, focussing on key developments in structure and law, and providing a context to the challenges of defining a ‘fifth stage’ of international drug control that will be explored later.

Following from the legal development of the modern drug treaties, chapter three explores the two related yet ultimately contradictory paradigms that have historically defined the evolution of the international drug control regime. The first is that ‘addiction’ to drugs is a form of ‘evil’ constituting a threat not only to individuals but to the fabric of society as a whole, creating a moral obligation on States to suppress drug cultivation, manufacturing, trafficking and use. The second is that coordinated international drug control activities, which by definition are morally demanded to fight this ‘evil’, represent a collective humanitarian mission by the international community. The interplay between these paradigms creates and perpetuates an atmosphere of human rights risk, in which the global cause of drug control is framed in a manner in which abusive practices and policies are not only considered necessary, but are morally justified by the righteousness of the humanitarian end goal itself.

Chapter four begins an exploration of consequences of these conflicting paradigms, namely the human rights violations related to drug control and enforcement emerging during the United Nations era. Drug control’s fourth stage has three main elements distinguishing it from its predecessors. The first two are the increased international obligations to use penal sanctions as tools of drug suppression, and near universal ratification of the regime itself, resulting in this penal approach becoming domestic law in almost every country of the world. However, this increasingly punitive and universal approach to drug enforcement sits

uncomfortably alongside the third unique element of this fourth stage: the fact that the United Nations drug control regime has developed in parallel to an increasingly robust system of international human rights treaty law. Using several case studies, the chapter illustrates the often strained nature of the relationship between these two legal regimes, highlighting examples of tensions and conflicts between the obligations within the two systems.

Building from the examples of regime tensions and conflicts examined in chapter four, chapter five begins an exploration of the challenges of treaty interpretation within the context of international drug control law. Using guidance provided within the Vienna Convention on the Law of Treaties, as well as other legal and historical sources, the chapter examines the object and purpose of the international law of drug control, which will be critical to later questions of treaty interpretation and adjudication of regime conflicts. It adopts an approach that considers the object and purpose as a single term, yet one embodying two separate concepts. The first of these concepts is the immediate or utilitarian object and purpose of the treaty, which chapter five concludes is to limit controlled drugs to medical and scientific purposes. The second concept is the ultimate goal or *telos* of the treaty, the state of affairs the treaty hopes to achieve. Chapter five concludes that this *telos* is to promote the health and welfare of humankind.

Chapter six examines the question of treaty interpretation. Exploring various interpretive approaches, and drawing on both the object and purpose identified in chapter five as well as the jurisprudence of the International Court of Justice, it makes the case that a teleological approach, often described as ‘dynamic’ or ‘evolutive’ interpretation, is the most appropriate to apply in this context, particularly in instances where drug control activities engage human

rights obligations. Furthermore, it makes the case that this evolutive interpretation must be driven by human rights considerations, and at minimum be consistent with, and at best advance, core human rights principles and obligations.

Having proposed the development of a dynamic, human rights-based approach to treaty interpretation, chapter seven considers where such a process should take place, and how it might be applied. In short, what might a ‘fifth stage’ of international drug control law look like in practice. It reviews the key international and domestic fora through which a dynamic interpretation of drug control law might take place. It also considers how a dynamic human rights-based interpretation of international drug control law might proceed, using illustrative examples from domestic, regional and United Nations case law, offering guidance on resolving regime tensions and conflicts in a manner that promotes human rights.

Chapter Two - The 'Fourth Stage' of Drug Control:

Development, Structure and Law

2.1 Introduction

This chapter will review the evolution of international drug control through the 'three stages' described by Wright, with a particular focus on the treaties and supervisory organs that define the 'fourth stage' United Nations regime. It is not intended as a comprehensive historical or legal analysis of the development of drug control under the League of Nations and the UN, as this work has been done by others.⁵⁰ Rather, this chapter seeks to review the historical and normative evolution of the regime in broad terms, focussing on key developments in structure and law, and provide a context to the challenges in defining a 'fifth stage' of international drug control that will be explored later.

As described in 1957 by the former Chief of the League of Nations Drug Control Service, the international drug control regime 'represent[s] the first concerted attempt by governments to regulate a single industry throughout the world, from the point at which the raw materials enter the international trade to the point at which they finally reach the legitimate consumer....Nothing similar or as far-reaching in international cooperation has ever been attempted.'⁵¹ To pursue this goal, international drug control law established a system of

⁵⁰ See Bertil A Renborg, *International Drug Control: A Study of International Administration by and Through the League of Nations* (Carnegie Endowment for Peace 1947).; Chatterjee (n 46).; Boister, *Penal Aspects* (n 46).

⁵¹ Bertil A Renborg, 'International Control of Narcotics' (1957) 22 *Law and Contemporary Problems* 86, 110.

indirect control, under which multilateral treaties define the laws and administrative practices that States are required to implement within their own territories, as well as creating supervisory organs to monitor and assist State progress in fulfilling these obligations.

Although the modern regime of international drug control law has evolved over the course of one hundred years, the functional aspects of the commodity control system were established at an early stage. These primarily include (a) internal domestic controls limiting distribution and consumption to medical and scientific needs, (b) controls on international trade, and (c) international limitations on domestic manufacturing. However, as the regime developed in the United Nations era, an important second element emerged alongside the commodity control function of the regime: the use of strict domestic penal sanctions to suppress illicit production, manufacturing, trafficking and possession. Indeed, as drug control's fourth stage progressed, the regime increasingly became defined as a system of law enforcement and penal sanction, rather than as a system of commodity control. Although both elements of the system have potential human rights implications, it has been the emergence and expansion of the penalisation regime, implemented in the context of the system of indirect control allowing States wide latitude to pursue the general aim of drug suppression, that has fueled most of the human rights abuses related to drug control documented around the world in the modern era.

2.2 Early Development of the Multilateral Regime

Prior to the twentieth century, drug control was seen as primarily a domestic concern, and the earliest attempts at suppressing opium during the first stage of drug control in the 18th and 19th centuries were primarily national or bilateral in scope. However, at the dawn of the new

century, it ‘became apparent that the problem would have to be treated on a universal basis’.⁵² Popular agitation for international action on ‘the opium question’ had been growing in the United States,⁵³ and Chatterjee notes that ‘[b]y coincidence, the anti-opium movement started at a time when the idea of internationalism itself was gaining momentum’.⁵⁴ The existence of large and well financed domestic opposition movements to other ‘moral vices’, such as alcohol consumption and ‘white slavery’, also meant that the anti-opium cause found itself in a receptive political environment, and attracted the attention of both the U.S. President and Secretary of State.⁵⁵ Boister notes that a mix of ‘international morality shaped by the anti-opium lobby consisting of missionaries, anti-opium societies and welfare organisations’ coupled with the ‘foreign policy and commercial imperatives’ of the United States were central to driving this early stage of drug control.⁵⁶ The anti-opium movement fit neatly with broader U.S. foreign policy and trade objectives at the time, and in particular provided a strategic opportunity to expand political and economic ties with China while isolating Great Britain, which had a long and controversial history of exporting opium to the country.⁵⁷ Beginning in 1773, the British East India Company had enjoyed a monopoly trade in opium,⁵⁸ and attempts by China to stop British opium imports resulted in two Opium Wars

⁵² Robert W Gregg, ‘The Single Convention for Narcotic Drugs’ (1961) 16/4 Food, Drugs and Cosmetic Law Journal 187, 189.

⁵³ Charles I Bevans, ‘International Conventions in the Field of Narcotic Drugs’ (1963-1964) 37 Temple Law Quarterly 41, 41.

⁵⁴ Chatterjee (n 46) 20.

⁵⁵ Norman Ansley, ‘International Efforts to Control Narcotics’ (1959-1960) 50 Journal of Criminal Law and Criminology 105, 106.

⁵⁶ Boister, ‘Interrelationship’ (n 15) 907.

⁵⁷ David R Bewley-Taylor, *The United States and International Drug Control, 1909-1997* (Continuum 1999) 18-19.

⁵⁸ Hepburn (n 3) 321.

being fought between them in the mid-1800s.⁵⁹ The combination of these factors resulted in the initiative of the United States to convene the first international conference to ‘study...the opium problem throughout the world’.⁶⁰ The International Opium Commission, comprised of thirteen States representing major opium producing and consuming nations of the day, met in February 1909.⁶¹ This meeting represented the first truly international initiative on opium suppression, and marks the beginning of what Wright terms the second stage of drug control, the early multilateral era.⁶²

As a commission of inquiry, the conference was mandated to make recommendations rather than produce law. After four weeks of deliberation, the Opium Commission agreed nine unanimous Resolutions, which have been described as ‘the foundation of today’s world-wide drug control effort’.⁶³ In the process, the Commission proposed the creation of two new obligations of international law. The first, under Resolution 4, was that it was ‘the duty of all countries to adopt reasonable measures to prevent at ports of departure the shipment of opium, its alkaloids, derivatives and preparations, to any country which prohibits the entry of any opium, its alkaloids, derivatives and preparations’.⁶⁴ Chatterjee states that ‘[t]he word

⁵⁹ Dikotter, Laamann and Zhou (n 4) chap 3.

⁶⁰ Hamilton Wright, ‘The International Opium Commission, Part 1’ (1909) 3/3 *American Journal of International Law* 648, 648.

⁶¹ The states represented were Austria-Hungary, China, France, Germany, Great Britain, Italy, Japan, The Netherlands, Persia, Portugal, Russia, Siam and the United States.

⁶² Wright, ‘The Opium Question’ (n 1) 283.

⁶³ John J Cohrerssen and Lawrence H Hoover, ‘The International Control of Dangerous Drugs’ (1974) 9 *The Journal of International Law and Economics* 63, 81.

⁶⁴ International Opium Commission, ‘Report of the International Opium Commission: Vol. I - Report of the Proceedings’ (North-China Daily News & Herald Ltd 1909) 84.

“duty” in this resolution denotes “obligation”⁶⁵. The second, in Resolution 5, ‘urge[d] strongly on all governments that it is highly important that drastic measures should be taken by each government in its own territories and possessions to control the manufacture, sale and distribution of this drugs, and also of such other derivatives of opium as may appear on scientific inquiry to be liable to similar abuse and productive of like ill effects’⁶⁶. In effect, these two resolutions established the principles that the control and suppression of drugs were both the ‘duty’ of individual states and the shared responsibility of the international community. As described in an editorial of the American Journal of International Law at the time, ‘by the joint action of the interested governments the opium problem had been raised from a national to an international plane’⁶⁷, in the process reframing drug control efforts from being primarily a domestic concern to a shared global responsibility. The recommendations also broadly described the approach to internal and external commodity controls that would underpin the international legal regime for the next century.

These non-binding Resolutions were given the force of international law three years later when, following a proposal of the U.S., these same thirteen governments convened a second International Opium Commission in May 1911 at The Hague in order to incorporate the recommendations into an international treaty. The resulting International Opium Convention, the first multilateral treaty on drug control, was adopted the following year on 23 January

⁶⁵ Chatterjee (n 46) 38.

⁶⁶ International Opium Commission (n 64) 84.

⁶⁷ ‘The International Opium Conference’ (1911) 5/2 American Journal of International Law 466, 466.

1912.⁶⁸ As described by Bevens, the Hague Convention ‘embodied a number of general principles that have remained the foundation and mainspring of all drug control’.⁶⁹

Import or export was to be made only by duly authorized persons. Exportation to countries prohibiting the import of raw opium was to be prevented and export to countries which desired to limit its import was required to conform to the regulations of such countries. The manufacture, internal traffic, and use of prepared opium were to be gradually suppressed, and imports and exports were to be prohibited. The manufacture, sale, and use of morphine, cocaine, and their derivatives, were to be controlled and limited to medicinal and other legitimate uses only. Legal and statistical information was to be exchanged by the parties.⁷⁰

The new Convention contained six chapters and twenty-five articles. The ratification process of the new treaty was slow, as many States were reluctant to voluntarily submit to the new regime. The process all but ground to a halt with the advent of the first World War in 1914.⁷¹ A major step towards expanding the regime was made at the end of the war, however, when the victorious powers inserted Article 295 into the Treaty of Versailles. This article committed all High Contracting Parties who were not already parties to the Opium Convention to ratify it within one year, and specified that the signing of the Treaty of Versailles would itself ‘be deemed in all respects equivalent to the ratification of the Convention and to the signature of the Special Protocol...for bringing the said Convention into force’.⁷² Similar clauses were also inserted into the other peace treaties at the conclusion of the war.⁷³

⁶⁸ 1912 Convention (n 40).

⁶⁹ Bevens (n 53) 43.

⁷⁰ *ibid.*

⁷¹ Renborg, ‘International Control of Narcotics’ (n 51) 86.

⁷² Peace Treaty of Versailles (n 9) art 295.

⁷³ Lande (n 10) 396.

2.3 The League of Nations Era and an Enhanced System of Control

The third stage of drug control, as described by Wright, begins with the foundation of the League of Nations in 1920. One of the shortcomings observed of the 1912 Opium Convention was that it established no permanent structures through which drug control efforts could be progressed and monitored.⁷⁴ Governments sought to rectify this within the League of Nations, and the period is marked by an increased commitment to international cooperation in drug control, and the creation of a ‘permanent international control machinery’.⁷⁵ This increased commitment is reflected in the foundational document of the organisation, the Covenant of the League of Nations, Article 23(c) of which ‘intrust[s] the League with general supervision over the execution of agreements with regard to traffic in...opium and other dangerous drugs’.⁷⁶ Later, this third stage sees the expansion of multilateral drug control efforts, including the creation of an Advisory Committee on the Traffic in Opium and Other Dangerous Drugs by the Council of the League of Nations, the adoption of new resolutions and a growing number of States entering into the regime. It is also marked by the adoption of new treaties that expanded the scope of international legal obligations in this area, and the creation of new control organs, which would later come to form the foundations of the United Nations regime. As characterised by one State

⁷⁴ Quincy Wright, ‘The Opium Conferences’ (1925) 19/3 American Journal of International Law 559, 561.

⁷⁵ May (n 7) 497.

⁷⁶ Covenant (n 12) art 23(c).

representative in 1925, ‘the drug question has entered upon a new period. It is now caught in the day-to-day machinery of the League of Nations. It cannot escape.’⁷⁷

In the two decades following the foundation of the League, three major and two minor drug treaties were adopted. In describing the progress of the legal regime during this period, Renborg explains that,

The League of Nations could not advance quicker or further [on drugs] than governments and public opinion were prepared to go. And they were not prepared to go the whole way at once...The League had to proceed slowly and gradually, attacking the most important problems first. The various important steps were marked by different conventions concluded one after the other.⁷⁸

The first of the major treaties was the 1925 International Opium Convention,⁷⁹ which in effect implemented the proposals put forward in Resolution 4 of the International Opium Commission in 1909.⁸⁰ Although this Convention established some greater domestic controls on the manufacture, sale and transport of drugs than those found in the 1912 opium treaty,⁸¹ its primary contribution to international drug control law was to create systems to regulate international trade in controlled substances. This included requiring mandatory government import and export authorisation certificates for all international transactions of drugs covered within the treaty,⁸² a development ‘[p]redicated on the assumption that it would be much

⁷⁷ M Zahle of Denmark, cited in Wright, ‘The Opium Conferences’ (n 74) 561.

⁷⁸ Bertil A Renborg, ‘Principles of International Control of Narcotics’ (1943) 37 *American Journal of International Law* 436, 437.

⁷⁹ 1925 Convention (n 14).

⁸⁰ Chatterjee (n 46) 38.

⁸¹ 1925 Convention (n 14) chap III.

⁸² *ibid* chap V.

more difficult to misuse narcotics if each act of importation and exportation were subject to government approval'.⁸³ The 1925 Convention also established a process allowing the scope of international drug control to evolve, based upon advances in medical and scientific knowledge. Through this process, new substances could be included within the treaty, or currently controlled substances removed, based upon the recommendation of the Health Committee of the League of Nations, and an assessment of whether the drug in question was 'liable to similar abuse and productive of similar ill-effects' as other drugs in the treaty.⁸⁴

Perhaps the most significant element in terms of the development of the regime as a whole was the establishment of the Permanent Central Board (also referred to as the Permanent Central Opium Board) as a new supervisory organ, comprised of eight independent experts.⁸⁵ The Board was empowered to oversee a new system of 'estimates', under which each Contracting Party was required to submit 'estimates of the quantities of each of the substances covered by the Convention to be imported into their territory for internal consumption during the following year for medical, scientific and other purposes'.⁸⁶ Parties to the Convention were also obligated to submit statistics on domestic production of raw materials (for example, raw opium or coca leaves), domestic manufacture and consumption of substances covered by the treaty and a report stocks on hand.⁸⁷ In addition to this data collection function, the Board was bestowed with powers of enforcement. If, based on the statistical data collected, the Board suspected that a State was producing or importing drugs

⁸³ Gregg (n 52) 190.

⁸⁴ 1925 Convention (n 14) arts 8, 10.

⁸⁵ *ibid* art 19.

⁸⁶ *ibid* art 21.

⁸⁷ *ibid* art 22.

in excess of its estimated legitimate consumption requirements, and that therefore there was ‘a danger of the country becoming a centre of...illicit traffic’, the Board was empowered to take actions of varying severity, from requesting additional information of the Government in question, to raising concerns to the Council of the League of Nations to even recommending an international embargo on further exports to the offending State.⁸⁸

With new controls and regulations established on international trade in controlled drugs, the next step taken by the League was to create a system to limit the levels of international manufacturing of drugs strictly to that necessary for medical and scientific purposes. Following a similar logic to that underpinning the 1925 Convention, it was considered that controlling production solely to that needed for ‘legitimate’ need would limit the amount of drugs being diverted into illicit markets. As described by the U.S. Department of State at the time, ‘It is foreign overproduction, *i.e.*, total production over and above the amount needed for medical and scientific purposes, which supplies the illicit international traffic.’⁸⁹ To this end, the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs was adopted in Geneva on 13 July 1931.⁹⁰ This treaty operationalised the restrictions on production and manufacture found in the International Opium Commission’s Resolution 5.⁹¹ Like the 1925 Convention, the controls in the 1931 Convention were based around a system of estimates of domestic consumption of drugs for medical and scientific

⁸⁸ *ibid* art 24.

⁸⁹ United States Department of State Press Release, 15 July 1933. Cited in Quincy Wright, ‘The Narcotics Convention of 1931’ (1934) 28 *American Journal of International Law* 475, 477.

⁹⁰ 1931 Convention (n 14).

⁹¹ Chatterjee (n 46) 38.

purposes.⁹² However, unlike the non-binding estimates system established in 1925 Convention, ‘under the 1931 Convention estimates were required for total consumption and were binding’.⁹³ The Convention also created a second international control organ, a Supervisory Body (often called the Drug Supervisory Body) under Article 5.⁹⁴ A critical new feature of the approach of the Convention was that ‘[l]imitation could never be effective if there were parts of the world to which the estimate system did not apply’, and therefore that drug control must be universal in application in order to be successful.⁹⁵ To address this, Article 2 of the Convention instructed that the Permanent Central Board ‘shall request estimates for countries and territories to which this Convention does not apply’,⁹⁶ in other words from non-Parties to the treaty. According to Renborg, this represented ‘a rather unusual feature which is a novelty in international legislation. Non parties to a convention are requested to perform a certain act although they have not undertaken an obligation to do so.’⁹⁷ The 1931 Convention went beyond merely requesting information from non-Parties. It also created a mechanism subjecting all States to the controls within the treaty, whether they had ratified the instrument or not. This power was found in Article 2, and mandated that in cases where States or territories failed to provide voluntary estimates to the Permanent Central Board, ‘the Supervisory Body shall itself, as far as possible, make the estimate’.⁹⁸ Estimates carried equal legal authority, whether they were submitted voluntarily by a State or

⁹² 1931 Convention (n 14) art 4(7).

⁹³ Bevens (n 53) 46.

⁹⁴ 1931 Convention (n 14) art 5.

⁹⁵ Renborg, ‘Principles of International Control of Narcotics’ (n 78) 438.

⁹⁶ 1931 Convention (n 14) art 2(3).

⁹⁷ Renborg, ‘Principles of International Control of Narcotics’ (n 78) 438.

⁹⁸ 1931 Convention (n 14) art 2(3).

were produced independently by the Supervisory Body. They were also equally binding on the treaty obligations of other States, as the estimates would be the basis for authorising importing/exporting controlled drugs to/from other Parties to the treaty. As a consequence, ‘non-parties, who have accepted no obligations whatsoever, are nevertheless limited in their drug supplies by the estimates made by the Supervisory Body’.⁹⁹ This development was described by Renborg as being ‘probably the most radical feature of the convention’.¹⁰⁰ The Convention also increased the powers of the Permanent Central Board in this regard. Under the 1925 Convention, the power to impose an import/export embargo on an offending State was vested in the Council of the League of Nations, with the Board only having the authority to recommend an embargo for the Council to consider.¹⁰¹ Under Article 14 of the 1931 Convention, however, the Board was given power to directly impose an embargo itself, without requiring the Council’s approval, and to communicate this decision directly with the High Contracting Parties.¹⁰²

The 1925 and 1931 Conventions defined a normative framework that reflected Resolutions 4 and 5 of the International Opium Commission in 1909, and as such represented significant developments in international drug control law, both in terms of State obligations and the scope of international supervisory bodies. Taken together, the treaties establish the principles and control measures that still define the commodity control pillar of the regime today.

However, as described by Boister, one of the outcomes of codifying a system for limiting the manufacture and trade in drugs to medical and scientific purposes was that it ‘marked the line

⁹⁹ Renborg, ‘Principles of International Control of Narcotics’ (n 78) 439.

¹⁰⁰ *ibid.*

¹⁰¹ 1925 Convention (n 14) art 24.

¹⁰² 1931 Convention (n 14) art 14(2).

between licit and illicit traffic, thus inviting the international community to endeavour to suppress the illicit traffic'.¹⁰³ This created the impetus for the development of a new convention, one establishing State obligations to strengthen the severity of penal sanctions within domestic criminal law, leading to the third and final major drug convention of the League of Nations era,¹⁰⁴ the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs.¹⁰⁵ Prior to the 1936 convention, few provisions within the previous instruments dealt with the question of the domestic criminal laws of Contracting Parties,¹⁰⁶ and the 1936 treaty was the source of many of the penal approaches that underpin the punitive approach of the modern 'war on drugs', in essence making illicit drug trafficking a crime under international law. The preamble states that the objective of the convention is 'to strengthen the measures intended to penalise offences contrary to the provisions' of the previous drug treaties, and 'to combat by the methods most effective in the present circumstances the illicit traffic in the drugs and substances covered by the...Conventions'.¹⁰⁷ To pursue these outcomes, the convention obligated Contracting Parties to enact a strict, penal-focussed approach to drugs within their domestic legislation, with a view towards increasing the severity of punishments for drug offences, and harmonising national criminal laws related to drugs in much the same way the previous conventions harmonised domestic

¹⁰³ Boister, *Penal Aspects* (n 46) 32-33.

¹⁰⁴ Two additional drug control instruments were also adopted under the League, the Agreements of 1925 and 1931 for the Suppression of Opium Smoking, which were intended to accomplish the gradual elimination of opium smoking in various Asian countries and territories. Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium, (signed 11 February 1925) 51 LNTS 337.; Agreement concerning the Suppression of Opium Smoking, (signed 27 November 1931) 177 LNTS 375.

¹⁰⁵ 1936 Convention (n 14).

¹⁰⁶ Boister, *Penal Aspects* (n 46) 32.

¹⁰⁷ 1936 Convention (n 14) preamble.

administration and control practices. Article 2 created an obligation ‘to make the necessary legislative provisions for severely punishing, particularly by imprisonment or other penalties of deprivation of liberty’ of a wide range of acts including the manufacture, possession, distribution, purchase and sale, transport, import and export of illicit drugs, as well as participation in such offences or conspiracy to commit them.¹⁰⁸ The Convention also included provisions on extradition,¹⁰⁹ and mandated the creation of centralised police offices ‘for the supervision and co-ordination of all operations necessary’¹¹⁰ to prevent or prosecute the offences enumerated under Article 2. However, few States ratified the treaty, and the 1936 convention was largely seen as a failure, as ‘many states with negligible or nonexistent illicit narcotic drug traffic have not felt it incumbent on them to ratify a convention that would involve them in complicated legislation and administrative measures’.¹¹¹

2.4 The United Nations Era: The ‘Fourth Stage’ of Drug Control

The advent of the second World War had a significant impact on the international drug control machinery. Although the League of Nations drug supervisory bodies continued to function, in reality the regime had largely broken down as a result of the hostilities.¹¹² The Permanent Central Board and the drug Supervisory Body continued to operate, although in many cases national mechanisms ceased to function, and the Advisory Committee on Traffic

¹⁰⁸ *ibid* art 2.

¹⁰⁹ *ibid* arts 7-9.

¹¹⁰ *ibid* art 11.

¹¹¹ Renborg, ‘International Control of Narcotics’ (n 51) 102.

¹¹² Boister, *Penal Aspects* (n 46) 40.

in Opium and other Dangerous Drugs did not meet after 1940.¹¹³ Therefore, one of the first tasks of the newly formed United Nations was to re-establish the international systems of control that had deteriorated or collapsed during the war.

2.4.1 International Drug Control, from Covenant to Charter

As described above, the Covenant of the League of Nations specifically invested the organisation with a drug control mandate under Article 23(c).¹¹⁴ When the Charter of the United Nations was drafted in 1945, this specific reference to drug control was not included. However, it would be incorrect to assume that the elimination of specific reference to drugs in the Charter represented, or was intended by States to be, a weakening of the mandate of the new UN organisation in the area drug control. In fact the opposite was the case, as this choice of language did not represent a fundamental shift away from the international community's concern for drug control, nor of the central role of international organisations in that effort. Rather, it reflected what was largely seen as the 'unsatisfactory' ability of the League to coordinate international activities on drugs and other areas of social and economic cooperation that encouraged the desire for stronger mechanisms under the United Nations.¹¹⁵

¹¹³ May (n 7) 503-504.

¹¹⁴ Covenant (n 12) art 23 (c).

¹¹⁵ Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford University Press 1994) 761.; See also, for example, comments of the South African and Canadian delegates to the San Francisco Conference. 'Documents of the United Nations Conference on International Organization, San Francisco, 1945', Vol III 'Dumbarton Oaks Proposals, Comments and Proposed Amendments', United Nations Information Organizations, 1945 vol 8, 52-53, vol 10, 21 (Official Records San Francisco).

To address these concerns, the Charter adopted language allowing for a new, more rigorous and robust system of international oversight and control of drugs to be put in place.

The UN Charter effectively takes the old Article 23 of the Covenant and expands it into six more detailed provisions, Articles 55—60 under Chapter IX,¹¹⁶ with the result that the specific activity areas identified under Article 23 were subsumed in the more general language of ‘international economic, social, health and related problems’ under Article 55.¹¹⁷ This did not represent a shift in concept or content, as under the Covenant drug control was already included within a subset of bilateral and multilateral activities that could be described as relating to social, health and economic needs. Article 23 was not solely concerned with the control of narcotics, but more broadly addressed the improvement of the social and economic welfare of the populations of Member States. For example, in addition to clause (c) on drugs, other clauses addressed issues including fair and humane labour standards,¹¹⁸ just treatment of aboriginal peoples,¹¹⁹ preventing trafficking of women and children,¹²⁰ arms control¹²¹, commerce¹²² and public health.¹²³ In essence, the UN Charter does not remove drug control as a matter of international concern, but rather enshrines a more flexible

¹¹⁶ See, A Walter Dorn, ‘The League Covenant and the UN Charter: A side-by side (full text) comparison’ (12 May 2008) Royal Military College of Canada.

¹¹⁷ Charter of the United Nations (24 October 1945) 1 UNTS XVI, art 55(b) (Charter).

¹¹⁸ Covenant (n 12) art 23(a).

¹¹⁹ *ibid* art 23(b).

¹²⁰ *ibid* art 23(c).

¹²¹ *ibid* art 23(d).

¹²² *ibid* art 23(e).

¹²³ *ibid* art 23(f).

formulation of wording that allows not only for the inclusion of drug control, but also for new and additional areas, as deemed necessary over time by the General Assembly. Indeed, in 1959 the General Assembly specifically recognised that the UN ‘exercises responsibilities in the field of narcotic drugs’ under Chapter IX of the Charter.¹²⁴

Furthermore, the operational language of Article 23 of the Covenant did little more than mandate States to abide by the terms of existing international instruments, requiring only that Members act ‘in accordance with the provisions of international conventions existing or hereafter to be agreed upon’.¹²⁵ As such, the Covenant created no new obligations towards drug control, other than symbolising the particular significance attributed by the League to this and other identified areas of social and economic activity, and encouraging Members to meet their treaty obligations in this regard. Indeed, when the inclusion of a clause on narcotics control was proposed by the British delegation, there was specific agreement among the High Contracting Parties that naming these areas of activity in the Covenant would not create legal obligations upon the States that had not ratified the relevant treaties.¹²⁶ The British delegation’s minutes of the meeting note that ‘President Wilson replied that their only obligation would be to see to it that subscribing States kept their obligations thereunder’.¹²⁷ Therefore, the clause on drugs had little or no binding legal significance, as it created no new obligations for Member States, whether or not they were party to the relevant drug conventions. It also did not create any new supervisory bodies under the League as an

¹²⁴ UN General Assembly, ‘Technical assistance in narcotics control’ (20 November 1959) UN Doc No A/RES/1395(XIV), para 1.

¹²⁵ Covenant (n 12) art 23.

¹²⁶ David Hunter Miller, *The Drafting of the Covenant*, vol. I (GP Putnam’s Sons 1928) 339-341.

¹²⁷ *ibid* 341.

organisation. As noted by Simma, the Covenant ‘did not establish a connection between the promotion of...social well-being and the maintenance of international peace and security; consequently it did not provide the League of Nations with the machinery necessary for dealing with social and economic matters.’¹²⁸

The UN Charter, however, commits that ‘[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55’.¹²⁹ In this context, article 57 establishes a mechanism allowing the UN to create ‘specialized agencies’ with ‘wide international responsibilities’ to deal with the economic, health and social matters identified by the Organization,¹³⁰ these 'specialized agencies' to fall under the authority of the newly created Economic and Social Council.¹³¹ These Charter provisions are a reflection of the proposals that emerged from the 1944 Washington Conversations on International Peace and Security Organization, known as the ‘Dumbarton Oaks Proposals’, where the major powers agreed the framework for a new international organisation to take the place of the League. Part of that new framework was agreement that ‘solutions of international economic, social and other humanitarian problems and promot[ing] respect for human rights and fundamental freedoms’ was necessary for ‘the creation of conditions of stability and well-being which are necessary for peaceful and

¹²⁸ Simma (n 115) 760.

¹²⁹ Charter (n 117) art 56

¹³⁰ *ibid* art 57.

¹³¹ *ibid* art 60.

friendly relations among nations'.¹³² In order to promote these aims, the Washington Conference proposed the creation of 'specialized economic, social and other organizations and agencies that would have responsibilities in their respective fields',¹³³ a proposal that was directly incorporated into the Charter.

Despite the existence of four major, and two minor, multilateral drug control treaties at the time of the San Francisco Conference, and the specific mention of drug control efforts within the Covenant, there was surprisingly little discussion of drugs during the drafting of the Charter. While Mexico proposed a list of twelve specific areas in which the Economic and Social Council should establish 'permanent organizations', drug control was not included among them.¹³⁴ The drafting committee did however, by unanimous vote, accept a proposal that the language of the draft Article 'includes international traffic in, and abuse of, opium and other narcotics and dangerous drugs',¹³⁵ a decision that was also reflected in the Rapporteur's report of the drafting committee's proceedings.¹³⁶ The specific discussion of drug control in this context appears to have been pushed most vigorously by the United

¹³² 'Washington Conversations on International Peace and Security Organization. October 7, 1944', chap IX, para 1 in *Pamphlet No. 4, Pillars of Peace: Documents Pertaining To American Interest In Establishing A Lasting World Peace: January 1941-February 1946* (Book Department, Army Information School 1946) 45.

¹³³ *ibid* chap IX, para 2.

¹³⁴ The subject areas proposed by Mexico were Protection of the International Rights of Man; Progress in international economy and commerce; Furtherance and coordination of land, sea, and air communications; Improvement of working conditions and abolition of unemployment; Nutrition and health; Agriculture; Financial and investment problems; Demographic and migration problems; Intellectual cooperation; Child welfare; Protection of countries under mandate; White slavery. 'Official Records San Francisco, Vol. 10' (n 115) 310-11.

¹³⁵ *ibid* 127-128, 390.

¹³⁶ Official Records San Francisco (n 115) vol 8, 81.

States, which issued the only specific document on drug control during the Conference, stating that ‘drug control raises issues that can best be met not by an international health, economic and social agency’ but instead by ‘specialized agencies’.¹³⁷ It proposed that the new international organisation ‘be entrusted with supervision over the execution of existing or future international agreements’ related to drugs, and that there ‘be established an advisory body to advise directly the Economic and Social Council in these matters.’¹³⁸ The U.S. statement received support from China, Canada and India.¹³⁹

Therefore, the new structures created under the Charter reflect not a retreat from a prioritisation of drug control, but rather an evolution in the scope of international cooperation and collaboration on social, health and economic issues. In 1946, the first sessions of both the General Assembly¹⁴⁰ and the Economic and Social Council¹⁴¹ considered resolutions to incorporate the League’s drug control instruments under UN authority, a fact suggesting the importance placed upon the issue had not diminished. In fact, the adoption of the UN Charter represents a significant evolution of the normative nature of international drug control. Under Article 1 of the Charter, which sets out the four purposes of the United Nations, paragraph three states that a purpose of the organisation is , ‘[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character,

¹³⁷ *ibid* 98-99, ‘Statement by the United States Delegation on the Control of Dangerous Drugs’.

¹³⁸ *ibid*.

¹³⁹ Official Records San Francisco (n 115) vol 10, 197.

¹⁴⁰ UN General Assembly, ‘Transfer to the United Nations of powers exercised by the League of Nations under the International Agreements, Conventions and Protocols on Narcotic Drugs’ (19 November 1946) UN Doc No A/RES/54(1).

¹⁴¹ UN Economic and Social Council, ‘ECOSOC Official Records, No. 2’ (First Year Third Session, 12 and 17 September 1946) 28.

and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.¹⁴² The drafters regarded Article 55 as a reinforcing and implementing provision for Article 1, in particular Articles 1(2) and 1(3).¹⁴³ Simma refers to Articles 55 and 56 as the 'operative parts of the Charter to which Art. 1(3) refer'.¹⁴⁴ Significantly, Article 55 states that promoting 'solutions of international economic, social, health, and related problems' as well as 'universal respect for, and observance of, human rights and fundamental freedoms' are 'necessary' for 'the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.¹⁴⁵ The Charter of the United Nations therefore established the framework for the creation of the legal and administrative tools necessary to enable the new organisation to take a more robust approach to international drug control than was previously possible. The next section will explore the development of the modern, fourth stage, drug control regime that developed under the UN system.

2.4.2 The United Nations Treaty Regime

2.4.2.1 The Pre-Treaty Period: Protocols of 1946, 1948 and 1953

¹⁴² Charter (n 117) art 1(3).

¹⁴³ Simma (n 115) 760, 762.

¹⁴⁴ *ibid* 53.

¹⁴⁵ Charter (n 117) art 55.

Under the League of Nations, the development of the international legal regime on drugs had ‘proceed[ed] slowly, step by step’.¹⁴⁶ The pace of this evolution reflected the evolving ‘technical, medical, and social knowledge of the nature of the problem’, the slow nature of international treaty-making processes and the lack of enthusiasm of many States to voluntarily enter the new legal regime.¹⁴⁷ As a result, at the time of the founding of the United Nations, the body of international law addressing drugs consisted of an assortment of instruments built up over the course of thirty years. The task before the United Nations was therefore to incorporate these existing norms into a modern, unified and simplified treaty, supported by the supervisory and technical bodies required to carry out the necessary functions. The work on this objective was begun by the Economic and Social Council in September 1946, which set about to prepare a protocol entitled ‘Transfer to the United Nations of the powers exercised by the League of Nations in connexion with Narcotic Drugs’.¹⁴⁸ The ‘Lake Success Protocol’, as it was known, was adopted by the General Assembly during its first session in November,¹⁴⁹ and served as a model for other UN instruments similarly transferring previous League of Nations powers and functions.¹⁵⁰ Under the protocol, the United Nations assumed supervisory responsibility for all previous conventions and protocols on drugs. Although maintaining the functions of the Permanent Central Board and Supervisory Body, the protocol shifted all other responsibilities to the newly established UN drug control machinery. The role of the Council of the League of

¹⁴⁶ Renborg, ‘International Control of Narcotics’ (n 51) 94.

¹⁴⁷ *ibid.*

¹⁴⁸ UN Economic and Social Council (n 141) 28.

¹⁴⁹ UN General Assembly, ‘Transfer to the United Nations of powers exercised by the League of Nations under the International Agreements, Conventions and Protocols on Narcotic Drugs’ (n 140).

¹⁵⁰ May (n 7) 505.

Nations was taken over by the Economic and Social Council; that of the Advisory Committee on Traffic in Opium and other Dangerous Drugs was taken over by the UN Commission on Narcotic Drugs; that of the Health Committee of the League was taken over by the World Health Organization.¹⁵¹

Two years later in 1948, a second protocol was adopted by the General Assembly. The ‘Paris Protocol’,¹⁵² which entered into force on 1 December 1949,¹⁵³ extended controls to new drugs and precursors not covered by the 1931 convention, in order to address ‘the progress of modern pharmacology and chemistry’, which had ‘resulted in the discovery of drugs, particularly synthetic drugs, capable of producing addiction’.¹⁵⁴ This resulted in twenty new substances coming under international control by 1954,¹⁵⁵ a number that increased to over thirty by 1956.¹⁵⁶ A third protocol was agreed in 1953 on limiting and regulating the cultivation of poppies, and the manufacture and trade in opium.¹⁵⁷ Under the protocol, only

¹⁵¹ Protocol amending the Agreements, Conventional and Protocols on Narcotic Drugs concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936 (19 November 1946) (Lake Success Protocol).

¹⁵² Protocol bringing under international control drugs outside 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 on 11 December 1946 (8 October 1948) (Paris Protocol).

¹⁵³ May (n 7) 516.

¹⁵⁴ Paris Protocol (n 152) preamble.

¹⁵⁵ UN Office on Drugs and Crime, *A Century of International Drug Control* (UN Office on Drugs and Crime 2009) 59.

¹⁵⁶ Ansley (n 55) 110.

¹⁵⁷ Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and use of Opium (23 June 1953).

seven countries were authorised to produce opium for export (Bulgaria, Greece, India, Iran, Turkey, Yugoslavia and the Soviet Union).¹⁵⁸ The protocol also bestowed the Permanent Central Board with with strong regulatory powers.¹⁵⁹ Described by one source as containing ‘the most stringent drug-control provisions that had ever been embodied in international law’,¹⁶⁰ Boister notes that these terms were ‘a more difficult legal pill to swallow and [the protocol] did not enter force until 1962. This lack of enthusiasm can to some extent be explained by the simultaneous development of...the 1961 Single Convention [on Narcotic Drugs]’,¹⁶¹ the first of the UN drug treaties.

2.4.2.2 *The United Nations Drug Conventions*

The need for a new drug convention that would amalgamate the complicated set of instruments agreed over the previous three decades, and also to update and expand the regime to meet contemporary challenges, had been under consideration since the very earliest years of the UN.¹⁶² As described by one observer at the time, ‘[b]ecause they were drafted at different times under different sets of circumstances and ratified by different combinations of states in each case, the several [pre-existing] international agreements amounted to a patchwork of obligations and commitments which was not wholly satisfactory.’¹⁶³ This

¹⁵⁸ *ibid* chap XV. This was later changed under the Single Convention on Narcotic Drugs, 1961.

¹⁵⁹ *ibid* art 6.

¹⁶⁰ UN Office on Drugs and Crime, *A Century of International Drug Control* (n 155) 60.

¹⁶¹ Boister, *Penal Aspects* (n 46) 41.

¹⁶² May (n 7) 518.

¹⁶³ Gregg (n 52) 188.

process was begun in 1948 with a request from the Commission on Narcotic Drugs to the Economic and Social Council to invite the Secretary-General to initiate the drafting.¹⁶⁴ Formal efforts began in 1949, with the objective to ‘simplify and improve the existing international instruments...on narcotic drugs’ as well as to ‘contain provisions for the limitation of the production of raw materials’.¹⁶⁵ The task, therefore, was to bring together the content of the pre-existing international drug control instruments, as well as to address new areas of concern, in one single international instrument (hence the title, the Single Convention).¹⁶⁶

The Single Convention was adopted on 30 March 1961, and entered into force on 13 December 1964.¹⁶⁷ Its fifty-one articles focus primarily on the control of plant-based narcotics: opium, cannabis, cocaine and their derivatives. It enshrines the basic principles of the League of Nations regime, namely that of limiting the availability and use of controlled drugs solely to medical and scientific purposes through administrative controls placed on manufacture, import, export and distribution. The treaty contextualises this mission in the

¹⁶⁴ May (n 7) 519.

¹⁶⁵ HJ Anslinger, ‘Report of Progress in Drafting the “Single Convention”, a Proposed Codification of the Multilateral Treaty Law on Narcotic Drugs’ (1958) 13 Food, Drug, and Cosmetic Law Journal 692, 692.

¹⁶⁶ The Single Convention was intended to replace the following agreements: International Opium Convention 23 Jan 1912 and subsequent protocols; Opium Agreement and Protocol and Final Act 11 Feb 1925; Convention, Protocol and Final Act 19 Feb 1925 and later protocol; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs 13 July 1931; Opium Agreement and Final Act 27 Nov 1931; Convention for the Suppression of Illicit Traffic in Dangerous Drugs 26 June 1936; Protocol to bring under international control drugs outside the scope of the 1932 convention.

¹⁶⁷ Single Convention on Narcotic Drugs, 1961 (30 March 1961) 520 UNTS 151 (1961 Convention).

preamble as being because the Parties are '[c]oncerned with the health and welfare of mankind', because 'adequate provision must be made to ensure the availability of narcotic drugs' for medical purposes and 'the relief of pain and suffering' and because 'addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind' and therefore 'require[s] co-ordinated and universal action'.¹⁶⁸ To pursue these goals, the treaty adopts the approaches developed under the earlier conventions, including that of indirect control, giving States themselves primary responsibility for implementing control measures,¹⁶⁹ and establishes supervisory bodies to monitor progress and treaty implementation. Measures carried forward from the League include the system of import/export authorisation (Article 31), the estimates system (Article 19), licensing regulations (Article 29) and the limitation on manufacturing (Article 21). The Single Convention includes penal provisions under Article 36, obligating that 'each Party shall adopt such measures as will ensure that' a list of offences related to drug cultivation, production, manufacture, possession, distribution, purchase, sale and trafficking 'shall be punishable offences...and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty'.¹⁷⁰ The penal provisions contained in Article 36 represented a compromise position, and were deemed too mild by some States.¹⁷¹ However Bewley-Taylor argues that, in its mandatory penalisation of

¹⁶⁸ *ibid* preamble.

¹⁶⁹ *ibid* art 4.

¹⁷⁰ *ibid* art 36(1)(a).

¹⁷¹ Boister, *Penal Aspects* (n 46) 44.

certain behaviours, based upon a prohibition of drug use, ‘the Single Convention redefined the normative order of the international drug control system’.¹⁷²

The Single Convention also introduced several new provisions that expanded and refined the scope of international drug control law. For example, it represented the first time that controls on the planting, cultivation and harvesting stages of drug production were included in international law.¹⁷³ The Convention also marked the first time that the provision of drug treatment for what it terms ‘addicts’ is codified. Under Article 38, ‘[t]he Parties shall give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts’, and that, subject to economic resources, ‘it is desirable that [States] establish adequate facilities for the effective treatment of drug addicts’.¹⁷⁴ The Single Convention also established a system of ‘scheduling’, which divided controlled substances into four different categories, each category subject to differing levels of control under Article 2. As was the case with the 1925 convention, a process was established to enable changes to be made to the schedules based upon advances in medical and scientific knowledge about the substances in question, and recommendations from expert bodies.¹⁷⁵ One particularly significant development was the decision to consolidate the two League of Nations drug supervisory bodies into a single organ.¹⁷⁶ As a result, the Permanent Central Board and the

¹⁷² David R Bewley-Taylor, *International Drug Control: Consensus Fractured* (Cambridge University Press 2012) 5 (International Drug Control).

¹⁷³ Gregg (n 52) 201.

¹⁷⁴ 1961 Convention (n 167) art 38.

¹⁷⁵ *ibid* art 3.

¹⁷⁶ *ibid* art 5.

Supervisory Body were dissolved and their respective functions amalgamated into an eleven member International Narcotics Control Board.¹⁷⁷

The Single Convention was amended by a protocol in 1972.¹⁷⁸ The 1972 protocol did not modify the terms of the convention in any dramatic way, although it did make a number of changes to the scope of the International Narcotics Control Board.¹⁷⁹ The protocol increased the membership of the Board from eleven to thirteen seats,¹⁸⁰ and increased the term of office from three to five years¹⁸¹ on the basis that longer terms of office would contribute to its independence.¹⁸² In addition, Article 6 of the protocol amended Article 14 of the Single Convention to bestow the Board with enhanced monitoring and enforcement functions.¹⁸³ The Protocol also significantly amended Article 38 of the convention on the provision of drug treatment services, increasing the scope of the treaty to create an obligation to take ‘all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of persons involved’.¹⁸⁴

¹⁷⁷ The functions of the Board will be explored in more detail in section 2.4.3.2 below.

¹⁷⁸ Protocol Amending the Single Convention on Narcotic Drugs, 1961 (25 March 1972) 976 UNTS 3 (1972 Protocol).

¹⁷⁹ Boister, *Penal Aspects* (n 46) 48.

¹⁸⁰ 1972 Protocol (n 178) art 2.

¹⁸¹ *ibid* art 3.

¹⁸² *Commentary on the Protocol amending the Single Convention on Narcotic Drugs, 1961* (United Nations 1976) 16, para 1.

¹⁸³ 1972 Protocol (n 178) art 6.

¹⁸⁴ *ibid* art 15.

The second drug convention adopted under the United Nations system was the 1971 Convention on Psychotropic Substances. The purpose of the treaty was to bring under international control the increasingly diverse group of synthetically-produced, non-plant based drugs, the use of which had become particularly prevalent in the 1960s.¹⁸⁵ These included synthetically produced stimulants, barbiturates, tranquilizers and hallucinogens, all of which fell outside the scope of the 1961 Convention. Like the Single Convention, the 1971 Convention sought to limit the use of psychotropic substances to medical and scientific purposes,¹⁸⁶ and to pursue this its thirty-three articles largely reflect the template used in the earlier treaty. Like the Single Convention before it, the 1971 Convention codifies a four-tiered system of scheduling (Article 2), import and export regulations (Article 12), limitations on manufacture (Article 5), the provision of treatment and rehabilitation (Article 20) and penal sanctions (Article 22). The treaty also falls under the supervision of the International Narcotics Control Board.¹⁸⁷ However, unlike the Single Convention, the 1971 Convention does not employ a system of estimates. According to Cohrerrsen and Hoover, this reflected the fact that, unlike narcotic drugs, the medical use of psychotropic drugs at the time was relatively new, and therefore ‘the necessary experience for making estimate projections [was] not available’.¹⁸⁸ However, both Jelsma and McAllister note that during treaty negotiations, Western States with powerful pharmaceutical industries played a key role in ensuring the structures for control of psychotropic substances were weaker than that those created under

¹⁸⁵ UN Office on Drugs and Crime, *A Century of International Drug Control* (n 155) 64.

¹⁸⁶ 1971 Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 14956, art 5 (1971 Convention).

¹⁸⁷ *ibid* arts 16, 18, 19.

¹⁸⁸ Cohrerrsen and Hoover (n 63) 101.

the 1961 Convention for narcotics.¹⁸⁹ As described by Boister, the 1961 and 1971 Conventions ‘do not...in any significant way depart from the basic assumption upon which the international drug control system by this time had come to rest, viz.: that the best way of dealing with the drug problem was prohibition’.¹⁹⁰

Similar to the League of Nations evolution, once the administrative systems of commodity control had been established, States sought to create a universal approach to suppressing drug trafficking by harmonising domestic criminal laws and penalties. The first attempt at this, the 1936 convention, was largely deemed unsuccessful.¹⁹¹ Few States ratified the treaty, and the objective of creating a universal approach to domestic criminal law was far from being achieved. However, with increased international concern about international drug trafficking in the 1980s,¹⁹² as well as increasing political pressures being exerted by the United States,¹⁹³ there was renewed momentum among Member States to conclude a trafficking convention. The result was the adoption in December 1988 of the Convention against Illicit Traffic in

¹⁸⁹ Martin Jelsma, ‘The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future’: Working Paper Prepared for the First Meeting of the Global Commission on Drug Policy (24-25 January 2011) 4.; William B McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (Routledge 2000) 229.

¹⁹⁰ Boister, ‘Interrelationship’ (n 15) 911.

¹⁹¹ Boister, *Penal Aspects*, (n 46) 36.

¹⁹² See, for example, UN General Assembly, ‘International campaign against traffic in drugs’ (18 December 1982) UN Doc No A/RES/37/198.; UN General Assembly, ‘International campaign against traffic in drugs’ (16 December 1983) UN Doc No A/RES/38/122.; UN General Assembly, ‘International campaign against traffic in drugs’ (14 December 1984) UN Doc No A/RES/ 39/143.

¹⁹³ See chapter three.

Narcotic Drugs and Psychotropic Substances, which entered into force on 11 November 1990.¹⁹⁴ As described in Article 2(1), which defines its scope,

The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.¹⁹⁵

The convention's thirty-four articles 'provide the structure for an extensive legal regime for the suppression of the illicit drug traffic',¹⁹⁶ one that creates a universal penal approach to drugs worldwide. As described by one commentator, the 1988 Convention represents an 'internationalizing of the war on drugs',¹⁹⁷ while another calls it 'the general extension of international drug control law into every corner of the globe'.¹⁹⁸ According to the Official Commentary, the convention requires that States 'establish a modern code of criminal offences relating to various aspects of illicit trafficking and to ensure that such activities are dealt with as serious offences by each State's judiciary and prosecutorial authorities'.¹⁹⁹ Central to this goal is Article 3,²⁰⁰ which proscribes a wide range of drug offences at every

¹⁹⁴ UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 27627 (1988 Convention).

¹⁹⁵ *ibid* art 2(1).

¹⁹⁶ Boister, *Penal Aspects* (n 46) 59.

¹⁹⁷ David P Stewart, 'Internationalizing The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1989-1990) 18 *Denver Journal of International Law and Policy* 387, 387.

¹⁹⁸ Boister, 'Interrelationship' (n 15) 913.

¹⁹⁹ *Commentary on the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations 1998) 48, para 3.1.

²⁰⁰ *ibid*.

stage, from cultivation, to production and manufacture, to transport and traffic, to distribution and sale, to purchase and possession, including possession for personal use.²⁰¹ Significantly, unlike the previous UN conventions, the Article 3 obligates States to make these acts ‘criminal offences’,²⁰² rather than the rather more vague and flexible terms ‘distinct offence’²⁰³ and ‘punishable offence’²⁰⁴ employed in the two previous treaties, and applies them to ‘any narcotic drug or any psychotropic substance contrary to the provisions’ of the 1961 and 1971 Conventions.²⁰⁵ In effect, the 1988 Convention criminalises the entire market chain, including not only offences related to controlled substances, but also to precursors and money laundering.²⁰⁶ In this process, the 1988 Convention also has the effect of criminalising large groups of individuals involved in the illicit industry, from farmers and growers, to producers and manufacturers, to large scale traffickers and small scale couriers, to individual retailers and consumers.

The 1988 Convention represents the third leg of the stool of modern international drug control law, augmenting the largely commodity-based controls of the 1961 and 1971 treaties with strict penal laws and sanctions for those infringing those controls.²⁰⁷ In addition to the increased focus on penal sanctions, a second significant feature of the fourth stage of drug

²⁰¹ 1988 Convention (n 194) art 3.

²⁰² *ibid* art 3(1).

²⁰³ Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961) 520 UNTS 7515 (1961 Convention amended) art 36(2)(a)(i).; 1971 Convention (n 186) art 22(2)(a)(i).

²⁰⁴ 1961 Convention amended (n 203) art 36(1)(a); 1971 Convention (n 186) art 22(1)(a).

²⁰⁵ 1988 Convention (n 194) art 3(1)(a)(i).

²⁰⁶ UN Commission on Narcotic Drugs, ‘Fit for Purpose’ (n 16) 5

²⁰⁷ Bewley-Taylor, *International Drug Control* (n 172) 3.

control is the near universal ratification of the United Nations regime. Whereas the League of Nations drug control system was marked by differing combinations of States ratifying different instruments,²⁰⁸ and very few States at all agreeing to enter into the 1936 convention on penal sanctions,²⁰⁹ the United Nations instruments have received broad support: the Single Convention (as amended by the 1972 Protocol) has been ratified by 184 States; the 1971 Convention has been ratified by 183 States; and the 1988 Convention has been ratified by 188 States.²¹⁰ This has the effect of creating international obligations to domestically implement a largely uniform and punitive approach to drug suppression and control.

2.4.3 The United Nations Machinery

During the League of Nations period, two different kinds of bodies were established to progress international drug control: a policy-making body comprised of Member States (the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs), and two independent expert bodies with authority to monitor State practice and criticise Governments where necessary (the Permanent Central Board and the Supervisory Committee).²¹¹ This basic structure was incorporated into the drug control machinery of the United Nations. This section will review the three primary United Nations organs mandated to supervise and progress international drug control: the Commission on Narcotic Drugs, the International Narcotics Control Board and the United Nations Office on Drugs and Crime. The following

²⁰⁸ Gregg (n 52) 188.

²⁰⁹ Only thirteen States ratified the 1936 Convention prior to 1940. United Nations Treaty Collection <www.treaties.un.org> last accessed 14 May 2014.

²¹⁰ *ibid.*

²¹¹ May (n 52) 493.

section will summarise the roles and mandates of each of these bodies, as each plays an important role in the question of human rights in the fourth stage of drug control, as well as a part in shaping drug control's fifth stage.

2.4.3.1 The Policy Making Body: Commission on Narcotic Drugs

The primary policy making body with the United Nations is the Commission on Narcotic Drugs. The Commission also functions as the governing body of the United Nations Office on Drugs and Crime, which will be discussed below. At the first session of the Economic and Social Council of the United Nations in February 1946, the Council established the Commission on Narcotic Drugs as one of the 'specialized agencies' described under Article 55 of the Charter. The Commission thereby replaced the Advisory Committee on the Traffic in Opium and Other Dangerous Drugs, and was established as the main policy-making organ of the UN on drug issues.²¹² According to the resolution establishing the Commission, in addition to carrying out the functions of the former Opium Advisory Committee, its mandate includes assisting the Council in supervising international drug control conventions and agreements, advising the Council on all matters pertaining to drug control, drafting international drug conventions and advising on any necessary changes to the UN drug control machinery.²¹³ As an advisory body to the Economic and Social Council, Commission decisions must be confirmed by the Council, except in those cases where the drug

²¹² UN Economic and Social Council, 'Resolution of the Economic and Social Council of 16 February 1946 on the establishment of a Commission on Narcotic Drugs' (16 February 1946) UN Doc No E/RES/1946/9(I).

²¹³ *ibid* para 2.

conventions bestow specific authority on the Commission.²¹⁴ When founded, the Commission was limited to fifteen members serving terms of three years, to be comprised of States that were ‘important producing or manufacturing countries or countries in which illicit traffic in narcotics constitutes a serious social problem’.²¹⁵ However, the membership has expanded over time, alongside the growth of the UN itself, to fifty-three members, with a specific regional distribution.²¹⁶

The Commission has been described by the General Assembly as ‘the principal United Nations policy-making body on drug abuse control’.²¹⁷ It meets annually at the United Nations headquarters in Vienna, where Member States take to opportunity to publicly review their progress towards meeting domestic and international drug control goals, and debate and ratify resolutions on various related topics. In addition to its policy-making role, the Commission is also mandated with normative functions under the UN drug control treaties, the most significant of these being the authority to make changes in the listing of substances under international control. This authority is exercised through a treaty provision enabling it to amend the schedules to the 1961 and 1971 Conventions, in effect empowering the

²¹⁴ Renborg, ‘International Control of Narcotics’ (n 51) 88.

²¹⁵ UN Economic and Social Council, ‘Resolution of the Economic and Social Council of 16 February 1946 on the establishment of a Commission on Narcotic Drugs’ (n 212) para 4.

²¹⁶ UN Economic and Social Council, ‘Enlargement of the Commission on Narcotic Drugs’ (21 June 1991) UN Doc No E/RES/1991/49. The distribution of seats is eleven each for the African and Asian regions, ten for Latin American/Caribbean States, six for Eastern Europe, fourteen for Western Europe and other States, and one seat that rotates every four years. Members are elected from among those States that have ratified the 1961 Single Convention on Narcotic Drugs.

²¹⁷ UN General Assembly, ‘Preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances’ (8 December 1988) UN Doc No A/RES/43/120, OP 3.

Commission to modify the terms of the treaties.²¹⁸ Based upon recommendations from the World Health Organization,²¹⁹ the Commission has the authority to include a new drug under international control by adding it to the schedules, or change the nature of the controls applied to a currently scheduled substance by raising or lowering its categorisation within the schedules. The 1971 and 1988 Conventions also bestow the same powers on the Commission regarding preparations and precursor chemicals.²²⁰ As the substances included within the schedules of the 1961 and 1971 Conventions are also those to which domestic criminal sanctions must be applied under Article 3 of the 1988 Convention, these powers also directly affect State obligations under that treaty. As a consequence, the Commission may on its own authority list a new substance within the schedules of the 1961 or 1971 Convention, therefore requiring Parties to the 1988 treaty to criminalise it under domestic drug law, without all States Parties explicitly consenting to that treaty amendment and subsequent legislative change. These are the only powers the Commission exercises autonomously, outside of its mandate from the Economic and Social Council, and are ones the Commission exercises routinely at its annual session.²²¹

²¹⁸ 1961 Convention amended (n 203) art 3.; 1971 Convention (n 186) art 2.

²¹⁹ Within the UN drug control regime, the World Health Organization takes over the role formerly played by the Health Committee of the League of Nations.

²²⁰ 1971 Convention (n 186) art 3.; 1988 Convention (n 194) art 12.

²²¹ See, for example, UN Commission on Narcotic Drugs, ‘Transfer of phenylacetic acid from Table II to Table I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988’ (8 March 2010) CND dec 53/1.; ‘Inclusion of oripavine in Schedule I of the Single Convention on Narcotic Drugs of 1961 and that Convention as amended by the 1972 Protocol’ (14 March 2007) CND dec 50/1.; ‘Inclusion of amineptine in Schedule II of the Convention on Psychotropic Substances of 1971’ (8 April 2003) CND dec 46/1. ‘Transfer of acetic anhydride from Table II to Table I of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988’ (20 March 2001) CND dec 44/5, among many others.

The powers given to the Commission are highly unusual, effectively authorising a subcommittee of the UN to amend the terms of the treaties themselves, without requiring the consent of a conference of States Parties. A useful comparison in this regard is the Convention on International Trade in Endangered Species of Wild Fauna and Flora, a treaty that creates similar systems of control to regulate imports and exports of protected species between and among States Parties, and a system of licensing for such trade.²²² Like the 1961 and 1971 drug conventions, which contain four schedules that list and categorise substances under international control, the Convention on International Trade in Endangered Species contains three appendices of species covered under the treaty, ‘afford[ing] different levels or types of protection’ to each of the three groups.²²³ These controls vary from the most rigorous under Appendix I, covering species threatened with extinction, the trade in which is controlled in all countries, to the least restrictive under Appendix III, which covers species protected in at least one State, the government of which has requested the co-operation of the other Parties in curtailing international trade.²²⁴ Unlike the autonomous powers given to the Commission on Narcotic Drugs in relations to scheduling, Appendix I and II of the Convention on International Trade in Endangered Species, which list species subject to the tightest controls, may only be amended at a Conference of State Parties, and then by a two-thirds majority of votes cast.²²⁵ Unlike the drug conventions, States may also enter individual

²²² Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed 3 March 1973, amended 22 June 1979)(CITES).

²²³ ‘The CITES Appendices’, Convention on International Trade in Endangered Species of Wild Fauna and Flora website <<http://www.cites.org/eng/app/index.php>> accessed 10 May 2013.

²²⁴ CITES (n 222) art II(1-3).

²²⁵ *ibid* art XV.

reservations to any of the specific species listed in all three appendices, a practice which is quite widely used among States Parties to the convention.²²⁶ The 1961 and 1971 drug conventions do not allow States to enter reservations on individual substances listed within the treaty schedules.

2.4.3.2 The Treaty Body: International Narcotics Control Board

The 1925 and 1931 League of Nations Conventions established separate organs to supervise State compliance with their treaty obligations, the Permanent Central Board and the Supervisory Committee. The 1961 drug convention consolidated these two bodies into a single organ, the International Narcotics Control Board (INCB).²²⁷ As described under Article 9(4),

The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of, drugs.²²⁸

The Board was first appointed in 1968.²²⁹ As a body of independent experts, the Board fulfills a similar role to that of treaty bodies within the UN human rights system, engaging with Governments to ensure their compliance with treaty obligations and monitoring State

²²⁶ See ‘Reservations entered by Parties’, Convention on International Trade in Endangered Species of Wild Fauna and Flora website <<http://www.cites.org/eng/app/reserve.php>> accessed 10 May 2013.

²²⁷ 1961 Convention amended (n 203) art 5.

²²⁸ *ibid* art 9(4).

²²⁹ Chatterjee (n 46) 256.

progress in that regard.²³⁰ Its members, expanded from eleven to thirteen under the 1972 Protocol, sit in an independent capacity, and ‘shall be persons who, by their competence, impartiality and disinterestedness, will command general confidence’.²³¹ Members of the Board are elected by the Economic and Social Council, with ten seats filled by persons nominated by States, and three seats filled by candidates proposed by the World Health Organization.²³²

The Board’s functions largely mirror those previously fulfilled by the two League of Nations organs, including responsibility for administering the systems of estimates and statistical returns used to establish national projections of quantities of controlled drugs needed for medical and scientific uses.²³³ As was the case under the League of Nations, should the Board feel ‘there exists evidence of a serious risk that it may become, an important centre of illicit cultivation, production or manufacture of, or traffic in or consumption of drugs’,²³⁴ it has various powers, ranging from opening communications with the Government in question to recommending to States Parties that they impose import/export embargoes on the offending country.²³⁵ This merging of the separate roles of the two previous organs into a single body was not without potential concern. Under the previous system, the Supervisory Body was responsible for overseeing the system of estimates and determining the permitted

²³⁰ See generally, Damon Barrett, ‘Unique in International Relations?: A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies’ (International Harm Reduction Association 2008).

²³¹ 1961 Convention amended (n 203) art 9(2).

²³² *ibid* art 9(1).

²³³ *ibid* arts 12, 13.

²³⁴ *ibid* art 14(1)(a).

²³⁵ *ibid* arts 14(1), 14(2).

national and international limits on drug manufacture and stockpiling, while the Permanent Central Board had the power to impose sanctions should States violate these limits. As described by one commentator, by consolidating both these mandates into a single entity, '[t]he International Narcotics Control Board would, thus, in a manner, function as both prosecutor and judge'.²³⁶

As was the case with the 1931 convention, the 1961 Convention vests the treaty body with the power to set estimates, and propose sanctions, even on States that have not ratified the treaty. This provision was the source of tension in the drafting, as the 'Soviet bloc delegates pressed the view that international law is violated when nonparties are made the prospective objects of board actions to which they have never given their consent'.²³⁷ However, a vote on the question supported the continuation of the former legal regime established under the 1931 convention.²³⁸

In addition to these technical functions, the Board has what Chatterjee describes as a 'remedial and preventive' role,²³⁹ in the sense that it is authorised to take measures where 'the Board has *objective reasons* to believe that the aims of [the 1961] Convention are being seriously endangered by reason of the failure of any *Party*, country or territory to carry out

²³⁶ Renborg, 'International Control of Narcotics' (n 51) 100.; see also Gregg (n 52) 198.

²³⁷ Gregg (n 52) 199.

²³⁸ See 'United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records Volume I' (24 January-25 March 1961) UN Doc No E/CONF.34/24, 135-141 (1961 Official Records vol I).

²³⁹ Chatterjee (n 46) 264.

the provisions of [the] Convention'.²⁴⁰ These measures are essentially communicative in nature, and include raising issues of concern with Governments directly, or, if the matter is not resolved to the Board's satisfaction, 'it may call the attention of the Parties, the [Economic and Social] Council and the Commission [on Narcotic Drugs] to the matter'.²⁴¹ Part of this communicative role is achieved via the production of annual reports of the Board, of which the treaties specify that '[t]he Parties shall permit their unrestricted distribution'.²⁴² As discussed by Bewley-Taylor, over time these annual public reports have become a major source of the Board's political influence, and 'are one of the key mechanisms deployed by the INCB to affect state behaviour and attempt to ensure what it perceives to be compliance to the conventions'.²⁴³

The Board is mandated with additional functions under both the 1971 and 1988 Conventions. Under the 1971 Convention, the Board holds similar powers as under the 1961 treaty,²⁴⁴ with the exception of an estimates system, which the 1971 Convention does not create for psychotropic substances. These functions include gathering statistical information, preparing annual reports and engaging with States.²⁴⁵ As with the Single Convention, the 1971 treaty

²⁴⁰ 1972 Protocol (n 178) art 6(1)(a).

²⁴¹ *ibid* art 6(1)(d).

²⁴² 1961 Convention amended (n 203) art 15.; 1971 Convention (n 186) art 18.; 1988 Convention (n 194) art 23.

²⁴³ Bewley-Taylor, *International Drug Control* (n 172) 224.

²⁴⁴ Boister, *Penal Aspects* (n 46) 47.

²⁴⁵ 1971 Convention (n 186) art 18(1).

also empowers the Board with the authority to take various actions against offending States, up to and including recommending import/export embargoes.²⁴⁶

The Board's mandate under the 1988 Convention is less extensive than in the previous treaties, and its technical mandate confined to some limited authority to monitor and comment on the control of precursors by States.²⁴⁷ The degree to which its mandate extends beyond these explicitly technical matters is the source of some debate in the literature. Bewley-Taylor, for example, argues there is 'no mandate...given to the INCB to monitor implementation of the 1988 Convention',²⁴⁸ while Boister concludes 'that the INCB does have general scrutiny powers in respect to the 1988 Convention in areas in which it is competent in other conventions'.²⁴⁹ The latter perspective finds stronger support within the convention text itself. Article 22(1)(a) states that if 'the Board has reason to believe that the aims of this Convention in matters related to its competence are not being met',²⁵⁰ it is mandated to undertake in a variety of communicative measures. This provision has the effect of providing the Board with a mandate to monitor the overall implementation of the treaty's broader provisions on suppressing illicit traffic.²⁵¹ While the scope and breadth of this mandate is be open to debate and interpretation, as is the question of what is and is not within the Board's 'competence', the language of Article 22 clearly allows scope for the Board to comment on issues beyond purely technical matters.

²⁴⁶ *ibid* art 19.

²⁴⁷ 1988 Convention (n 194) art 12.

²⁴⁸ Bewley-Taylor, *International Drug Control* (n 172) 224.

²⁴⁹ Boister, *Penal Aspects* (n 46) 488.

²⁵⁰ 1988 Convention (n 194) art 22(1)(a).

²⁵¹ Boister, *Penal Aspects* (n 46) 488.

2.4.3.3 The Secretariat: United Nations Office on Drugs and Crime

The final major component of the United Nations drug control machinery is the UN Office on Drugs and Crime, housed within the Secretariat. In 1959, the General Assembly passed a resolution establishing ‘a continuing programme of technical assistance in narcotics control within the regular budget of the United Nations’.²⁵² This resolution initiated the development of a formal programme of activities aimed at supporting States, particularly developing countries, to meet their international drug control obligations. This effort was expanded in 1970 with the creation of the United Nations Fund for Drug Abuse Control, a fund comprised of voluntary contributions from Member States and others to support such technical assistance activities.²⁵³ In 1990, the General Assembly requested that the Secretary-General create a single UN drug control programme, to be called the United Nations International Drug Control Programme. This new body would bring together the previously separate activities of the United Nations Fund for Drug Abuse Control, the secretariat of the International Narcotics Control Board and the functions of the Division of Narcotic Drugs.²⁵⁴ This same resolution requested the creation of a new senior UN official at the rank of Under-Secretary-General to lead the newly amalgamated Programme.²⁵⁵

²⁵² UN General Assembly, ‘Technical assistance in narcotics control’ (20 November 1959) UN Doc No A/RES/1395(XIV), para 1.

²⁵³ UN General Assembly, ‘Technical assistance in the field of drug abuse control’ (15 December 1970) UN Doc No A/RES/2719(XXV).

²⁵⁴ UN General Assembly, ‘Enhancement of the United Nations structure for drug abuse control’ (21 December 1990) UN Doc No A/RES/45/179, para 3.

²⁵⁵ *ibid* para 4

Established in 1997, the Office on Drugs and Crime was created through a merger of the United Nations International Drug Control Programme²⁵⁶ and the Crime Prevention and Criminal Justice Programme.²⁵⁷ As part of the United Nations Secretariat, the Office was ‘established to implement the Organization’s drug programme and crime programme in an integrated manner’,²⁵⁸ and carries out various activities as directed by the Commission on Narcotic Drugs, the Economic and Social Council and the General Assembly. The Office ‘[s]erves as the central drug control entity with the exclusive responsibility for coordinating and providing effective leadership on all United Nations drug control activities’.²⁵⁹

2.5 Conclusion

This chapter has provided an overview of the historical and normative development of one hundred years of international law in the area of drug control, with a particular focus on the legal instruments and machinery of the fourth stage United Nations era. This history reveals several unusual features of international drug control law as a legal system, including the establishment of treaty obligations for non-Parties, the creation of a mechanism to amend the terms of the treaties outside of a Conference of Parties and the near universal ratification of the treaty regime as a whole. This history also illustrates the increasing use of penal

²⁵⁶ Established by UN General Assembly, ‘Enhancement of the United Nations structure for drug abuse control’ (n 254).

²⁵⁷ Established by UN General Assembly, ‘Creation of an effective United Nations crime prevention and criminal justice programme’ (18 December 1991) UN Doc No A/RES/46/152.

²⁵⁸ UN Secretariat, ‘Secretary-General’s bulletin: Organization of the United Nations Office on Drugs and Crime’ (15 March 2004) UN Doc No ST/SGB/2006/6, para 2.1.

²⁵⁹ *ibid* para 2.2(a).

sanctions as a tool of drug control, and the use of international law to harmonise a universal domestic criminal law approach in the area of drugs. It also summarised the roles and mandates of the three main drug control bodies within the UN system. All of these factors and actors influence the emergence of the negative unintended consequences of the drug control regime in the UN era, as well as considerations of the development of a fifth stage of drug control.

Chapter Three - Humanitarian or Stigmatising? - The Contradictory

Paradigms of International Drug Control

I extend to the Commissioners to-day assembled my good wishes and conviction that their labours will be of the greatest importance towards the general suppression of the opium evil throughout the world.²⁶⁰

President Theodore Roosevelt
1909

3.1 Introduction

Writing in 1934 of the League of Nations drug control machinery, Quincy Wright described the international treaty regime of the time as representing 'the first attempt at a world plan for any economic commodity'.²⁶¹ Ten years later, another noted commentator described 'the international opium administration' as 'one of the most advanced examples of international control and cooperation in respect of an article of commerce'.²⁶² However, past and current international attitudes towards drugs and drug use inevitably mean that attempts at regulation occur in a context markedly different than that of most other economic commodities. Indeed, although the controls established in international law during the second and third stages of the regime, incorporated into and expanded during the fourth stage, are in many ways dry and technical systems of licensing production, estimating need, limiting manufacture and

²⁶⁰ International Opium Commission (n 64) 14.

²⁶¹ Wright, 'The Narcotics Convention of 1931' (n 89) 475.

²⁶² Lande (n 10) 394. Reborg also notes that 'The conventions...represent the first concerted attempt by governments to regulate a single industry throughout the world, from the point at which the raw materials enter the international trade to the point at which they finally reach the legitimate consumer.' Reborg (n 51)110.

controlling imports and exports, the rationales justifying them have been anything but dry and technical. As discussed in chapter two, the origins of the the anti-opium movement were situated in a context of popular agitation against other perceived ‘moral vices’ such as alcohol use and ‘white slavery’.²⁶³ It is perhaps unsurprising that the subsequent historical development of international drug control has been intertwined in a complicated mixture of fear and aspiration; of threat and responsibility. It is this mix of apparently conflicting drives that form the context for the human rights abuses evident in the fourth stage of drug control, and forms the basis of challenges in forging a fifth stage of drug control that remedies or prevents these abuses.

In reviewing that past one hundred years of international drug control law, it is clear that efforts to control drugs evolve from interplay between two related yet ultimately contradictory paradigms. The first of these is that ‘addiction’ to drugs is considered a form of ‘evil’, one that constitutes a threat not only to individuals but indeed to the fabric of society as a whole. As a result, States have a moral obligation to suppress drugs. The second paradigm is that coordinated international drug control activities, which by definition are morally demanded to fight this ‘evil’, represent a collective humanitarian mission by the international community, rather than simply an exercise in commodity control or law enforcement. As described by Wright, ‘The international conventions to control the use of opium and narcotic drugs have been of interest to the United States...primarily from the standpoint of their efficiency in combating an acknowledged evil.’²⁶⁴ The relationship between these two paradigms is illustrated in the comments of an Iranian delegate during the

²⁶³ Ansley (n 55) 106.

²⁶⁴ Wright, ‘The Narcotics Convention of 1931’ (n 261) 475.

drafting of the 1961 Single Convention on Narcotic Drugs, who stated that ‘drug addiction was like a contagious disease: no country could be certain that it would be spared...when a country like Iran at great cost prohibited the cultivation of the poppy to abolish that evil, it was in fact eliminating a source of danger to the health of the whole world and benefiting all mankind’.²⁶⁵ From the perspective of the international drug control regime, these two paradigms are not only copasetic, they are in fact mutually reinforcing, flowing logically one into the other. Because drug addiction is considered an evil to the individual, and because that evil is a risk of spreading throughout societies like a disease, the shared effort to suppress this ‘contagion’ is not merely a policy objective of an individual government, it is a moral and altruistic mission of the world community, one pursued for the greater good and protection of humankind.

However, when considered from the perspective of human rights, the assessment is very different, and must take into account the effects on State practice of defining various human activities (drug use, cultivation, manufacturing, trafficking, etc.) and, by extension, the people who engage in these activities, as being ‘evil’ and comprising an existential threat to the greater good. This is particularly relevant as the basis for the operation of international drug control has always been one of indirect control, based around the domestic laws and administrative practices of States, with the role of the international regime being to standardise and make universal those laws and practices enshrined in the treaties.²⁶⁶ As a result, these paradigms create and perpetuate an atmosphere of human rights risk, in which the global cause of drug control is framed in a manner whereby abusive practices and policies

²⁶⁵ 1961 Official Records vol I (n 238) 6

²⁶⁶ Gregg (n 52) 192.

are not only considered necessary, they are indeed morally justified by the righteousness of the end goal itself. While Wright's 1934 perspective of the drug control regime as 'the first attempt at a world plan for any economic commodity' is illuminating, in the current period it must be acknowledged that the ideological underpinnings of this plan are the stigmatisation, discrimination and demonisation of certain elements of society, and in many cases of individuals who are already vulnerable to exploitation and human rights abuse. This is the challenge facing the development of a fifth stage of drug control.

3.2 The Humanitarian Drive for Drug Control

Although perhaps not obvious in the modern context of the 'war on drugs' - and its association with policing, incarceration and even military action - multilateral efforts to control narcotics have, from the beginning, been framed as a humanitarian mission, rather than an exercise in law enforcement or commodity regulation. This humanitarian paradigm has been a consistent feature of the framing of international drug control from the foundation of the regime. For example, during the proceedings of the first International Opium Commission in 1909, the global effort to suppress opium were openly described as being the contemporary equivalent of the great humanitarian movement of the previous century, that to abolish slavery.²⁶⁷ In his closing address to the conference delegates, for example, the Commission President, Bishop Charles Brent, stated,

Just as slavery reached a point when among its opponents it was no longer a mere question of morals or academic theory but 'an actual perplexing problem continually appearing in every direction and in various forms,' so has it come to be with the evil

²⁶⁷ See, for example, the statement of the Commission President, International Opium Commission (n 64) 82.

before us, and we have, we trust, not wholly failed in carrying the problem a stage nearer to its final solution.²⁶⁸

Speaking on behalf of the delegation of the United States, Dr Hamilton Wright described the growing international consensus in support of the suppression of opium.

The slavery question agitated the civilised world for a century. No more emotion was expended, no greater misconception of facts occurred, no greater stubbornness of opinion was shown in the initial stage of the solution of that problem, than has been shown in the initial stages of the opium question...During the last few years our people have watched with admiration a repetition of history.²⁶⁹

The nobility of the cause of opium suppression found expression in international law three years later in the International Opium Convention of 1912, which was drafted to embody in law the resolutions emerging from the 1909 Commission. The convention conceptualised drug control as a noble enterprise, and measures of control as tools for promoting the greater public good, the preamble describing ‘the gradual suppression of the abuse of opium, morphine, and cocaine’ and their derivatives as a ‘humanitarian endeavour’.²⁷⁰

This humanitarian paradigm also influences the development of the third stage of drug control. The Covenant of the League of Nations, under Article 23(c), invested the League with ‘the general supervision over the execution of agreements with regard to the traffic in...opium and other dangerous drugs’.²⁷¹ This clause was inserted at the request of the British delegation, and was described by David Hunter Miller, in his definitive 1928 account

²⁶⁸ *ibid* 82.

²⁶⁹ *ibid* 44.

²⁷⁰ 1912 Convention (n 40) preamble.

²⁷¹ Covenant (n 12) art 23(c).

of the drafting history of the Covenant, as being ‘in the line of extending the humanitarian activities of the League’.²⁷² In fact, ‘Humanitarian Activities of the League’ is the characterisation Miller uses to describe Article 23 and its subclauses.²⁷³ The subsequent drug Convention of 1925 similarly describes international cooperation to control the trade in and use of narcotics as a ‘humanitarian effort’.²⁷⁴

This humanitarian framing of drug control is also evident from the foundations of the fourth stage United Nations drug control regime. Unlike the Covenant of the League of Nations, the Charter of the United Nations does not explicitly reference drug control within its text. The Charter in effect expands the mandate of the League under Article 23 into five related articles, 55-60, under Chapter IX on International Economic and Social Cooperation.²⁷⁵ The basis for Article 55, which gives the United Nations a mandate to ‘promote...solutions of international economic, social, and health related problems’²⁷⁶ originates in the Dumbarton Oaks Proposals, which laid the foundational framework for the Charter and served as the basis for the drafting debates. Chapter IX, Section A of the Proposals, entitled ‘Arrangements for International Economic and Social Cooperation’, proposed that

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should

²⁷² Hunter Miller, *vol. 1* (n 126) 220.

²⁷³ David Hunter Miller, *The Drafting of the Covenant*, *vol. 2* (GP Putnam’s Sons 1928) 850.

²⁷⁴ 1925 Convention (n 14) preamble.

²⁷⁵ The relationship between Article 23 of the Covenant and Articles 55-60 of the Charter on the question of drug control is explored in chapter two.

²⁷⁶ Charter (n 117) art 55(b).

facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms.²⁷⁷

The structure of what evolved into the UN drug control regime can be seen in these original documents, as Chapter IX proposed the creation of ‘various specialized economic, social and other organizations and agencies [that] would have responsibilities in their respective fields’.²⁷⁸ These ‘specialized organizations and agencies’ were to be coordinated by, and were to report to, an Economic and Social Council under the authority of a General Assembly.²⁷⁹ One of the first of these new ‘specialized agencies’ to be created by the new United Nations was the Commission on Narcotic Drugs.²⁸⁰ Therefore, although not specifically named within the text of the Charter, the fourth stage of international drug control clearly continues to address drugs within the context of the humanitarian activities of the organisation.

The influence of this humanitarian ethos is more explicit within the work of the United Nations drug control bodies themselves. For example, during the first session of the Commission on Narcotic Drugs held in Lake Success, New York in 1946, the French delegate to the Commission made a rather grand statement to this effect.

Confucius...had advocated the establishment, under the name of the ‘Great Union’ of a vast association of peoples who ‘would extend the conception of welfare not only to include all nationals, of which each State was inclined to cherish its own, but also

²⁷⁷ The United Nations Conference on International Organization. ‘The United Nations Dumbarton Oaks Proposals for a General International Organization’, Doc. 1, G/1, p. 18 in Official Records San Francisco (n 115).

²⁷⁸ *ibid.*

²⁷⁹ *ibid* 18-19.

²⁸⁰ UN Economic and Social Council, ‘Resolution of the Economic and Social Council of 16 February 1946 on the establishment of a Commission on Narcotic Drugs’ (n 212).

all individuals without distinction.’ Twenty-five centuries had passed. The “Great Union” so earnestly desired by Confucius had been brought into being, not at Peking, but at Geneva and later at Lake Success and now its first care had been to fight the scourge of opium which afflicted above all the populations of the Far East. The dream of Confucius had thus become a reality.²⁸¹

During the preliminary drafting stages of the Single Convention of Narcotic Drugs in 1950, the UN Secretary-General specifically suggested that the new treaty highlight these same principles, asking that ‘[i]f it is decided that the new single convention should have a preamble it might refer...to the social and humanitarian motivation of international co-operation in the field’.²⁸² This humanitarian drive to establish an effective international drug control regime was reiterated throughout the 1961 Plenipotentiary Conference that concluded the drafting of the Single Convention. For example, the representative of Lebanon stated that, ‘one of the purposes of the United Nations was to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character; the control of narcotic drugs was one of the most important of those problems’.²⁸³ Ghana,²⁸⁴ the USSR,²⁸⁵ Czechoslovakia²⁸⁶ and the United States²⁸⁷ all made reference to the ‘humanitarian purpose’ of the new Convention, while India spoke of the ‘great humanitarian objectives’ of

²⁸¹ ‘Report to the Economic and Social Council on the First Session of the Commission on Narcotic Drugs held at Lake Success New York, from 27 November to 13 December 1946’ (11 December 1946) UN Doc. No. E/C.S.7/55, p 14.

²⁸² Economic and Social Council of the United Nations ‘Commentary on the Draft Single Convention: Note by the Secretary-General’ (March 1950) UN Doc. No. E/CN.7/AC.3/4, p 8.

²⁸³ 1961 Official Records vol I (n 238) 7.

²⁸⁴ *ibid* 83.

²⁸⁵ *ibid* 156.

²⁸⁶ *ibid* 157.

²⁸⁷ *ibid* 158.

the treaty.²⁸⁸ Bulgaria expressed its belief ‘that the Convention had been drafted on the basis of humanitarian principles’²⁸⁹ and that ‘every step towards the elimination of that social evil was regarded by [the] government as having great humanitarian importance’.²⁹⁰ The representative of Afghanistan noted how that country’s ‘interest in narcotic drugs had... always been humanitarian rather than commercial’.²⁹¹ The representative of the Vatican expressed that ‘[t]he Holy See, which had always been concerned with the welfare of mankind and of civilization, was therefore happy to lend its moral support to the humanitarian aims of the Conference’.²⁹² The delegate of the United Arab Republic stated that ‘[e]very country was under a moral obligation to make the Convention an effective instrument serving the interests of the entire world. On behalf of mankind, therefore, his delegation urged all States to give it their full and whole-hearted support.’²⁹³ For some delegations, the humanitarian imperative driving drug control was so significant as to limit national self-interest. China, for example, encouraged others delegations to agree that, ‘[f]or humanitarian reasons, every State should be willing to make greater sacrifices of national sovereignty and to co-operate more closely with others in preventing the abuse of narcotics’.²⁹⁴ Guatemala argued that ‘[p]rogress in the control of narcotic drugs would only be made if the international and humanitarian aspects of the problem were given precedence

²⁸⁸ *ibid* 156.

²⁸⁹ *ibid* 162.

²⁹⁰ *ibid* 12.

²⁹¹ *ibid*.

²⁹² *ibid* 216.

²⁹³ *ibid* 6.

²⁹⁴ *ibid* 13.

over national interests'.²⁹⁵ The humanitarian paradigm evident during the drafting conference was eventually reflected in the opening lines of the preamble of the 1961 Single Convention on Narcotic Drugs.

The Parties,

Concerned with the health and welfare of mankind,

*Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes*²⁹⁶

When States met again in 1971 to conclude the drafting of the Convention on Psychotropic Substances, the second of the three UN drug treaties, this humanitarian purpose was again reiterated by some. The USSR noted that its support for international narcotics control measures was based on 'humanitarian reasons',²⁹⁷ while Mexico noted 'the humanitarian purposes to be served by the proposed international instrument'.²⁹⁸ The preamble to the Convention on Psychotropic Substances reaffirms the concern for the health and welfare of mankind expressed in the Single Convention, while also '[n]oting with concern the public health and social problems resulting from the abuse of certain psychotropic substances'.²⁹⁹

3.3 The Concept of 'Evil' in International Drug Control Law

²⁹⁵ *ibid.*

²⁹⁶ 1961 Convention amended (n 203) preamble.

²⁹⁷ 'United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Official Records Volume II' (24 January-25 March 1961) UN Doc No E/CONF.34/24/Add. 1, 7 (1961 Official Records vol II).

²⁹⁸ *ibid* 10.

²⁹⁹ 1971 Convention (n 186) preamble.

This notion that the international control of drugs was an historic humanitarian mission, rather than a technical exercise in commodity control, was made possible only by the second paradigm driving the development of the regime: that drugs constitute a form of ‘evil’, and that the activities related to their use, cultivation, manufacture and trade constitute a tangible threat to health, morality and stability of society. As stated by Bishop Charles Brent, President of the 1909 International Opium Commission, ‘[b]ehind the raw statistics and cold sentences of our deliberative language and of most of our resolutions stand the pitiable army of moral slaves, in whose behalf we have been labouring in order that they may gain the greatest of all gifts - moral freedom’.³⁰⁰ In this context, international efforts to suppress drugs become part humanitarian mission, part protective intervention and part moral crusade, all underpinned by an international legal framework. Absent this context of a moral campaign, drug control looks a rather uninspiring and technical system of licensing, manufacturing/import/export controls and law enforcement measures. The concept of a common humanitarian purpose, shared by all countries of the world for the betterment and protection of the world community, also had a functional outcome. The sense of shared purpose was critical to expanding support for the regime, particularly in the early stages of the international system when States, many of which did not themselves have any domestic interest or concern in drug issues, were being asked to voluntarily enter a new legal regime and submit their domestic systems to international control. As described by one League of Nations official, as ‘the drug smuggler has no respect for national frontiers...only concerted international action could bring any hope of eradicating drug smuggling or reducing it to a

³⁰⁰ International Opium Commission (n 64) 82.

minimum and thereby gradually eliminating drug addiction as a social evil'.³⁰¹ In 1950, the United Nations Bulletin of Narcotics described

the close interdependence of nations and the need of their association for the accomplishment of an object of importance to each one of them separately, and therefore to all of them as a group. It is because no one country could protect itself against the evils of addiction that they found it necessary to associate themselves in limiting the spread of a habit which all regarded as an evil. There was thus the strong motive of a national interest which moved the governments and which has held them together in the fight against one of the great curses of the human race.³⁰²

A particularly insightful perspective in this regard is offered by May, who observed in 1951 that 'the national interest of the various countries in the maintenance of international control of narcotic drugs is not equally strong'.³⁰³ As a result, the sense of shared common purpose was critical to the maintenance of the regime.

There is a definite danger that if an organization separate from the United Nations were charged with such control a considerable number of countries might fail to join it. The cooperation of states which believe that they have a comparatively minor interest in narcotic drugs, can, however, be secured within the framework of the United Nations if this Organization is charged with the campaign against the drug evil. It is, therefore, vital that international control of narcotic drugs be entrusted not to a separate organization but to a general international organization such as the United Nations, representing mankind as a whole.³⁰⁴

In her review of anti-narcotic campaigns in the United States between 1920—1940, Susan Speaker finds that the characterisation of drugs as an 'evil', a 'menace' or a threat was standard fare within the propaganda of the U.S. anti-drugs movement of the period.

³⁰¹ Renborg, 'Principles of International Control of Narcotics' (n 78) 436.

³⁰² United Nations 'Bulletin of Narcotics' (July 1950) vol H, no 3, 4. Cited in May (n 52) 535.

³⁰³ May (n 52) 494.

³⁰⁴ *ibid* 494-95.

According to Speaker, ‘After about 1918...these negative images expanded enormously: drug use was increasing characterized...as a monstrous, immensely powerful, civilization-threatening evil, perhaps the worst menace in all history.’³⁰⁵ She continues,

During the 1920s and 1930s, newspaper and magazine accounts of the ‘narcotics problem’...consistently used the same stock images and ideas to construct an intensely fearful rhetoric about drugs. Authors routinely described drugs, users, and sellers as ‘evil’ and often implied that there was a sinister conspiracy at work to undermine American society and values through drug addiction....According to most of these accounts, addiction was spreading rapidly and would soon engulf the country...Such was the danger to civilization that there could be no compromise measures: drug use and drug trafficking would have to be completely eradicated, no matter what it cost or how long it took.³⁰⁶

While the use of such ‘apocalyptic’ language, to use Speaker’s assessment,³⁰⁷ is perhaps understandable and expected within the realm of social or political agitation, it becomes of more serious concern when that same language moves outside of popular media and anti-drugs campaigning literature, and becomes reflected in broader discourse. However, this is precisely the case with drugs, and the use of this type of language was common in the professional legal and medical literature of the time. A 1909 article in the *American Journal of International Law*, for example, described the ‘widespread evil’ of opium smoking,³⁰⁸ and a 1911 editorial in that same journal welcoming the second International Opium Conference stated:

³⁰⁵ Susan L Speaker, “‘The Struggle of Mankind against its Deadliest Foe’: Themes of Counter-Subversion in Anti-Narcotics Campaigns, 1920—1940’ (2001) 34/3 *Journal of Social History* 591, 592.

³⁰⁶ *ibid* 591.

³⁰⁷ *ibid*.

³⁰⁸ Wright, ‘The International Opium Commission’ (n 60) 670.

It may be said that there is no such thing as an evil wholly national in its incidence. Where an evil appears amongst one people, it is generally the reflex or concomitant of a similar evil amongst other peoples. This being so, few evils can be eradicated by national action alone. National action may be incentive, but finally there must be international action. The suppression of the opium and allied evils has on these principles been raised from the plane of sporadic national effort to the higher and more certain ground of international cooperation. The honor roll of international action for the settlement of the opium and allied problems is as follows: America, Austria-Hungary, China, France, Germany, Great Britain, Italy, Japan, Netherlands, Persia, Portugal, Russia and Siam.³⁰⁹ (*n.b. the thirteen countries at the first International Opium Convention in 1909*)

The medical literature of the era was also rife with similar characterisations. The British Medical Journal, for example, published many articles describing drugs, drug use or drug trafficking as ‘evil’ in the 1920s and 1930s.³¹⁰

Apocalyptic language and provocative analogies about drugs are also evident in the work of some modern legal scholars. Professor Yehuda Z Blum, for example, in his comparative analysis of extradition for terrorism and drug trafficking, includes drug offences among those categories of crimes that ‘represent an attempt...to subvert the existing social order’. These crimes ‘are aimed at the fundamental human rights of life and liberty of a person, as well as his physical integrity. As such, they must be viewed as violating not only the domestic laws of the target State but also as being directed against mankind in general’.³¹¹ Blum therefore argues that drug crimes constitute *delicta juris gentium*. In a similar vein, Professor Cherif

³⁰⁹ ‘The International Opium Conference’ (n 67) 472.

³¹⁰ See, for example, ‘The Traffic in Narcotic Drugs’ (1923) 2/3283 British Medical Journal 1053.; ‘The Opium Evil’ (1924) 2/3328 British Medical Journal, 678.; ‘Control Of Dangerous Drugs’ (1930) 2/3639 British Medical Journal 572.; ‘The Traffic in Narcotic Drugs’ (1933) 2/3795 British Medical Journal 618.

³¹¹ Yehuda Z Blum, ‘Extradition: A Common Approach to the Control of International Terrorism and Traffic in Narcotic Drugs’ (1978) 13 Israeli Law Review 194, 197.

Bassiouni has proposed, in discussing codification of international offences, that ‘drug offences’ should be included in the same category of ‘seriousness’ as slavery and slave-related practices, torture, unlawful human experimentation, aircraft hijacking, taking of civilian hostages and theft of nuclear weapons.³¹²

The language of drugs as ‘evil’ can be found in the the discourse of States in the early stages of fashioning domestic approaches to drug control. For example, an Imperial Decree of the Chinese Government published in the *Peking Gazette* on 6 September 1906 stated

The opium smoker wastes time and neglects work, ruins his health, and impoverishes his family, and the poverty and weakness which for the past few decades have been daily increasing amongst us are undoubtedly attributable to this cause. To speak of this arouses our indignation, and, at a moment when we are striving to strengthen the Empire, it behooves us to admonish the people, that all may realize the necessity of freeing themselves from these coils, and thus pass from sickness into health.

It is hereby commanded that within a period of ten years the evils arising from foreign and native opium be equally and completely eradicated.³¹³

In China, the language of evil moved quickly from the realm of political pronouncement to the realm of domestic law when Article 1 of the eleven measures published in November of that same year to implement this edict described its objective as being, ‘[t]o restrict the

³¹² M Cherif Bassiouni, ‘A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression on International and Transnational Criminality, including the Establishment of an International Criminal Court’ (1991) 15 *Nova Law Review* 353, 362-363. Bassiouni categorises these and a number of other offences as International Delicts, or ‘those offenses which offend basic human values, but which do not affect the peace and security of humankind, and which are not the product of state action or state policy’.

³¹³ Cited in Hamilton Wright, ‘The International Opium Commission’ (1909) 2/4 *American Journal of International Law* 828, 828.

cultivation of the poppy in order to remove the root of the evil'.³¹⁴ A Second Imperial Decree issued in February 1907 similarly noted that 'it is even more necessary to forbid the cultivation of the poppy, in order to sweep away the source of evil'.³¹⁵ In September 1908, the King of Siam declared it to be 'unquestionable that opium had an evil effect upon its consumers and casts degradation upon every country where the inhabitants are largely addicted to the habit of opium smoking. There is no reason to doubt that the most earnest desire of nearly every country in the world is to suppress this noxious habit.'³¹⁶

This language is omnipresent in the work of international drug control organs, and within the drafting of international instruments, dating back to the first International Opium Commission when a telegram from U.S. President Theodore Roosevelt extended to delegates 'my good wishes and conviction that their labours will be of the greatest importance towards the general suppression of the the opium evil throughout the world'.³¹⁷ Throughout the official record of the Commission's work, the characterisation of opium as an 'evil' features regularly among the statements of various delegations,³¹⁸ although this language is not ultimately reflected in the resolutions that emerged from the meeting. The codification of this language in law would not occur until drug control's fourth stage.

³¹⁴ *ibid.*

³¹⁵ *ibid* 836.

³¹⁶ *ibid* 851.

³¹⁷ International Opium Commission (n 64) 14.

³¹⁸ *ibid.* See, for example, statements of delegates of Great Britain (p 27), China (p 32), France (p 39) and United States (p 44).

3.4 The Legacy of Language on Law: ‘Evil’ and the Fourth Stage of Drug Control

It would be tempting to dismiss such use of language as a relic of a previous time, and not relevant to the modern era where medical knowledge of drugs and drug use is advanced, and international law in this realm exists on a contemporary footing. However, to do so would ignore the legacy of such language in the historical development of international drug control law, its currency in the modern legal regime and its continuing influence on the human rights violations occurring in this fourth stage. Indeed, one of the main justifications for punitive, prohibitionist policies towards drugs - including strict enforcement measures and severe punishments - has been on the ‘moral’ grounds³¹⁹ that drug use is intrinsically wrong, evidence of moral inadequacy and should therefore be harshly penalised.³²⁰ From this context emerges the discourse that is now common to the drugs debate around the world, where pronouncements are made about the ‘social evil caused by drug trafficking’³²¹ and the ‘global menace’ of the drug trade.³²² Persons involved in the drug trade are ‘merchants of death’,³²³

³¹⁹ MT Aoyagi, ‘Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy’ (2005) 37 NYU Journal of International Law and Policy 555, 585.

³²⁰ *ibid* 561.; Gilmore (n 38) 384.

³²¹ *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 (PC), para 64.

³²² AH Geraghty, ‘Universal Jurisdiction and Drug Trafficking: A Tool for Fighting one of the World’s Most Pervasive Problems’ (2004) 16 Florida Journal of International Law 371, 374.

³²³ M Hor, ‘Singapore’s Innovations to Due Process’ (International Society for the Reform of Criminal Law Conference on Human Rights and the Administration of Justice, Johannesburg, December 2000) <<http://www.isrcl.org/Papers/Hor.pdf>> accessed 13 May 2014, 9.

‘engineers of evil’³²⁴ or ‘peddlers of death’.³²⁵ In a major address on drugs in June 2014, Pope Francis stated that ‘[d]rug addiction is an evil, and with evil there can be no yielding or compromise’.³²⁶

As is evident from Pope Francis’s comments, the end of the League of Nations did not mean an end to the morality-based paradigm of drug control, and the language of drugs as ‘evil’ common to the second and third stages of drug control also carries over into the fourth. Such language is evident in the very first session of the UN Commission on Narcotic Drugs in 1946, which was presented with a resolution of the United States Congress speaking of ‘freeing the world of an age-old evil’, noting that ‘the only effective way to suppress the demoralizing use of opium and its derivatives (heroin, morphine, and so forth) was to control the source of the evil by limiting cultivation of the poppy plant’.³²⁷ Speaking at Commission’s second session, the Chairman noted that ‘addicts derived real pleasure from inducing others to follow the same vice; in this way they increased the number of their potential sources of supply. A criminal addict was no more useful to the community than a case of smallpox.’³²⁸ The third session of the Commission in 1948 went so far as to agree a

³²⁴ Malaysia Chief Justice Azlan Shah. Cited in SL Harrington, ‘Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs’ (1991) 29 *Columbia Journal of Transnational Law* 365, 380.

³²⁵ *ibid.*

³²⁶ James Mackenzie, ‘Pope Francis warns on “evil” of drugs, opposes legalization’ *Reuters* (20 June 2014).

³²⁷ UN Commission on Narcotic Drugs, ‘Limitation of the Production of Raw Materials (Opium and Coca Leaf) used in the manufacture of narcotic drugs: Documents Transmitted by the Government of the United States of America’ (26 November 1946) UN Doc No E/C.S.7/8, 6.

³²⁸ UN Commission on Narcotic Drugs, ‘Summary Records of the Second Session’ (7 January 1948) UN Doc No E/CN.7/106, 124.

resolution to the Economic and Social Council stating ‘that narcotic drugs constituted, and may constitute in the future, a powerful instrument of the most hideous crime against mankind’ and urging the Council to ‘ensure that the use of narcotics as an instrument of committing a crime of this nature be covered by the proposed Convention on the prevention and punishment of genocide’.³²⁹ This attempt by a UN drug control body to have drug offences codified alongside the most heinous of international crimes was seen again half a century later in 1996, when the International Narcotics Control Board urged the inclusion of drug trafficking within the remit of the International Criminal Court.³³⁰ The language of ‘evil’ remains a common feature of drug policy political discourse within the Commission on Narcotic Drugs in the 21st century.³³¹

While the characterisation of drugs as ‘evil’ has been omnipresent throughout the era of international drug control at a rhetorical level, the fourth stage of drug control is unique and significant for the fact that it is within the United Nations period that the language of evil moves from the realm of political discourse or newspaper editorial to that of codification within the core international legal instrument. The preamble of the 1961 Single Convention on Narcotic Drugs reads,

³²⁹ UN Commission on Narcotic Drugs, ‘Summary Records of the Third Session Lake Success New York, 3-22 May 1948’ (16 February 1949) UN Doc No E/CN.7/155, 161.

³³⁰ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 1996’ (1997) UN Doc E/INCB/1996/1, para 14.

³³¹ See, for example, Antonio Maria Costa, ‘Speech by Antonio Maria Costa, Executive Director of UNODC, to the 50th Session of the Commission on Narcotic Drugs, Vienna’ (12 March 2007).; Zhanat Suleimenov, ‘Statement by Mr. Zhanat Suleimenov, Chairman of the Anti-Drugs Control Committee of the Ministry of Internal Affairs of Kazakhstan, at the high-level segment of the Fifty-Second Session of the UN Commission on Narcotic Drugs’ (11 March 2009), 2.

Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,

Conscious of their duty to prevent and combat this evil,

Considering that effective measures against abuse of narcotic drugs require co-ordinated and universal action³³²

In the context of international treaty law, this wording is notable for a number of reasons, all of which have the effect of undermining, if not outright conflicting with, the parallel humanitarian aspirations of the regime. Whatever the intended appeal to a greater humanitarian mission expressed in the Single Convention's opening line, 'Concerned with the health and welfare of mankind', such sentiments are compromised, if not negated, by those describing 'addiction to narcotic drugs' as a form of 'evil'. As the international drug control regime necessarily regulates human activities - whether those be drug production, manufacturing, cultivation, trafficking, selling/purchase or use - the Single Convention labels, by extension, those who engage in these activities as being, if not evil themselves, then at least purveyors of evil deeds or collaborators in the threat drugs pose to States. It is useful here to consider Conor Gearty's thoughts on the use of similar language in the context of the 'war on terror', where human rights violations also occur in the name of, and are often justified by, the drive to suppress an existential 'evil' or 'threat'. In assessing the negative impact of anti-terrorism rhetoric on public and political discourse, Gearty notes,

There are many things worryingly wrong about this perspective when viewed through a human rights lens. First, it reintroduces into international affairs the language of evil, when one of the primary achievements of the international legal

³³² 1961 Convention amended (n 203) preamble.

order has been to remove such tendentious and highly inflammatory absolutist talk from the conduct of nation states.³³³

However, in the context of drug control, the international legal order, rather than ‘remov[ing] such tendentious and highly inflammatory absolutist talk’, actually enshrines it within the core international instrument. The use of such language, as Gearty notes, is highly unusual, and the unique nature of its use is particularly glaring when considered alongside other treaties addressing matters that the international community considers abhorrent. For example, neither slavery,³³⁴ apartheid³³⁵ nor torture³³⁶ are described as being ‘evil’ in the relevant international conventions that prohibit them. Nuclear war is not described as being ‘evil’ in the treaty that seeks to limit the proliferation of atomic weapons, despite the recognition in the preamble that ‘devastation that would be visited upon all mankind’ by such a conflict.³³⁷ The closest one finds to the language contained in the preamble to the Single Convention to describe drugs is that found in international instruments in the context of genocide. For example, in describing the crimes committed during the Second World War, the

³³³ Conor A Gearty, ‘Terrorism and Human Rights’ [2005] *European Human Rights Law Review* 1, 3.

³³⁴ Convention to Suppress the Slave Trade and Slavery (signed 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Registered no 141.

³³⁵ UN General Assembly, ‘International Convention on the Suppression and Punishment of the Crime of Apartheid’ (30 November 1973) UN Doc No A/RES/3068(XXVIII).

³³⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

³³⁷ Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970) 729 UNTS 161.

Universal Declaration of Human Rights uses the term ‘barbarous acts’,³³⁸ while the Genocide Convention uses the term ‘odious scourge’.³³⁹

The framing of drugs in this manner is not without broader legal impacts, and is found replicated in the reasoning of domestic constitutional courts, and even international human rights mechanisms, the bodies charged with upholding and defending the rights of individuals against the State. For example, drugs have been characterised as a ‘social evil’³⁴⁰ by the Supreme Court of Singapore. Persons involved in the drug trade have been described as ‘engineers of evil’ by the former Chief Justice of the Malaysian Supreme Court.³⁴¹ The House of Lords in Great Britain has characterised drug trafficking as a ‘notorious social evil’³⁴² and the Irish High Court has described ‘the growing evil associated with drug dealing’.³⁴³ In a 2006 speech, the then Chief Justice of the Supreme Court of India stated

Drug abuse is a social evil...Just as any virus, use of drugs and drug trafficking knows no bonds or limitations. It spreads all over a country; from nation to nation; to the entire globe infecting every civilized society irrespective of caste, creed, culture and the geographical location.³⁴⁴

³³⁸ UN General Assembly, ‘Universal Declaration of Human Rights’ (10 December 1948) UN Doc No A/RES/217 A (III).

³³⁹ UN General Assembly, ‘Convention on the Prevention and Punishment of the Crime of Genocide’ (9 December 1948) UN Doc No A/RES/260, preamble.

³⁴⁰ *Ong Ah Chuan* (n 321) para 64.

³⁴¹ *Harring* (n 324) 380.

³⁴² *R v Lambert (Steven)* [2001] UKHL 37; [2001] 3 WLR 206; [2001] 3 All ER 577, HL para 156.

³⁴³ *Director of Public Prosecutions v Farrell* [2009] IEHC 368 (HC), para 16.

³⁴⁴ YK Sabharwal, ‘Keynote Address’ (National Seminar and Training Programme on Narcotic Drugs and Psychotropic Substances’, 25 March 2006, New Delhi) <http://www.supremecourtfindia.nic.in/speeches/speeches_2006/ndps.pdf> accessed 14 June 2014, 1.

Even the European Court of Human Rights has talked of ‘the scourge of drug trafficking’.³⁴⁵

The presence of such ‘tendentious and highly inflammatory absolutist talk’, to use Gearty’s phrase, within discourse of both UN drug control bodies as well as domestic courts is not only worrying, but contributes to an environment in which human rights violations in the name of drug control flourish. It can be argued that this rhetoric of ‘evil’ goes so far as to provide ideological justification for, and defence of, such abuses. As noted by Room, it is this language of drugs as ‘evil’ that ‘serves as a justification of the...Convention regime of control and coercion’.³⁴⁶

In addition to enshrining drugs as evil within its core international instrument, a second element observed in the fourth stage of drug control, one again with an impact on the human rights environment, is the evolution of the notion of drugs as ‘evil’ to drugs as ‘threat’. As discussed earlier, the concept of drug use as a threat to the individual and the fabric of society has always been a component of what one might call the ‘morality-based’ paradigm of the regime. As noted by Speaker, at the birth of the League of Nations era ‘negative images expanded enormously: drug use was increasingly characterized as not just a serious medical or social problem, but as a monstrous, immensely powerful, civilization-threatening evil, perhaps the worst menace in all history’.³⁴⁷ During the drafting of the 1961 Single Convention, Harry J Anslinger, chairman of the U.S. delegation, notably stated that

³⁴⁵ *Phillips v United Kingdom* App no 41087/98 (ECHR, 5 July 2001), para 52.

³⁴⁶ Robin Room, ‘Addiction Concepts and International Control’ (2006) 20 *The Social History of Alcohol and Drugs* 2006, 282.

³⁴⁷ Speaker (n 305) 592.

‘[n]arcotic drugs have taken more lives than hydrogen bombs ever would’, a statement to which one observer noted ‘[n]one of the other 72 delegations in the meeting voiced any exception’.³⁴⁸ However, from the early 1970s onwards, it is possible to observe a tangible shift in the emphasis of the language UN system, with a decreasing emphasis on drugs as a moral or subversive ‘evil’, which dominated the discourse in the second and third stages of drug control, to an emphasis on drugs as a real and present danger to the State and the international community as a whole, one that if not suppressed vigorously threatens the future of humankind. The political context for this shift was the U.S.-driven ‘war on drugs’, announced by President Richard Nixon in 1969.³⁴⁹ The U.S. has always been a leading force driving international drug control, dating back to the beginnings of the regime when the Opium Commissions of 1909 and 1912 were convened at the urging of the United States.³⁵⁰ However, under the new ‘war on drugs’ approach, the United States, ‘sceptical about the international community’s willingness and ability to implement strict drug prohibition’,³⁵¹ took an increasing active unilateral role in pressing a supply reduction and law enforcement-centred approach to drug control, through actions including financial support and training to foreign States and the concluding of thirty bilateral treaties on drug control.³⁵² As described by Boister, this U.S.-led agenda influenced the UN to follow a similar approach, if for no other reason than the desire of many States to try and reign in the unilateral actions of the

³⁴⁸ Bevens (n 53) 41.

³⁴⁹ Boister, *Penal Aspects* (n 46) 49.

³⁵⁰ May (n 52) 491.

³⁵¹ Boister, *Penal Aspects* (n 46) 49.

³⁵² *ibid* 48-52.

United States.³⁵³ As a result, '[t]he UN was the agent for the transformation of this new approach into general international consciousness'.³⁵⁴

This transformation is apparent when reviewing the work of the UN General Assembly. Prior to 1970, language typically adopted in General Assembly resolutions on drug control tended to be of a more technical and less rhetorical nature. However, beginning around 1970 there is a noticeable shift. For example, General Assembly resolutions passed in 1970 state that 'on the whole addicts in all countries constitute a danger to society at large'³⁵⁵ and note 'with grave concern the spread of drug abuse in many parts of the world and its disastrous impact on individuals and nations';³⁵⁶ in 1971 'that the abuse of dependence-producing drugs represents an especially serious threat to the youth of the world';³⁵⁷ in 1972 that drugs represent a 'threat to human dignity and society';³⁵⁸ in 1974 that 'the abuse and illicit traffic in narcotic drugs has transcended national boundaries and affect the well-being and health of mankind as a whole...[and] that the misuse of narcotic and psychotropic substances presents an actual as well as a potential danger to the health and future of mankind';³⁵⁹ and in 1975

³⁵³ *ibid* 50.

³⁵⁴ *ibid*.

³⁵⁵ UN General Assembly, 'Technical assistance in the field of narcotic drugs' (15 December 1970) UN Doc No A/RES/2720(XXV).

³⁵⁶ UN General Assembly, 'Technical assistance in the field of drug abuse control' (n 253).

³⁵⁷ UN General Assembly, 'Youth and dependence-producing drugs' (20 December 1971) UN Doc No A/RES/2859(XXVI).

³⁵⁸ UN General Assembly, 'International instruments relating to drug abuse control' (18 December 1972) UN Doc No A/RES/3013(XXVII).

³⁵⁹ UN General Assembly, 'Abuse of and illicit traffic in narcotic drugs' (10 December 1974) UN Doc No A/RES/3279(XXIX).

‘the growing threat caused by the spread of drug abuse in certain parts of the world’³⁶⁰ and ‘the continuing serious menace of drug abuse’.³⁶¹ Although such language would seem commonplace today, viewed in its historical context these early 1970s resolutions demonstrate a subtle shift in the paradigm, one which would become more extreme over the following decade.

UN General Assembly Resolution 32/124, adopted in 1977, was the first detailed example of the lengths to which the shift to a threat-based paradigm had progressed, and an indication of where it would develop in the future. Rather than individual references to danger, as was evidenced in the resolutions noted above, Resolution 32/124 describes a worldview in which drugs are a central menace threatening all aspects of society.

Recognizing the growing threat caused by the spread of drug abuse in many parts of the world, the impact of this situation on social and economic development, agriculture and many other areas, and the resultant increase in crime and corruption,

Aware that drug abuse has serious adverse effects on the quality of life of individuals and upon the societies in which they live,

Concerned by the fact that drug trafficking exploits every individual with which it comes into contact,

Realizing that the concerted effort of States is required in dealing with this problem, and that the international effort in this respect should be strengthened,

...

³⁶⁰ UN General Assembly, ‘Adequate priority for narcotics control’ (9 December 1975) UN Doc No A/RES/3445(XXX).

³⁶¹ UN General Assembly, ‘United Nations Fund for Drug Abuse Control’ (9 December 1975) UN Doc No Res 3446(XXX).

Recognizing the urgent need to make individuals and Governments more aware of the dangers of drug abuse and the need for increased attention in the field of prevention, treatment and rehabilitation³⁶²

To examine the content of this resolution in its constituent parts, the first two sentences paint drugs as a threat to social and economic development, agriculture and the environment, community safety and good governance, the life and health of individuals and the fabric of society. Sentence three characterises this threat as being contagious, affecting ‘every individual with which it comes into contact’. Importantly for the threat-based paradigm, sentence four indicates the need for ‘strengthened’ international efforts, while sentence five highlights ‘the urgent need to make individuals and Governments more aware of the dangers of drug abuse’. Taken together, these sentences suggest an international response that is insufficiently robust, and an international community that is largely blind to, and therefore vulnerable from, the menace confronting it. In essence, the resolution describes a threat that is growing and spreading, that threatens essentially every aspect of life and society, to which the international response is insufficient, and States not properly aware of the danger facing them. In 1998, this threat based paradigm would find ultimate expression in the opening preamble of the UN Political Declaration on the world drug problem.

Drugs destroy lives and communities, undermine sustainable human development and generate crime. Drugs affect all sectors of society in all countries; in particular, drug abuse affects the freedom and development of young people, the world’s most valuable asset. Drugs are a grave threat to the health and well-being of all mankind, the independence of States, democracy, the stability of nations, the structure of all societies, and the dignity and hope of millions of people and their families.³⁶³

³⁶² UN General Assembly, ‘International co-operation in the field of narcotic drugs relating to treatment and rehabilitation’ (16 December 1977) UN Doc No A/RES/32/124.

³⁶³ UN General Assembly, ‘Political Declaration’ (21 October 1998) UN Doc No A/RES/S-20/2, 1.

In 2012, the annual General Assembly resolution on ‘International cooperation against the world drug problem’ stated that ‘the world drug problem continues to constitute a serious threat to public health and safety and the well-being of humanity...and to the national security and sovereignty of States’.³⁶⁴ In the contemporary context, the only area of international concern in which language approximates this is found in the context of the ‘war on terror’. Consider, for example, the language of the 1998 Political Declaration mirrors that found in UN Security Council Resolution 1377 in 2001, which ‘[u]nderlines that acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity’,³⁶⁵ or that of the Council of Europe in 2002, that ‘terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society’.³⁶⁶ Given this parallel, Gearty’s work on terrorism and human rights again provides useful insights when considering the impact of such a threat-based approach to public policy-making.

[T]his approach asserts that the danger facing our democracies and our culture of human rights is so great, so evil that we are entitled, indeed morally obliged, to fight back, and that in defending ourselves in this way it may well be that we ourselves have to commit evil acts, to commit harms that run counter to our fundamental principles, but that these actions are nevertheless justified, both as necessary (to save ourselves) and as less evil than what our opponents do.³⁶⁷

³⁶⁴ UN General Assembly, ‘International cooperation against the world drug problem’ (3 April 2012) UN Doc No A/RES/66/183, preamble.

³⁶⁵ UN Security Council Res 1377 (12 November 2001) UN Doc No S/RES/1377.

³⁶⁶ COE, *Guidelines on human rights and the fight against terrorism* (adopted by the Committee of Ministers 11 July 2002) preamble, para a.

³⁶⁷ Gearty (n 333) 1.

Although writing in the context of terrorism, Gearty's analysis slips easily into a discussion of international drug control, where the 'evil threat' posed by drugs is similarly a driving rationale for the international response, and the use of extreme measures in waging that response. For example, in 2006 Malaysian Prime Minister Datuk Seri Abdullah Ahmad Badawi defended the use of death penalty for drug offences because it was the 'right kind of punishment' given the menace that drugs pose to society.³⁶⁸

3.5 Conclusion

When considering a framework for the development of a fifth stage of drug control, unpacking the implications of this evolution is critical, as the reality, or perhaps the unintended consequence, of the UN era is that the two historical paradigms that have driven drug control have gone from being mutually reinforcing to being in open conflict. At the heart of this conflict is human rights. As Boister writes, 'most commentators ignore the fact that the drug conventions fail to adequately protect the human rights of those individuals subject to the system, whether they are offenders, alleged offenders or innocent third parties'.³⁶⁹ However, as this chapter has illustrated, the drug control regime not only fails to fulfil a protective human rights function, it contributes to a political and legal environment that heightens human rights risk, and leads to human rights violations.

Although the similarities explored above between the discourse on drug control and that on terrorism are illuminating, there is at least one clear point difference in the approach that is

³⁶⁸ M Hussein, 'Abdullah Defends Death Penalty For Drug Traffickers' *Bernama Malaysian National News Agency* (22 February 2006).

³⁶⁹ Boister, *Penal Aspects* (n 46) 524.

relevant in this context. From the very early years of the most recent ‘war on terror’ post 11 September 2001, the international community has recognised and understood the risk that the threat-based paradigm poses to human rights. Beginning in 2003, the General Assembly has adopted a resolution each year on the ‘Protection of human rights and fundamental freedoms while countering terrorism’, stating in its preambular section that the General Assembly ‘[d]eeply deplor[es] the occurrence of violations of human rights and fundamental freedoms in the context of the fight against terrorism, as well as violations of international refugee and humanitarian law’, and that ‘all measures used in the fight against terrorism...must be in compliance with obligations of States under international law, including international human rights, refugee and humanitarian law’.³⁷⁰ The resolution continues in its operational paragraphs to urge States to comply with human rights obligations in specific areas including the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment;³⁷¹ the rights of persons deprived of liberty;³⁷² the rights of due process;³⁷³ the right to privacy;³⁷⁴ the protection of economic, social and cultural rights;³⁷⁵ and non-refoulement.³⁷⁶

When the threat of drugs is painted in the type of extreme terms described above, a threat not only to the individual but to the nation itself, it creates an atmosphere where the risk of

³⁷⁰ UN General Assembly, ‘Protection of human rights and fundamental freedoms while countering terrorism’ (30 March 2012) UN Doc No A/RES/66/171, preamble.

³⁷¹ *ibid* para 6(a).

³⁷² *ibid* paras 6(b), 6(c), 6(e).

³⁷³ *ibid* paras 6(d), 6(f),

³⁷⁴ *ibid* para 6(g).

³⁷⁵ *ibid* para 6(h).

³⁷⁶ *ibid* para 6(j-l).

abusive measures against people involved in these activities is heightened. As described by Boister, ‘the drug conventions...provide a broad framework and introduce a no-holds-barred ethos into domestic drug control’.³⁷⁷ The paradigm that paints drug suppression as a collective campaign against an evil threat has had the effect of creating a legal and policy environment in which millions of people worldwide are stigmatised and criminalised, and their vulnerability to both health problems and human rights abuses increased as a consequence. It has served to justify the application of abusive laws and policies, and the imposition of severe penalties, resulting in the incarceration of millions of people for drug offences,³⁷⁸ often in overcrowded and inhumane conditions, and the execution of perhaps one thousand people annually for drug crimes.³⁷⁹ Although the violations identified in the General Assembly resolution human rights and terrorism have been documented in the context of drug control, there has yet to be a similar resolution on protecting human rights and fundamental freedoms while countering drugs.

Although the threat-based discourse used in drug policy and terrorism is similar, there is still little official recognition of the human rights impacts of this in the area of drug control. Such negative human rights outcomes cannot be considered anything other than a direct contradiction to the historical claim to a humanitarian basis of the international drug control project. Indeed, it is fair to say that in the modern reality of efforts to suppress drugs, the threat paradigm has become the sole driving force behind the regime, to the point that few

³⁷⁷ Boister, *Penal Aspects* (n 46) 527.

³⁷⁸ See Dave Bewley-Taylor, Mike Trace and Alex Stevens, ‘Incarceration of drug offenders: costs and impacts’ (Beckley Foundation Drug Policy Programme 2005).

³⁷⁹ Gallahue, ‘The Death Penalty for Drug Offences: Global Overview 2011’ (n 20) 5.

would imagine that an expressly humanitarian paradigm exists in the regime at all.

Developing a framework for a fifth stage of drug control can only occur if this situation is reversed, and promoting ‘the health and welfare of mankind’ becomes the engine of drug policy, to the extent that the moralistic paradigm of ‘evil’ is abandoned as an historical curiosity.

Chapter Four - Drug Control and Human Rights:

Tensions and Conflicts between Regimes

4.1 Introduction

The previous chapter explored the historic internal tensions peculiar to the development of international drug control law: the competing drive to pursue humanitarian objectives on the one hand, while viewing drug use and the drug trade as an ‘evil’ to be suppressed and eradicated on the other hand. During the United Nations era, the inherent strains between these two moral and philosophical concepts have been amplified, in both law and in practice, in the engagement between international drug control law and international human rights law.

As mentioned previously, there are three key elements of the fourth stage, United Nations era, of drug control that differentiate it from its predecessors. The first is the increased use of penal sanctions as a tool of drug suppression. As described by Bewley-Taylor,

While the pre-1961 foundational treaties were in essence ‘restrictive commodity agreements’, the Single Convention [on Narcotic Drugs] was a stricter and wider-ranging multilateral instrument which, although still addressing the concerns of its predecessors, became more prohibitionist in tenor; including an increased focus upon individual drug users.³⁸⁰

The second element is the near universal ratification of the core drug control instruments.

While the pre-United Nations drug control regime was characterised by a patchwork of treaties and numbers of States Parties to them, the modern conventions have achieved near

³⁸⁰ Bewley-Taylor, *International Drug Control* (n 172) 5.

unanimous support, resulting in this penal-focussed approach to drug control being incorporated into domestic law in almost every country of the world. The increasingly punitive nature of drug control has contributed to what the United Nations Office on Drugs and Crime calls the negative ‘unintended consequences’ of the regime. As described in a 2008 report from its Executive Director, ‘[l]ooking back over the last century, we can see that the control system and its application have had several unintended consequences – they may or may not have been *unexpected*, but they were certainly *unintended*’.³⁸¹ The unintended consequences identified by the Executive Director include the creation of ‘a huge criminal black market’, the prioritising of law enforcement in government policy and expenditure at the expense of public health and the destabilising effects of the drug trade on producer and transit countries.³⁸² The notion that there are unintended negative consequences resulting from punitive approaches to drug control is not a new one. Writing of the domestic situation in the United States almost fifty years earlier, Makowski observed,

It is evident...that present controls leave much to be desired. International attempts have failed to stifle illicit drug traffic at its sources. In spite of severe penalties and spirited enforcement existing domestic policies have failed to weaken a billion-dollar American black market in drugs. Narcotism in America remains an embarrassing social problem. This dark state of affairs has cast doubt not only upon present legislation but also upon the entire fabric of concepts and attitudes which gave rise to it...Severe penalties where the addict has no legal access to drugs merely elevates black market prices rendering it impossible for him to alleviate his suffering by lawful means. Such penalties even where rendered fall heavily only upon ‘pushers’ and other unimportant violators many of whom are addicts themselves driven to such employment by the high cost of drugs...Incarceration of addicts has proved entirely without merit.³⁸³

³⁸¹ UN Commission on Narcotic Drugs, ‘Fit for Purpose’ (n 16) 10.

³⁸² *ibid* 10-11.

³⁸³ Makowski (n 2) 317.

The third element differentiating the fourth stage of drug control from those that came before is that the modern legal instruments developed in parallel to an increasingly robust system of international human rights treaty law. This international legal terrain has led to another negative unintended consequence of the fourth stage of international drug control, one alluded to by Makowski, namely the multiple human rights violations documented around the world occurring as a result of drug enforcement efforts. In many cases, these human rights violations are excused or justified on the basis that the abusive policies or practices are supported under international drug control law, or are implemented as part of fulfilling drug treaty obligations. This has created, in effect, a situation where one branch of international law is used as a rationale to ignore or erode the effect of another - the phenomenon of 'parallel universes' described by Paul Hunt.

This chapter will explore the engagement between these two legal regimes, and the negative human rights consequences that often emerge as a result of the parallel universes. It is not intended as a comprehensive listing of the multiple areas in which human rights are affected by drug control, nor an exhaustive treatment of any one particular issue. Rather, the purpose is to illustrate the often strained nature of the relationship between these two legal regimes, highlighting examples of tensions and conflicts within this broader field of concern. In doing so, this chapter will lay the foundations for a later discussion of treaty interpretation, and the development of an approach that bridges the parallel universes in a manner that ensures protection and fulfillment of human rights.

4.2 Historical Tensions in the Fourth Stage

In February 1946, the First Session on the UN General Assembly was held in London. On the agenda during that inaugural meeting of the UN's highest policy-making body was the question of the new organisation's relationship with Spain. While the defeat of the Axis powers less than twelve months earlier had precipitated the fall of fascist regimes across Europe, the government of General Franco was an anomaly. Franco had seized power in Spain some ten years earlier in a military coup, overthrowing a democratically elected civilian government, and throwing the country into civil war. Franco's victory in the civil war was in no small way attributable to the assistance of both Hitler's Germany and Mussolini's Italy. Franco, in turn, was an active supporter of the Axis powers during World War II, although, unlike in Germany and Italy, the Allied victory did not result in toppling his regime.

At the very first session of the UN General Assembly, Panama put forward a resolution proposing that the UN and its Member States have no relations with General Franco's government, and neither diplomatically recognise nor support the regime.³⁸⁴ The Panamanian proposal was based upon positions agreed at the Potsdam Conference at the end of World War II, and at the San Francisco Conference that led to the drafting of the Charter of the United Nations.³⁸⁵ At those meetings, it was agreed that membership 'cannot apply to States whose regimes have been installed with the help of armed forces of countries which have fought against the United Nations, so long as these regimes are in power'.³⁸⁶ As explained by the delegate of Panama in proposing the resolution, 'all the members of the San Francisco

³⁸⁴ UN General Assembly, 'Relations of Members of the United Nations with Spain' (12 December 1946) UN Doc No A/RES/39(I).

³⁸⁵ *ibid* para 1.

³⁸⁶ Official Records of the First Part of the First Section of the General Assembly, Plenary Meetings of the General Assembly Verbatim Record (10 January—14 February 1946), para 352. (Official Records: First Section).

Conference who approved this resolution had in mind exactly the country to which it really was referring; that is, the regime now in power in Spain'.³⁸⁷ The resolution specifically recommended that Franco's Spain be 'debarred from membership in international agencies established by or brought into relationship with the United Nations'. It further recommended that it be banned from 'participation in conferences or other activities which may be arranged by the United Nations or by these agencies'.³⁸⁸

The Panamanian resolution received wide support from other Member States. Speaking in support of the resolution, the delegation of Czechoslovakia noted that '[t]he United Nations are met in London to lay the foundations of a just and democratic world order'. Franco's regime 'came into power through crimes against humanity and justice, such are to-day on trial in Nuremberg'.³⁸⁹ The delegate continued, '[n]either democracy in Czechoslovakia, nor the democratic system in any other countries, can consider itself safe so long as, even in a far distant country, the fact of being a democrat means prison or the concentration camp. Not only is peace indivisible, but liberty and democracy too.'³⁹⁰ The delegation of Mexico expressed its belief that the Franco regime should 'not be granted, by this Organization nor by any one of our countries, the international status of a government representing the Spanish nation. Our only demand is that we should refrain from having diplomatic relations with a spurious regime.'³⁹¹ Uruguay stated that 'if we are not to be in flagrant opposition to the

³⁸⁷ *ibid.*

³⁸⁸ UN General Assembly, 'Relations of Members of the United Nations with Spain' (n 384) 9.

³⁸⁹ Official Records: First Section (n 386) 354.

³⁹⁰ *ibid* 355.

³⁹¹ *ibid.*

origins and purposes of our Organization...this resolution should be carried with the whole-hearted and unanimous support of the Assembly'.³⁹² The Byelorussian Soviet Socialist Republic concurred, stating that the people of Spain were 'still under the yoke of a dictatorship'.³⁹³ According to the Byelorussian delegate, '[t]hat situation is like a nightmare. There is terror; there is bloodshed; there are no laws. This is entirely in contradiction with the principles adopted by the United Nations...The Franco regime must not enjoy any help or support whatever from the States Members of the United Nations.'³⁹⁴ Other governments speaking in support of the resolution included France, Norway, Venezuela, Yugoslavia and the United Kingdom. When put to the General Assembly for a decision, the resolution was passed by a vote of forty-six to two.³⁹⁵

Just over six months after the General Assembly's decision that the newly formed United Nations would neither recognise nor have diplomatic relations with fascist Spain, the UN Economic and Social Council (ECOSOC) convened its Third Session in Lake Success, New York. At its ninth meeting on 26 September 1946, ECOSOC members heard a report from the Drafting Committee on Narcotic Drugs. The Committee had been tasked by ECOSOC and the General Assembly to draft a new protocol that would 'transfer to the United Nations the activities, powers and functions formerly exercised by the League of Nations in the field of narcotics control'.³⁹⁶ At this meeting, the question of UN relations with Spain was again

³⁹² *ibid* 357.

³⁹³ *ibid* 359.

³⁹⁴ *ibid* 359-360.

³⁹⁵ *ibid* 361.

³⁹⁶ UN Commission on Narcotic Drugs, First Session Agenda (27 November 1946) UN Doc No E/C.S.7/2/Rev.2, 3.

on the agenda for debate. At issue was a proposal put forward jointly by the governments of China, Czechoslovakia and the USSR that the new protocol on drug control include a clause which would have the effect of excluding Franco's Spain from being invited to become a party to the new narcotics treaty, this based upon the resolution of the General Assembly in February and the previous decisions made at Potsdam and at the San Francisco Conference. According to the Soviet delegate who presented the proposal, 'to invite Franco to sign the Protocol would be contrary to the decisions taken regarding Spain'.³⁹⁷

Despite the clear direction from the General Assembly that the UN and its Member States should neither recognise nor engage with the fascist regime in Spain, the proposed clause to the new drugs protocol provoked surprising debate among ECOSOC members. For some, the crimes of the Spanish regime and the resulting General Assembly decision should not prevent the UN from embracing Franco when it came to matters of narcotics control. The United Kingdom, which had spoken in favour of the General Assembly resolution seven months earlier, 'did not want to exclude Franco from the Protocol', arguing that to prevent Spain from becoming a party to the Protocol 'could only weaken the international [drug] control system'.³⁹⁸ Canada, which had also voted in favour of the General Assembly resolution excluding Spain, reasoned that the objective of narcotics control demanded a different approach. According to the Official Records of the session,

As regards Spain, the representative of Canada realized that the advantages and privileges of the United Nations should not be accorded to a nation which was not qualified to enter the Organization, but found it difficult to exclude a signatory to the [drug] Conventions from control, whoever he might be. In [Canadian delegate] Mr.

³⁹⁷ UN Economic and Social Council, Official Records No. 5, First Year: Third Session, Ninth and Tenth Meetings (26 and 27 September 1946), 57.

³⁹⁸ *ibid.*

Martin's opinion, no political problem was involved in this case, and he therefore declared himself against the exclusion of Spain.³⁹⁹

Other States argued in favour of the exclusion clause. Czechoslovakia, one of the proposal's co-sponsors, stated simply that '[t]he principle of entertaining no relations with Franco had been admitted. To accept the participation of the Franco Government in the Protocol would mean denying that principle.'⁴⁰⁰ Similarly, Chile 'was in favour of excluding Franco Spain on the basis of the attitude adopted at San Francisco and London'.⁴⁰¹ The Ukrainian Soviet Socialist Republic argued that 'if the Secretary-General sent an invitation to Franco in order to settle any problem whatever, it would be tantamount to recognizing Franco's signature'.⁴⁰² Therefore, Spain should be excluded from the protocol. In the end, the proposal to exclude Franco's Spain was adopted by ECOSOC. Only the United Kingdom voted against the proposal. Five others – Canada, Colombia, France, Greece and Peru – abstained from the vote.⁴⁰³ Interestingly, all six of these countries had voted in favour of the General Assembly resolution against UN engagement with Franco earlier that same year.⁴⁰⁴

This history is interesting not only for the light it sheds on the politics of international relations in the months following the end of the Second World War, and the emerging East-West factionalism that would come to define much of the UN's work during the ensuing decades of the Cold War. It also reveals the tensions within the United Nations between

³⁹⁹ *ibid* 58.

⁴⁰⁰ *ibid*.

⁴⁰¹ *ibid*.

⁴⁰² *ibid* 60.

⁴⁰³ *ibid* 61.

⁴⁰⁴ Official Records: First Section (n 386) 361.

concern for human rights on the one hand and the desire to control illicit drugs on the other, and the question of whether human rights violations may be overlooked, or even condoned, when occurring in the context of fighting drugs. Although set in a specific historical context, the debates over the UN's relations with fascist Spain on drug control are not at all unique in either content or reasoning. Rather, they provide a vivid illustration that these tensions and conflicts within the United Nations system are as old as the institution itself, and have remained at the heart of the international community's approaches to human rights and drug control over the next seventy years.

4.3 Complementarities, Tensions and Conflicts

In his work, *General Theory of Norms*, Hans Kelsen argues that norms in international law reflect four general functions - commanding norms, permitting norms, derogating norms and empowering norms.⁴⁰⁵ Pauwelyn summarises these four categories of norms as being:

1. Those that impose upon a State an obligation to do something, that is, to take some form of action – norms that impose positive obligations.
2. Those that impose an obligation on a State not to do something, that is, norms that impose negative obligations.
3. [Those that] grant the right to States not to do something, also known as an exemption [derogation] obligation.
4. [Those that] grant the right to a State to do something, or permissive norms.⁴⁰⁶

⁴⁰⁵ Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, Clarendon Press 1991) 96-114.

⁴⁰⁶ Pauwelyn (n 44) 158.

Types 1 and 2 impose *obligations* on States, and from these obligations other States or individuals derive rights. Types 3 and 4 grant rights to States, and therefore create obligations on other States or individuals.⁴⁰⁷

In general terms, a norm of international law can interact with another, separate norm, in one of two ways. The norms can either *accumulate* or they can *conflict*.⁴⁰⁸ Norms accumulate when the rights or obligations contained within them complement each other, therefore adding to or reinforcing the normative content of each. They may also have an accumulative relationship where the rights or obligations of one norm confirms that of the other, without creating any additionality in terms of content.⁴⁰⁹ In general, norms accumulate or are *complementary* where they either deal with different subject matters, or where they do not share any common States Parties.⁴¹⁰ However, norms may also form a complementary relationship when they share common subject matter and/or States Parties where one norm adds new rights or obligations to the existing norm without contradicting it.⁴¹¹

It is also possible for two norms to be in conflict. According to Jenks, in his influential 1953 treatise on the subject, '[a] conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible'.⁴¹² There are a

⁴⁰⁷ *ibid.*

⁴⁰⁸ *ibid* 161.

⁴⁰⁹ *ibid* 161-162.

⁴¹⁰ *ibid.*

⁴¹¹ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949) 38-39.

⁴¹² C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 451.

number of preconditions that must be met in order for a conflict of norms to exist. Therefore, one of the key issues in considering conflicts of norms between human rights and drug control, and therefore resolving them, is to ascertain whether the preconditions for a conflict exist to begin with. This territory is not uncontested, particularly by mechanisms of the international drug control regime, which have traditionally been reluctant to embrace the relevance of human rights within their mandates.⁴¹³

There are a number of preconditions that must be met in order for a conflict of norms to exist - an overlap of *ratione personae*,⁴¹⁴ *ratione materiae* and *ratione temporis*.⁴¹⁵ In essence, in order for a conflict to exist, the norms in question must overlap in terms of States concerned, the subject matter involved and must exist at the same point in time (whether a single unique event or a over a prolonged period). There can be little doubt that the thresholds of both *ratione personae* and *ratione temporis* are met in this case. Given that nearly all States have ratified at least one of the three drug conventions, it would be highly unusual that a State Party to any human rights treaty would not also be Party to at least one drug convention. Similarly, the obligations placed upon States by both the drug conventions and the UN human rights treaties exist contemporaneously. One set of obligations does not switch on, and another switch off. Therefore, in assessing any potential or actual conflicts of norms, the threshold of *ratione temporis* is also clearly established. On the third question of *ratione*

⁴¹³ See generally Barrett and Nowak (n 19).; Hunt (n 24).

⁴¹⁴ 'If two treaties are concluded by totally different parties, no conflict of obligations is possible. At least one party must be common to both treaties.' Hans Kelsen, *The Law of the United Nations* (Stevens & Sons Ltd 1950) 122.

⁴¹⁵ For discussion on necessary conditions for a conflict of norms to occur, see Karl Wolfram, 'Conflicts Between Treaties' in R Bernhardt (ed) *Encyclopedia of Public International Law* (1984) vol VII, 467.; Pauwelyn (n 44) 165.

materiae, there is little to suggest that there is not at least some overlap - and indeed in some cases significant overlap - between the human rights and drug control regimes. Even if one were to consider drug control a purely technical matter, and that the subject matter in that sense does not overlap with that of human rights, the activities that States undertake to fulfill their obligations under the drug control regime - whether those be related to matters of supply reduction, demand reduction or treatment - clearly overlap with or engage human rights norms. Subjects addressed within the drug treaties - such as health, law enforcement, incarceration and extradition, to name but a few - all engage elements of international human rights law. Therefore, the necessary preconditions exist to enable a consideration of conflicts between the two regimes.

Examples of complementary norms within international narcotics control law are common, for example between provisions of the 1961 and 1971 Conventions. In large part, the 1971 Convention simply expands the control measures established for plant-based narcotics under the 1961 Convention to also include synthetic psychotropic substances. Therefore, for example, Article 5 of the 1971 Convention, which calls upon States to limit to medical and scientific purposes of the psychotropic substances listed in that treaty, complements the General Obligation in Article 4(c) of the 1961 Convention ‘to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs’.⁴¹⁶ In this context, the 1971 treaty provision complements that of the 1961 Convention by expanding the scope and nature of the norm to include a new class of drugs. Norms may also be considered to be accumulating when one norm *confirms* the

⁴¹⁶ 1971 Convention (n 186) art 5(1).; 1961 Convention amended (n 203) art 4(c).

rights or obligations of another, pre-existing norm without adding to or expanding it.⁴¹⁷ For example, Article 17(1) of the 1988 drug convention, which stipulates that ‘[t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea’,⁴¹⁸ confirms Article 108(1) of the 1982 UN Convention on the Law of the Sea, which creates obligations upon States to ‘cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international [drug] conventions’.⁴¹⁹

Complimentary or accumulating norms are also evident in the relationship between international drug control law and international human rights law. One clear example is found in the issue of access to controlled drugs for medical purposes. As stated within the preamble of the 1961 Single Convention, the Parties

Concerned with the health and welfare of mankind,

*Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes*⁴²⁰

Here the preamble engages concepts central to modern discourse on economic, social and cultural rights, specifically Article 12 of the International Covenant on Economic, Social and Cultural Rights.⁴²¹ The Single Convention's context of ‘the health and welfare of mankind’

⁴¹⁷ Pauwelyn (n 44) 162.

⁴¹⁸ 1988 Convention (n 194) art 17(1).

⁴¹⁹ UN General Assembly, ‘Third United Nations Convention on the Law of the Sea’ (14 December 1983) UN Doc No A/RES/38/59, art 108(1).

⁴²⁰ 1961 Convention amended (n 203) preamble.

⁴²¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 12.

suggests that the treaty and its provisions are intended to advance, or be considered within, this broader concept of the right to health. The specific recognition in the preamble of the importance of the ‘adequate provision’ of medicines, and the need for States to ‘ensure the availability of narcotic drugs’ for the purpose of ‘the relief of pain and suffering’, further engages State obligations vis-à-vis the right to health. For example, the Committee on Economic, Social and Cultural Rights considers that the fulfillment of the right to health involves the provision a number of elements, including access to essential drugs.⁴²² Indeed, the Committee includes such access among the Core Obligations of States under Article 12.⁴²³ The failure of States to provide access to medicines to alleviate pain and suffering has prompted critical comment from the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.⁴²⁴ The recognition by the States Parties to the Single Convention of the importance of ensuring access to medicines clearly engages the obligation ‘to take positive measures that enable and assist individuals and communities to enjoy the right to health’.⁴²⁵ Similarly, ensuring access to controlled drugs for medical purposes is a core element of the mandate and activities of the International Narcotics Control Board.⁴²⁶ Therefore, the State obligation to ensure access to essential medicine is one that is duplicated in, and reinforced between, the two legal regimes.

⁴²² UN Committee of Economic, Social and Cultural Rights ‘General Comment No. 14: The right to the highest attainable standard of health’ (11 August 2000) UN Doc No E/C.12/2000, paras 12(a), 17.

⁴²³ *ibid* para 43(c).

⁴²⁴ UN Human Rights Council, ‘Nowak Report’ (n 36) paras 68-70.

⁴²⁵ UN Committee on Economic, Social and Cultural Rights (n 422) para 37.

⁴²⁶ International Narcotics Control Board, ‘Mandate and Functions’ <www.incb.org/incb/en/about/mandate-functions.html> accessed 17 February 2014.

In addition to the complimentary and conflicting norms described above, Barrett proposes a third category when considering the specific relationship between international drug control law and international human rights law, which he calls *tensions*.⁴²⁷ Tensions are instances where drug control policy, law or practice is implemented in a manner that undermines human rights protections. However, unlike an outright conflict, a tension is not the consequence of explicit treaty obligation in the drug conventions, but rather results from the manner in which a State or other body interprets that obligation within domestic practice. In effect, going further than is required under the drug control treaties to a point where the activities encroach on human rights safeguards. Jenks proposes a similar category in general international law, which he terms ‘divergences’. He states that

A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making treaties with a number of common parties may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.⁴²⁸

Tensions or divergences comprise the vast majority of instances where human rights are violated in the name of drug control. For the purposes of this analysis, complimentary/accumulating obligations, by their very nature, do not present a significant risk of violating human rights norms, and will therefore not be examined further. Instead, this chapter will focus on the question of tensions and conflicts between them as these represent the areas

⁴²⁷ Damon Barrett, ‘Intersections between the International Legal Regimes for Drug Control and Human Rights’ (Human Rights and Drugs Conference, Human Rights Centre, University of Essex, 8 February 2014).

⁴²⁸ Jenks (n 412) 425-26.

where human rights risk occurs, and where a process of interpretation is required in order to minimise or eliminate that risk.

4.4 Regime Tensions

Tensions or divergences between the drug control and human rights regimes are common, and are at the root of some of the most widespread and egregious human rights abuses resulting from drug policy and enforcement. As described above, a tension exists where the implementation of drug control law, policy or enforcement breach human rights protections, without an explicit treaty obligation to undertake such actions. In effect, it is where a State or an international body interprets the requirements of international drug control law as being broader or more severe than what is codified in the drug conventions, and the resulting outcomes exceed the requirements of treaty obligations. This section will explore three illustrative examples of tensions or divergences between international drug control law and international human rights law.

4.4.1 Death Penalty for Drug Offences

One example of tensions between the regimes is the issue of the death penalty for drug offences. In the mid-1980s, the death penalty for drug-related offences was in force in twenty-two States. By 1995, this number had increased to twenty-six, and by the end of 2000 at least thirty-four countries had enacted legislation providing for capital punishment for drug crimes.⁴²⁹ It is estimated today that as many as thirty-three countries and territories have

⁴²⁹ See generally, Lines, ‘A “Most Serious Crime”?’ (n 29) 21-28.

enacted capital laws for drug offences, and although most do not actually carry through the penalties allowed in legislation, it is still thought that as many as one thousand people annually are executed for drug offences.⁴³⁰ In a number of these States, drug offences can carry a mandatory sentence of death.⁴³¹

The growth in the number of States applying the death penalty for drug offences, particularly in the years since the adoption of the 1988 drug convention, is remarkable for two reasons. The first is that it stands in stark contrast to the overall international trend towards the abolition of the death penalty.⁴³² The second is that capital drug laws are not required under any of three drug conventions. In effect, the growth in the application of the death penalty for drug offences did not emerge as the result of a positive treaty obligation in the drug conventions to enact capital punishment laws, but instead by the manner in which States chose to implement the penal drug laws defined in those treaties, often based on the sense of existential threat or paradigm of ‘evil’ explored in chapter two. The Government of Singapore, for example, has defended its use of capital punishment because ‘tough anti-drug laws have worked well in Singapore's context to deter and punish drug traffickers’ and are

⁴³⁰ Patrick Gallahue and Rick Lines, ‘The Death Penalty for Drug Offences: Shared responsibility and shared consequences’ in P Hodgkinson (ed) *The International Library of Essays on Capital Punishment, Volume III: Policy and Governance* (Ashgate 2013) 559.

⁴³¹ Hood and Hoyle (n 31) 138.; Gallahue (n 20) 11.

⁴³² UN Economic and Social Council, ‘Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty-Report of the Secretary-General’ (18 December 2009) UN Doc No E/2010/10, 139.

‘necessary legislation to help us keep our country drug-free’.⁴³³ In a written statement made at the March 2009 session of the Human Rights Council, Singapore’s delegation defended itself from criticism over the use of the death penalty for drug offences by claiming that ‘[t]he death penalty has deterred major drug syndicates from establishing themselves in Singapore’.⁴³⁴ In 2006, the Malaysian Prime Minister Datuk Seri Abdullah Ahmad Badawi defended the use of death penalty is the ‘right kind of punishment’ given the menace that drugs pose to society.⁴³⁵

However, prescribing of the death penalty for drug offences raises serious human rights concerns. Under the International Covenant on Civil and Political Rights, the application of capital punishment, while not prohibited, is restricted in important ways. One key restriction is found in Article 6(2), which states that, ‘[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes’.⁴³⁶ From the perspective of the UN human rights system, there is little to support the suggestion that drug offences meet the threshold of ‘most serious crimes’. The Human Rights Committee, which holds the mandate to monitor State compliance with the Covenant, has stated definitively that drug offences do not meet this threshold. In its 2005 Concluding Observations on Thailand, the Committee noted ‘with concern that the death penalty is not restricted to the “most

⁴³³ Government of Singapore, ‘Letter dated 27 June 1997 from the Permanent Mission of Singapore to the United Nations Office at Geneva addressed to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (5 December 1997) UN Doc No E/CN.4/1998/113, para 4.

⁴³⁴ ‘Statement by Singapore during the interactive dialogue at the 10th session of the Human Rights Council on 10 March 2009’ (copy on file with author).

⁴³⁵ Hussein (n 368).

⁴³⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6(2).

serious crimes” within the meaning of article 6, paragraph 2, and is applicable to drug trafficking’.⁴³⁷ The Committee repeated this interpretation in its 2007 Concluding Observations on The Sudan, raising concern at ‘[t]he imposition in the State party of the death penalty for offences which cannot be characterized as the most serious, including embezzlement by officials, robbery with violence and drug trafficking’.⁴³⁸ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has also stated that drug offences do not meet the threshold of ‘most serious crimes’, concluding in 1996 that:

[T]he death penalty should be eliminated for crimes such as economic crimes and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences.⁴³⁹

The conclusion that drug-related offences fall outside the scope of ‘most serious crimes’ was reaffirmed in the Special Rapporteur’s 2006 Annual Report.⁴⁴⁰ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also reached this same conclusion. As stated in his 2009 Report to the Human Rights Council, ‘drug offences do not meet the threshold of most serious crimes. Therefore, the imposition of the death

⁴³⁷ UN Human Rights Committee, ‘Concluding observations: Thailand’ (8 July 2005) UN Doc No CCPR/CO/84/THA, para 14.

⁴³⁸ UN Human Rights Committee, ‘Concluding observations: The Sudan’ (29 August 2007) UN Doc No CCPR/C/SDN/CO/3, para 19.

⁴³⁹ UN Commission on Human Rights, ‘Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1996/74’ (24 December 1996) UN Doc No E/CN.4/1997/60, para 91.

⁴⁴⁰ UN Human Rights Council, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston’ (29 January 2007) UN Doc No A/HRC/4/20, paras 51-52.

penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly...also their right to human dignity'.⁴⁴¹

Here then is a prime example of tension, where State interpretation of how it implements the drug control treaties creates a breach of international human rights law. This breach is not one created by virtue of an explicit drug treaty obligation to impose capital punishment, but instead how a Government chooses to interpret the offences and sanctions within the drug treaties. Interestingly, this tension can be found even within the drug control regime itself. In recent years, the UN Office of Drugs and Crime has taken an unequivocal position that the death penalty is not a justifiable sanction.⁴⁴² The International Narcotics Control Board, on the other hand, has until recently refused to take a position, traditionally stating that the 'determination of sanctions applicable to drug-related offences remains the exclusive prerogative of each State and therefore lies beyond the mandate...[of] the Board'.⁴⁴³ In a 2014 case before the Indian Supreme Court, the Government cited the Board's failure to reject to the death penalty for drugs as evidence that 'the body mandated to ensure compliance of the UN Drug Conventions has no objection to the presence of capital

⁴⁴¹ UN Human Rights Council, 'Nowak Report' (n 36) para 66.

⁴⁴² See, for example, UN Office on Drugs and Crime, 'Contribution of the Executive Director of the United Nations Office on Drugs and Crime to the high-level review of the implementation of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem, to be conducted by the Commission on Narcotic Drugs in 2014' (6 December 2013) UN Doc No UNODC/ED/2014/z, para 52(c).

⁴⁴³ Secretariat, International Narcotics Control Board, Correspondence with Harm Reduction International (29 February 2012) <<http://www.hrw.org/news/2012/03/12/letter-international-narcotics-control-board-capital-punishment-drug-offences>> accessed 27 July 2014.

punishment...It is, therefore, wrong to say that such provisions are contrary to the UN Conventions'.⁴⁴⁴

4.4.2 Compulsory Detention in the name of 'Drug Treatment'

As described in chapter two, the United Nations era marked the first time that the provision of drug treatment was codified as a State obligation in international drug control law.

According to Article 38 of the Single Convention on Narcotic Drugs, '[t]he Parties shall give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts', and, subject to economic resources, 'it is desirable that [States] establish adequate facilities for the effective treatment of drug addicts'.⁴⁴⁵ The 1972 Protocol to the 1961 Convention significantly amended Article 38 in this regard, increasing the scope of the treaty to create an obligation to take 'all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of persons involved'.⁴⁴⁶ Similar provisions on drug treatment are found at Article 20 of the 1971 Convention,⁴⁴⁷ while the 1988 Convention specifies that drug treatment is an acceptable alternative or additional sanction within the context of penal provisions for offences related to the possession of drugs for personal use.⁴⁴⁸

⁴⁴⁴ Supreme Court of India, *Indian Harm Reduction Network v. Union of India and Ors*, Special Leave Petition (Criminal) No 114 of 2012, 'Affidavit in Reply on behalf of Respondent No. 1&2' (11 November 2013), para 4(v)

⁴⁴⁵ 1961 Convention (n 167) art 38.

⁴⁴⁶ *ibid* art 15.

⁴⁴⁷ 1971 Convention (n 186) art 20.

⁴⁴⁸ 1988 Convention (n 194) art 3(4)(d).

However, while such obligations are clearly intended to introduce less punitive, health-based responses to drug offences into treaty obligations, some States' approaches to providing drug treatment have created another regime tension, particularly the practice of the forcible detention and compulsory 'drug treatment' of people who use (or who are suspected of using) illegal drugs. This practice has been documented in numerous States including China, Vietnam, Cambodia, Thailand, Russia, Malaysia, Lao PDR and India.⁴⁴⁹ In total, it is estimated that perhaps half a million people worldwide are arbitrarily detained on any given day for the purpose of 'drug treatment', many of them held for months or even years at a time, without being charged with any criminal offence, being brought before a court or otherwise allowed to challenge the legality of their detention.⁴⁵⁰ In many cases, these 'treatment' centres are run by military or police personnel rather than medical staff, and numerous investigations into the conditions of these centres include reports of physical and sexual abuse and humiliation, beatings, forced labour and denial of medical services.⁴⁵¹ The situation clearly raises numerous human rights concerns, including questions of inhuman or

⁴⁴⁹ See, for example, International Harm Reduction Development Program, 'Human Rights Abuses in the Name of Drug Treatment: Reports From the Field', Public Health Fact Sheet (March 2009).; Human Rights Watch, 'The Rehab Archipelago Forced Labor and Other Abuses in Drug Detention Centers in Southern Vietnam' (2011).; Human Rights Watch, "'Skin on the Cable" The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia' (2010).; Nick Thompson, 'Detention as Treatment: Detention of Methamphetamine Users in Cambodia, Laos, and Thailand' (International Harm Reduction Development Program 2010).; Elliott, Lines and Schleifer (n 21).; Richard Pearshouse, 'Compulsory Drug Treatment in Thailand' (Canadian HIV/AIDS Legal Network 2009).; World Health Organization Western Pacific Region, 'Assessment of Compulsory Treatment of People Who Use Drugs in Cambodia, China, Malaysia and Viet Nam: An Application of Selected Human Rights Principles' (2009).

⁴⁵⁰ Ralf Jurgens and Joanne Csete, 'In the name of treatment: ending abuses in compulsory drug detention centers' (2012) 107/4 *Addiction* 689.

⁴⁵¹ *ibid.*; UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (1 February 2013) UN Doc No A/HRC/22/53, paras 40—44 (Mendez Report).

degrading treatment or punishment, the right to consent or to refuse treatment and of forced labour. It also raises serious concerns about illegal or arbitrary detention, prohibition of which is integrally linked to the broader right to liberty.⁴⁵²

As in the case of the death penalty, the question of compulsory drug detention exposes tensions within the drug control regime itself. While the UN Office on Drugs and Crime has been clear in rejecting compulsory detention for drug use,⁴⁵³ the International Narcotics Control Board is far more equivocal, and has at times commended countries with compulsory systems in its Annual Reports. The Board's 2001 Report, for example, recognises without comment the 'significant increase' in the population of China's compulsory drug detention centres to 360,000.⁴⁵⁴ It also 'welcome[d]' Vietnam's approach to drug treatment, which includes widespread use of compulsory detention, while also 'encourag[ing] the Government to reinforce and support existing facilities'.⁴⁵⁵

Muddying the waters considerably in this context is the fact that the Board, although eschewing any suggestion its mandate should be responsive to human rights concerns,⁴⁵⁶ has

⁴⁵² International Covenant on Civil and Political Rights (n 436) art 9(1).; Human Rights Committee 'General Comment No. 8: Right to liberty and security of the person (Art. 9)' (30 June 1982) UN Doc No HRI/GEN/1/Rev.1. See also Fiona de Londras, 'The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists' (2007) 12/2 *Journal of Conflict and Security Law*, 223, 238.

⁴⁵³ See, for example, International Labour Organisation, et al (n 35).

⁴⁵⁴ International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2011' (2012) UN Doc No E/INCB/2011/1, para 583.

⁴⁵⁵ *ibid* para 117.

⁴⁵⁶ Joanne Csete, 'Overhauling Oversight: Human Rights at the INCB' in J Collins (ed) *Governing The Global Drug Wars LSE Ideas: Special Report* (LSE Ideas 2012) (Overhauling Oversight).

been vocal in its assertion that there exists a human right to be ‘free from drug addiction’.⁴⁵⁷ As early as 1998, the President of the Board was stating in United Nations sessions that ‘[t]he right to be free of drug abuse and the right to be protected from drug abuse...should be respected by all people’.⁴⁵⁸ This claim to a right to be drug free, coupled with the State obligations within the drug conventions to provide drug treatment, creates a risky environment for human rights. As has been pointed out by one non-governmental organisation, such claims ‘could easily lead to a justification of forced treatment, claiming that it is aimed at the realisation of human rights’.⁴⁵⁹ This is not simply a theoretical risk, as this rationale underpins some defences of compulsory drug detention within parts of the human rights and medical literature. Takahashi, for example, advances the position in *Human Rights Quarterly* that ‘drug addiction...destroys—or at least suspends—the free will of the addict’,⁴⁶⁰ and therefore that ‘[i]t is disingenuous to pretend that the “decision” not to undergo treatment is an entirely free one...[as] [d]ecisions made under the influence of drugs are not decisions of free will’.⁴⁶¹ A similar perspective is advanced by Zunyou Wu of the Chinese Centre for Disease Control and Prevention in a 2013 publication of the World Health Organization. Like Takahashi, Wu questions the ability of people who are drug dependent ‘to make rational decisions, provide informed consent for treatment or participate completely in

⁴⁵⁷ International Narcotics Control Board 2011 (n 454) iii.

⁴⁵⁸ ‘Statement by Professor Hamid Ghodse, President of the International Narcotics Control Board’ delivered at the Economic and Social Council (28 July 1998). See also ‘Statement by Professor Hamid Ghodse, President of the International Narcotics Control Board’, Statement delivered at the 20th Special Session of the General Assembly on the World Drug Problem, 8-10 June 1998.

⁴⁵⁹ Harm Reduction International, ‘Commanding General Confidence? Human Rights, International Law and the INCB Annual Report for 2011’ (2012) 8.

⁴⁶⁰ Takahashi (n 39) 775.

⁴⁶¹ *ibid.*

their own due process’, in effect suggesting that the rights violations involved are either minimal, non-existent or legitimated as being done in the best interests of the individual.⁴⁶²

He further argues that ‘the rights of entire communities’ [presumably to be drug free] need to be balanced with, or even take priority over, the rights of the individual in question.⁴⁶³

Takahashi takes a similar position, stating that ‘[s]ociety has a strong interest in ensuring that persons who are addicted to drugs undergo treatment for their condition and...[t]o exclude completely the possibility of any level of coercion would be in many cases to exclude the possibility of the addict overcoming his addiction’.⁴⁶⁴

The issue of compulsory detention for drugs has become an increasing concern among non-governmental organisations and United Nations human rights bodies.⁴⁶⁵ As described in 2013 by the UN Special Rapporteur on Torture,

Compulsory detention for drug users is common in so-called rehabilitation centres. Sometimes referred to as drug treatment centres or “reeducation through labor” centres or camps, these are institutions commonly run by military or paramilitary, police or security forces, or private companies. Persons who use, or are suspected of using, drugs and who do not voluntarily opt for drug treatment and rehabilitation are confined in such centres and compelled to undergo diverse interventions.⁴⁶⁶

International human rights law also offers significant guidance specifically on the question of arbitrary detention in the context of drug treatment, none of it supportive of the notion that people who use drugs or are drug dependent surrender the right to liberty or security of the

⁴⁶² Zunyong Wu, ‘Arguments in favour of compulsory treatment of opioid dependence’ (2013) 91/2 Bulletin of the World Health Organization 142.

⁴⁶³ *ibid.*

⁴⁶⁴ Takahashi (n 39) 775.

⁴⁶⁵ International Labour Organisation, et al (n 35).

⁴⁶⁶ UN Human Rights Council, ‘Mendez Report’ (n 451) 40.

person, or the right to informed consent.⁴⁶⁷ For example, in its General Comment on Article 9 of the International Covenant on Civil and Political Rights, the Human Rights Committee notes that the protections enshrined in the treaty should not be narrowly interpreted to apply only to arrest and detention in the context of criminal cases. Rather, Article 9 ‘is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example...drug addiction’.⁴⁶⁸ Similarly, the Working Group on Arbitrary Detention considers Article 9 protections to be engaged in matters related to drugs. In its 2003 Report, the Working Group noted that it had been

[I]nformed by several sources that, in some countries, the disabled, drug addicts and people suffering from AIDS are detained in places that are incompatible with their state of health, sometimes without treatment and without it having been established that their detention is justified on medical or public health grounds. The Group is concerned because it is vulnerable persons that are involved, people who are often stigmatized by social stereotypes; but it is concerned above all because often such administrative detention is not subject to judicial supervision.⁴⁶⁹

In his 2009 report to the General Assembly, the UN Special Rapporteur on the right to the highest attainable standard of health raised specific concerns about consent to treatment for people who use drugs, noting they ‘are often perceived as being dangerous to themselves and unable to make the “right” decision. Prohibitions against their behaviour threaten their ability

⁴⁶⁷ See Rick Lines, “‘Treatment in Liberty’ - Compulsory Detention for Drug Use and Human Rights’ (2014) 3 Human Rights and Drugs (in press).

⁴⁶⁸ UN Human Rights Committee ‘General Comment No. 8’ (n 452) para 1. The Committee on the Rights of the Child has similarly noted that the rights of children deprived of their liberty apply with respect to children in conflict with the law and “to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.” See UN Committee on the Rights of the Child, ‘General Comment No. 10 – Children’s rights in juvenile justice’ (9 February 2007) UN Doc No CRC/C/GC/10, fn 1.

⁴⁶⁹ UN Working Group on Arbitrary Detention ‘Report of the Working Group on Arbitrary Detention’ (15 December 2003) UN Doc No E/CN.4/2004/3, para 74.

to refuse testing and treatment.⁴⁷⁰ The Special Rapporteur's report in 2010 was entirely dedicated to exploring issues of drug use and drug policy as they affect the right to health, and the report addressed the question of compulsory detention and treatment.⁴⁷¹ In a clear rebuke of the position argued by Takahashi and Wu, he concluded that '[p]eople who use or are dependent on drugs do not automatically lack the capacity to consent to treatment. A presumption of incapacity based on drug use or dependence creates significant potential for abuse.'⁴⁷² The Special Rapporteur also found that the type of mass detention and treatment described above were inconsistent with established human rights safeguards governing when such committal is legal. According to the report, '[d]ecisions regarding capacity and competence, and the need to obtain informed consent, must be made on a case-by-case basis. Treatment *en masse* prima facie fails to meet this requirement.'⁴⁷³

4.4.3 Harm Reduction

A third example of tensions between the drug control and human rights regimes is found on the question of harm reduction. 'Harm Reduction' is an approach to providing services to people who are active drug users that seeks to minimise the health harms related to their drug use, rather than end the use of drugs itself.⁴⁷⁴ Examples of harm reduction programmes are the distribution of sterile syringes and other injecting paraphernalia, on the basis that using

⁴⁷⁰ *ibid* para 88.

⁴⁷¹ UN General Assembly, 'Special Rapporteur Health 2010' (n 23).

⁴⁷² *ibid* para 39

⁴⁷³ *ibid* para 38.

⁴⁷⁴ International Harm Reduction Association, 'What is Harm Reduction?' (International Harm Reduction Association 2009).

sterile equipment to inject minimises or eliminates the risk of the transmission of blood-borne viruses such as HIV among networks of people who inject as a result of sharing used syringes.⁴⁷⁵ Another example is the provision of opioid substitution treatments, such as methadone and buprenorphine. These prescribed medicines are ingested orally, enabling the heroin dependent individual to cease injecting and therefore end the need to acquire drugs from illicit sources. Although patients are still dependent on an opiate, evidence has demonstrated the numerous health and social benefits that emerge when people move from illicit injectable opiates onto pharmaceutical, non-injectable opiates administered through a physician.⁴⁷⁶ Within the drug control system, harm reduction interventions have often been seen as controversial because they do not abide by the dominant paradigm of abstinence from the ‘evil’ of drug ‘addiction’, and instead accept the reality of drug use and seek to design health interventions for people who choose to use illegal substances.

Bewley-Taylor has written in detail on the tension over harm reduction within the international drug control system, in particular intense debates among Member States, and the strains the issue has created within and among the UN drug control bodies, especially within the UN Commission on Narcotic Drugs.⁴⁷⁷ He notes these debates ‘reflected divergent perspectives on the [drug control] regime’s fundamental principles and norms concerning punitive prohibition’.⁴⁷⁸ Much of this debate, at least from those States that

⁴⁷⁵ World Health Organization, ‘Effectiveness of Sterile Needle and Syringe Programming in reducing HIV/AIDS among Injecting Drug Users’ (World Health Organization 2004).

⁴⁷⁶ World Health Organization, UN Office on Drugs and Crime and UNAIDS, ‘Position Paper: Substitution maintenance therapy in the management of opioid dependence and HIV/AIDS prevention’ (World Health Organization 2004).

⁴⁷⁷ Bewley-Taylor, *International Drug Control* (n 172) chaps 2, 3.

⁴⁷⁸ *ibid* 101.

supported the harm reduction approach, was driven by public health imperatives in the face of a growing HIV crisis among people who injected drugs. However, given the centrality of human rights advocacy within the international response to HIV,⁴⁷⁹ it was inevitable that human rights concerns also became an element of the harm reduction debate.

The approach of the relevant UN bodies illustrates this tension. Within the UN human rights system, harm reduction approaches have increasingly received explicit endorsement from key actors, including by the Committee on Economic, Social and Cultural Rights,⁴⁸⁰ the Committee on the Rights of the Child,⁴⁸¹ the Office of the High Commissioner for Human Rights⁴⁸² and the Special Rapporteurs on Health⁴⁸³ and on Torture.⁴⁸⁴ However, within the drug control regime, the situation is much different. The International Narcotics Control

⁴⁷⁹ See, for example, Office of the UN High Commissioner for Human Rights, 'International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version' (2006) UN Doc No E.06.XIV.4.

⁴⁸⁰ See, for example, UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Tajikistan' (24 November 2006) UN Doc No E/C.12/TJK/CO/1, para 70.; 'Concluding Observations: Ukraine', (23 November 2007) UN Doc No E/C.12/UKR/CO/5, para 28.

⁴⁸¹ UN Committee on the Rights of the Child, 'Concluding observations: Ukraine' (21 April 2011) UN Doc No CRC/C/UKR/CO/3-4, para 60(a).; UN Committee on the Rights of the Child, 'Concluding observations: Albania' (7 December 2012) UN Doc No CRC/C/ALB/CO/2-4, para 63(b).; UN Committee on the Rights of the Child, 'Concluding observations: Austria' (3 December 2012) CRC/C/AUT/CO/3-4, para 51.

⁴⁸² Office of the UN High Commissioner for Human Rights, 'High Commissioner calls for focus on human rights and harm reduction in international drug policy', statement of 10 March 2009.

⁴⁸³ UN Human Rights Council, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Mission to Sweden' (28 February 2007) UN Doc No A/HRC/4/28/Add.2, para 60 (Hunt Sweden Report).; UN General Assembly, 'Special Rapporteur Health 2010' (n 23) paras 50-61.

⁴⁸⁴ UN Human Rights Council, 'Nowak Report' (n 36) para 74(a-c).

Board has historically been reluctant to enthusiastically embrace harm reduction approaches.

At best, the Board has offered qualified acceptance of these programmes, for example stating in its 1993 Annual Report that,

The Board acknowledges the importance of certain aspects of ‘harm reduction’ as a tertiary prevention strategy for demand reduction purposes. The Board considers it its duty, however, to draw attention of Governments to the fact that ‘harm reduction’ programmes are not substitutes for demand reduction programmes.⁴⁸⁵

In 2000, the Board lamented that Government investment in HIV prevention services for people who inject drugs were, in its estimation, being diverting money from drug prevention activities, stating that

The fact that harm reduction programmes should constitute only one element of a larger, more comprehensive strategy to reduce the demand for illicit drugs has been neglected. The Board regrets that the discussion on drug injection rooms and some other harm reduction measures has diverted the attention (and, in some cases, funds) of Governments from important demand reduction activities such as primary prevention or abstinence-oriented treatment.⁴⁸⁶

In its 2004 Annual Report, the Board encouraged States to address the spread of HIV, yet at the same time qualified this statement with the caution that ‘[m]easures to prevent the spread of infectious diseases must not be seen as facilitating or even promoting drug abuse, which is, after all, the root of the problem’.⁴⁸⁷ Despite the fact that the Board’s mandate gives it responsibility for monitoring, and ensuring availability of, controlled opioid replacement

⁴⁸⁵ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 1993’ (1994) UN Doc No E/INCB/1993/1, para 29.

⁴⁸⁶ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 2000’ (2001) UN Doc No E/INCB/2000/1, p 60, para 446.

⁴⁸⁷ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 2004’ (2005) UN Doc No E/INCB/2004/1, p iv.

medicines for people who are heroin dependent, ‘the Board’s Reports and associated public statements have demonstrated at best a lukewarm support for the interventions and use of methadone and buprenorphine’.⁴⁸⁸

At other times, the Board has expressed outright hostility to, and denunciation of, harm reduction programmes. The most glaring example of this is in the case of ‘safe injecting facilities’, or ‘drug injection rooms’ to use the Board’s own phrase. These are health clinics established in some urban centres where people are allowed to bring drugs into the facility and inject under sterile, clinical conditions, and under the supervision of medical personnel. Although only established in a handful of countries, these facilities have proved very effective at not only reducing HIV transmission and fatal overdoses, but also in ensuring people are not injecting publicly, for example in parks and alleys, which has additional residual benefits for the individuals and the broader community.⁴⁸⁹

Safe injecting facilities have often been the source of some domestic controversy in the countries where they have been established. Most notably, the only such facility established in North America - ‘Insite’ in Vancouver, British Columbia - has been the cause of a series of court challenges in which the Federal Government of Canada sought to force the city and province to shut the clinic down.⁴⁹⁰ These challenges culminated in the Supreme Court in

⁴⁸⁸ Bewley-Taylor, *International Drug Control* (n 172) 232.

⁴⁸⁹ Dagmar Hedrich, Thomas Kerr and Françoise Dubois-Arber, ‘Drug consumption facilities in Europe and beyond’ in T Rhodes and D Hedrich (eds) *Harm reduction: evidence, impacts and challenges* (Publications Office of the European Union 2010).

⁴⁹⁰ *PHS Community Services Society v. Attorney General of Canada* [2008] BCSC 661 (B.C. Supreme Court); *PHS Community Services Society v. Canada (Attorney General)*, [2010] BCCA 15 (B.C. Court of Appeal).

2011, where the justices ruled unanimously in favour of Insite and against the attempts of the Canadian Government to close it.⁴⁹¹ However, despite the verdict of the Supreme Court, the International Narcotics Control Board has vocally criticised both Canada and the Court in its reports, calling the existence of the facility and others like it a violation of international law.⁴⁹² In a 2014 report to the Commission on Narcotic Drugs, for example, the Board stated that safe injecting facilities ‘promote social and legal tolerance of drug abuse and drug trafficking and therefore contravene the international drug control treaties’.⁴⁹³ The Board’s public criticism of Canada in this regard is in stark contrast with its approach on the death penalty for drug offences, where it refuses to take a position on the basis that it is an internal matter for States.⁴⁹⁴ It is also at odds with the drug control treaties themselves, which explicitly place constitutional caveats and exceptions for the obligation in question.⁴⁹⁵ Article 3(1)(c) of the 1988 Convention, the subclause to which the Board is referring in its criticism, is expressly ‘[s]ubject to [the State’s] constitutional principles and the basic concepts of its legal system’.⁴⁹⁶

⁴⁹¹ *Attorney General v. PHS Community Services Society*, [2011] SCC 44 (Supreme Court of Canada).

⁴⁹² International Narcotics Control Board 2011 (n 454) para 289.

⁴⁹³ International Narcotics Control Board, ‘Contribution of the INCB to the high-level review of the implementation by Member States of the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem’ (2014) p 41, para 7.

⁴⁹⁴ The Board’s inconsistent behaviour in this regard has been described as ‘selective reticence’ by some observers. See International Drug Policy Consortium, ‘The International Narcotics Control Board: Current Tensions and Options for Reform’, International Drug Policy Consortium Briefing Paper (February 2008).

⁴⁹⁵ See, for example, 1988 Convention (n 194) art 3.

⁴⁹⁶ *ibid* art 3(1)(c). The Supreme Court of Canada’s judgment in the Insite case will be examined in more detail in chapter eight.

The Board's public position is also at odds with its own internal legal advice on the matter. In 2002, and at the specific request of the Board, the Legal Affairs Section of the UN Drug Control Program (the forerunner of the Office on Drugs and Crime) produced a restricted opinion on the legal position of harm reduction approaches under the international drug conventions.⁴⁹⁷ The conclusion of the Legal Affairs Section on the question of safe injecting facilities was that 'the intention of governments is to provide healthier conditions for IV drug abusers, thereby reducing their risk of infection with grave transmittable diseases and...reaching out to them with counselling and other therapeutic options'.⁴⁹⁸ The opinion concluded that '[i]t would be difficult to assert that, in establishing drug-injection rooms, it is the intent of Parties to actually *incite* or *induce* the illicit use of drugs, or even more so, to associate with, aid, abet or facilitate the *possession* of drugs', and therefore 'it would...fall far from the intent of committing an offence as foreseen in the 1988 Convention'.⁴⁹⁹ Given this legal opinion from within the UN drug control system itself, as well as the constitutional caveats within the convention noted above, the Board's criticism of Canada in this case appears less based on sound legal grounds, and more reflective of what Bewley-Taylor calls the Board's 'fears for the defence of the status quo regarding drug prohibition than any broader concerns for the "health and welfare of humankind" as laid out under the conventions'.⁵⁰⁰

4.5 Regime Conflicts

⁴⁹⁷ Legal Affairs Section, UN Drug Control Program, 'Flexibility of Treaty Provisions as Regards Harm Reduction Approaches' (20 September 2002) UN Doc No E/INCB/2002/W.13/SS.5

⁴⁹⁸ *ibid* para 28.

⁴⁹⁹ *ibid* paras 27-28.

⁵⁰⁰ Bewley-Taylor, *International Drug Control* (n 172) 230.

Although human rights violations resulting from regime tensions are perhaps the most obvious and widespread, there also exist examples of clear conflicts between explicit treaty obligations within the drug control and human rights conventions, situations where fulfilling the obligation of one would necessarily cause a breach of the other. As explained by Jenks, ‘[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties’.⁵⁰¹ While few in number, these instances are also important to highlight as they will create a separate yet significant interpretive challenge.

4.5.1 Traditional Uses of Coca

The cultivation and use of the coca leaf has been a staple part of traditional indigenous communities in the Andean region of South America for hundreds of years. Typically chewed or brewed into tea, coca acts as a mild stimulant, useful for suppressing hunger and fatigue, and overcoming the effects of living and working at high altitudes. Coca is also considered a sacred plant within some indigenous cultures in the region.⁵⁰² However, coca is also the plant that serves as the raw material from which cocaine is produced, and as such is considered among the ‘plants containing narcotic or psychotropic substances’,⁵⁰³ subject to the strictest controls of the 1961 drug convention.⁵⁰⁴ Article 49 of the convention recognises

⁵⁰¹ Jenks (n 412) 426.

⁵⁰² Tom Blickman, ‘A beginner’s guide to coca’ (Transnational Institute 2011).

⁵⁰³ 1988 Convention (n 194) art 14(2).

⁵⁰⁴ 1961 Convention amended (n 203) schedule 1.; See also, 1988 Convention (n 194) art 3.

the existence of traditional coca use in some States, and requires that ‘[c]oca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention’.⁵⁰⁵

The obligation contained in Article 49 of the 1961 Convention is perhaps the clearest example of regime conflict between the drug control and human rights legal systems, as it has the effect of creating a positive State obligation to eradicate a traditional practice of cultural significance to indigenous peoples. In 2007, for example, the International Narcotics Control Board called upon Bolivia to ‘initiate action without delay with a view to eliminating uses of coca, including coca leaf chewing’.⁵⁰⁶ While the 1961 Convention obligates States to eradicate the practice, multiple human rights instruments - including the Universal Declaration of Human Rights,⁵⁰⁷ the International Covenant on Civil and Political Rights,⁵⁰⁸ the International Covenant on Economic, Social and Cultural Rights,⁵⁰⁹ the International Covenant on the Elimination of All forms of Racial Discrimination⁵¹⁰ and the United Nations Declaration on the Rights of Indigenous Peoples⁵¹¹ - obligate States to protect the traditional cultural practices of indigenous peoples, creating a clear conflict of norms between the two regimes. The UN Permanent Forum on Indigenous Issues has called for ‘those portions of

⁵⁰⁵ 1961 Convention amended (n 203) art 49(2)(e).

⁵⁰⁶ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 2007’ (2008) UN Doc No E/INCB/2007/1, p 108, rec 7.

⁵⁰⁷ Universal Declaration of Human Rights (n 338) art 27.

⁵⁰⁸ International Covenant on Civil and Political Rights (n 436) art 27.

⁵⁰⁹ International Covenant on Economic, Social and Cultural Rights (n 421) art 15.

⁵¹⁰ UN Committee on the Elimination of All Forms of Racial Discrimination, ‘General Recommendation XXIII’ (18 August 1997) UN Doc No A/52/18, annex V, paras 4-5.

⁵¹¹ UN General Assembly, ‘United Nations Declaration on the Rights of Indigenous Peoples’ (2 October 2007) UN Doc No A/RES/61/295, art 31.

the [1961 Single] Convention regarding coca leaf chewing that are inconsistent with the rights of indigenous peoples to maintain their traditional health and cultural practices...be amended or abolished'.⁵¹² Furthermore, as has been pointed out by Barrett, '[t]he ban on both coca chewing as a cultural practice and cultivation as an economic activity rooted in cultural heritage was implemented...without consultation with indigenous communities', having the effect of undermining the principle of free prior and informed consent that is now widely accepted as a norm of international human rights law.⁵¹³

This conflict has been brought into the open in recent years by Bolivia, where the country's first indigenous President, Evo Morales, made the criminalisation of this cultural practice by the drug conventions a national priority issue in UN drug control fora, noting that the ban is not only in conflict with the State's international human rights obligations, but is also in violation of Bolivia's new constitution, ratified in 2009. After failing to achieve an amendment to the 1961 Convention in 2011,⁵¹⁴ the State took the unusual step in 2011 of denouncing the treaty effective January 2012,⁵¹⁵ and re-acceding with a reservation on Article

⁵¹² Permanent Forum on Indigenous Issues, 'Report of the Eighth Session of the UN Permanent Forum on Indigenous Issues' (18-19 May 2009) UN Doc No E/2009/42-EC/C.19/2009/14, para 89.

⁵¹³ Damon Barrett, 'Background: Bolivia's concurrent drug control and other international legal commitments' (International Centre on Human Rights and Drug Policy 2011), p 2.

⁵¹⁴ Permanent Mission of Bolivia to the United Nations, 'Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: Proposal of Amendments by Bolivia to Article 49 paragraphs 1(c) and 2(e)' (12 March 2009) UN Doc No C.N.194.2009.TREATIES-2 (Depositary Notification).

⁵¹⁵ Permanent Mission of Bolivia to the United Nations, 'Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: Denunciation' (30 June 2011) UN Doc No C.N.421.2011.TREATIES-26 (Depositary Notification).

49 twelve months later in January 2013.⁵¹⁶ Indeed, Bolivia already had a similar reservation to a similar article on traditional uses of coca in the 1988 drug convention.⁵¹⁷ Despite the objections of fifteen States Parties to this legal manoeuvre,⁵¹⁸ and the outrage of the International Narcotics Control Board, which said the reservation ‘would undermine the integrity of the global drug control system’,⁵¹⁹ the reservation stood and Bolivia again became a Party to the 1961 Convention.

4.5.2 Application of more severe measures

Traditionally, the concept of conflict of norms has been limited only to consideration of those norms that create either positive obligations or negative prohibitions⁵²⁰ - instances in which it is impossible for a State to ‘simultaneously comply with...obligations under both treaties’.⁵²¹ The other two categories of norms - exempting/derogating norms and permissive norms - have not been considered within this context. However, Vranes argues that ‘[t]he

⁵¹⁶ Permanent Mission of Bolivia to the United Nations, ‘Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: Accession’ (22 January 2013) UN Doc No C.N. 94.2013.TREATIES-VI.18 (Depositary Notification).

⁵¹⁷ 1988 Convention (n 194) art 14(2).

⁵¹⁸ Multilateral Treaties Deposited with the Secretary-General, United Nations, New York (ST/LEG/SER.E) <<https://treaties.un.org/Pages/ParticipationStatus.aspx>> accessed 17 February 2014.

⁵¹⁹ International Narcotics Control Board, ‘International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs’ (5 July 2011) UN Doc No UNIS/NAR/1114.

⁵²⁰ Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17/2 *The European Yearbook of International Law* 395, 395.

⁵²¹ Jenks (n 412) 426.

problem with this strict definition is that it does not recognize that a permissive norm may conflict with an obligation or a prohibition'.⁵²² This point is of particular relevance to examining conflicts between drug control and human rights, as evidence of a conflict of obligations between the regimes is found in a permissive obligation common to all three drug treaties.

As was explored in chapter two, the UN drug conventions require the application of criminal law to the various categories of offences the treaties identify, as well as suggest a 'minimum level of measures to be taken by all parties' as sanctions for such offences.⁵²³ However, each of the three drug conventions also contains a specific article permitting States Parties to adopt 'more strict or severe measures' than those required in the treaties themselves.⁵²⁴ For example, under Article 24 of the 1988 Convention, '[a] Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic'.⁵²⁵

According to the traditional perspective on conflict of laws described by Jenks, '[t]here is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining

⁵²² Vranes (n 520) 395-96.

⁵²³ *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (n 199) p 391, para 24.3.

⁵²⁴ 1961 Convention amended (n 203) art 39.; 1971 Convention (n 186) art 23.; 1988 Convention (n 194) art 24.

⁵²⁵ 1988 Convention (n 194) art 24.

from exercising a privilege or discretion accorded by another'.⁵²⁶ However, in each of the three drug treaties, this article is enshrined without safeguards or limitations, in effect creating a permissive obligation that opens up scope for potential conflict with international human rights obligations. This conflict is perhaps most clear in the matter of penal sanctions for drug offences, and the license it may appear to give to States to impose harsh punishments for drug offences that conflict with the protections the human rights treaties embody.

This conflict is not simply theoretical, and the article has been cited to defend human rights violations in the name of drug control by a State. In 2007, the Indonesian Constitutional Court heard a case challenging the death penalty for drug offences.⁵²⁷ The Court invoked Article 24 of the 1988 drug convention as legal justification for the Government to impose this penalty, despite its clear illegality under human rights law. According to the judgment,

[I]f according to Indonesia, more severe measures are needed to prevent and eradicate such crimes, such measures are not contradictory to but rather are justified and suggested instead by the Convention. This means that Indonesia as a state party adopting the system of capital punishment against the certain Narcotics criminals has the right to determine capital punishment to the Narcotics criminals.⁵²⁸

Furthermore, the Court ruled that the 1988 drug convention held a higher status in law than did the UN human rights mechanisms' jurisprudence on the question of 'most serious crimes'.⁵²⁹ This example illustrates the limitations of the narrow construction of conflict of norms, at least when such conflicts are interpreted within a domestic high court, and

⁵²⁶ Jenks (n 412) 451.

⁵²⁷ *Edith Yunita Sianturi, Rani Andriani (Melisa Aprilia), Myuran Sukumaran, Andrew Chan, Scott Anthony Rush* [2007] 2-3/PUU-V/2007 IDCC 16.

⁵²⁸ *ibid* p 103, para i.

⁵²⁹ *ibid* para j.

underlines the value of calls for ‘a broader definition of conflict in public international law’.⁵³⁰ Vranes,⁵³¹ for example, supports Pauwelyn’s more flexible approach, where two norms are ‘in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other’.⁵³² Using this more flexible definition, it is clear that the permissive norms enshrined in the drug treaties above are in conflict with international human rights law.

4.6 Conclusion

Chapter four set out to explore the engagement between international human rights law on the one hand and international drug control law on the other. As is evident above, there are multiple examples of tensions between the regimes, or conflicts of treaty obligations, where drug control efforts result in increased human rights risk, or outright human rights violations. The question then becomes how to resolve these tensions and conflicts, and determine an approach to interpreting the engagement between the legal regimes that ensures human rights abuses do not occur as the result of drug control activities. These questions will be explored in the subsequent chapters.

⁵³⁰ Vranes (n 520) 407.

⁵³¹ *ibid.*

⁵³² Pauwelyn (n 44) 175-76.

Chapter Five - The Object and Purpose of the International Drug Control Regime

5.1 Introduction

The modern drug control regime is built upon more than a century of international treaty law, and its core norms and mechanisms pre-date not only the development of international human rights law, but the foundation of the United Nations itself. The core UN drug control instrument, the 1961 Single Convention on Narcotic Drugs, is itself more than half a century old. This has led some to question the relevance of the drug control regime in the context of twenty-first century challenges.⁵³³ Even the United Nations Office on Drugs and Crime, a staunch defender of the drug control status quo, has identified the need ‘to make the conventions fit for purpose and adapt them to a reality on the ground that is considerably different from the time they were drafted’.⁵³⁴ At the same time, the growing recognition of human rights violations linked to drug laws, policies and enforcement practices - some of which were explored in chapter four - raises the further question of how States should reconcile their concurrent obligations under these two international legal regimes, and what is to be done when the regimes, or their implementation by States, come into conflict. How do these two treaty regimes engage with one another in cases of human rights violations linked

⁵³³ See, for example, David Bewley-Taylor and Martin Jelsma, ‘Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation’ (Transnational Institute Series on Legislative Reform of Drug Policies Nr 12 2011).

⁵³⁴ UN Commission on Narcotic Drugs, ‘Fit for Purpose’ (n 16) 13.

to drug policy or enforcement? How are real or apparent conflicts between drug control obligations on the one hand and human rights obligations on the other resolved in a manner in which a State maintains its adherence to both bodies of law? In international law terms, the challenge becomes how ‘to redefine the meaning of a treaty without altering its nature [as]...[i]n many cases the very survival of the agreement and its applicability to present-day concerns are at stake’.⁵³⁵

Chapter five will begin an exploration of the challenges of treaty interpretation within international drug control law. Using guidance provided within the Vienna Convention on the Law of Treaties, as well as other legal and historical sources, it will explore the object and purpose of the international drug control law regime, which will be critical to later questions of treaty interpretation and adjudication of regime conflicts.

5.2 Background to the Interpretation of Treaties

The process of interpretation of international treaties is one which has been characterised as ‘occup[ying] a prime position on the crossroads between law and politics’.⁵³⁶ This is certainly an appropriate characterisation of the context of treaty interpretation in international drug

⁵³⁵ Pierre-Marie Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’ in E Cannizzaro (ed) *The Law of Treaties: Beyond the Vienna Convention* (Oxford University Press 2011) 110. Richard Gardiner, ‘The Vienna Convention Rules on Treaty Interpretation’ in DB Hollis (ed) *The Oxford Guide to Treaties* (Oxford University Press 2012) 125 (Vienna Convention Rules).

⁵³⁶ Jean-Marc Sorel and Valerie Bore Eveno, ‘Article 31: General rule of interpretation’ in O Corten and P Klein (eds) *The Vienna Convention on the Law of Treaties: A Commentary, Vol. I* (Oxford University Press 2011) 807.

control law, a regime which, as explored in chapter three, has historically evolved through the interplay of two often conflicting paradigms. General rules of treaty interpretation are found under Articles 31—33 of the Vienna Convention on the Law of Treaties,⁵³⁷ which are seen as providing authoritative guidance in these matters.⁵³⁸ In particular, Articles 31 and 32 are generally agreed to reflect customary international law.⁵³⁹ Article 31(1) of the Vienna Convention states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁵⁴⁰ Therefore, a key initial challenge in any process of interpreting the international drug control conventions in the context of international human rights law is the identification of an 'object and purpose' test for the legal regime the drug conventions establish. Identifying the object and purpose is an essential element when considering broader questions of legal interpretation, and is a key element in making an assessment of the 'ordinary meaning' that is to be given to treaty terms.⁵⁴¹ However, doing so is not a straightforward task for several reasons, both legal and political.

⁵³⁷ Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969, entered into force on 27 January 1980) UNTS vol 1155, p 331, arts 31-33 (Vienna Convention).

⁵³⁸ See, for example, *Golder v United Kingdom* App no 4451/70 21 (ECtHR, 21 February 1975) paras 29-30.; *Witold Litwa v Poland* App no no. 26629/95 (ECtHR, 4 April 2000) paras 57-64.; *Johnston and Others v. Ireland* (1986) Series A no 112, para 51.; *Lithgow and Others v. the United Kingdom* (1986) Series A no 102, paras 47-48.

⁵³⁹ Fragmentation Report (n 43) 215, para 427.

⁵⁴⁰ Vienna Convention (n 537) art 31(1).

⁵⁴¹ Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in E Cannizzaro (ed) *The Law of Treaties: Beyond the Vienna Convention* (Oxford University Press 2011), 110 (Rules on Interpretation).; Gardiner, 'Vienna Convention Rules' (n 535) 480-81.

In legal terms, the first challenge is that a treaty's object and purpose is itself open to interpretation. Many scholars agree that the concept is somewhat adaptable in practice, if not also in intent, as this provides some flexibility in international relations and in international law.⁵⁴² As described by Klabbers, 'the notion of object and purpose cannot have a single fixed meaning: its precise meaning in any given context must be determined on a case by case basis, depending on the treaty concerned and the circumstance in which the notion is invoked'.⁵⁴³ However, it would be incorrect to suggest, as have some commentators,⁵⁴⁴ that because the object and purpose test is open to interpretation that it is impossible or irrelevant in the context of the drug conventions.

The second challenge is the nature of interpretation itself which, despite the rules articulated in the Vienna Convention, is very much a subjective process. As described by the International Law Commission in 1966, 'the interpretation of documents is to some extent an art, not an exact science'.⁵⁴⁵ In discussing Articles 31 to 33 of the Vienna Convention, Gardiner notes that 'the difficult part of the art of treaty interpretation involves going beyond the rules themselves, that is the evaluation and judgement required in applying the rules to a

⁵⁴² See, for example, Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties' (1997) 8 Finnish Yearbook of International Law 160.

⁵⁴³ *ibid* 141.

⁵⁴⁴ Robin Room and Sarah MacKay, *Roadmaps to Reforming the UN Drug Conventions* (Beckley Foundation Press 2012) 30-31.

⁵⁴⁵ International Law Commission, 'Yearbook of the International Law Commission, vol II' (1966) UN Doc No A/CN.4/SER.A/1966/Add.1, p 218, para 4 (Yearbook vol II).

particular treaty to produce an actual interpretation'.⁵⁴⁶ Villiger further notes that 'the process of eliciting the different meanings - and in particular the "correct" meaning - from the terms of a treaty is altogether a creative process leaving room for extralegal considerations such as one's personal or cultural background'.⁵⁴⁷ Gardiner concurs, noting that treaty interpretation is not a mechanical exercise, but one where 'the person giving meaning to the terms of a treaty introduces elements of subjectivity and creativity. Thus judgement is a necessary component of the process.'⁵⁴⁸

In political terms, a further complicating factor is that the international drug control regime is wedded in public consciousness, if not in domestic and international discourse and politics, to law enforcement, criminalisation and prohibition: the paradigm of drugs as 'evil' and 'threat' explored in chapter three. As a consequence, it is difficult to engage the question of the 'purpose' of drug control in a context other than one in which prohibition and criminalisation are presumed to be the *raison d'être* of the regime. Japan, for example, in a 2013 objection to a Bolivia's reservation on traditional uses of coca to the 1961 Convention, stated its opinion that the object and purpose of the treaty was 'to prevent the illicit production, manufacture and trafficking of cocaine'.⁵⁴⁹ Bewley-Taylor writes that respecting the object and purpose of the drug treaties requires that States 'must adhere to the central prohibitive norm of the global

⁵⁴⁶ Gardiner, 'Vienna Convention Rules' (n 535) 477.

⁵⁴⁷ Villiger, 'Rules on Interpretation' (n 541) 106.

⁵⁴⁸ Gardiner, 'Vienna Convention Rules' (n 535) 478.

⁵⁴⁹ Permanent Mission of Japan to the United Nations, 'Japan: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia' (15 January 2013) 1.

drug control system'.⁵⁵⁰ However, while the regime established under the conventions is clearly prohibitionist in nature, the matter of the object and purpose of the treaties is a more nuanced discussion, and on that must be anchored in the relevant interpretive sources.

Modern legal discourse on the question of the object and purpose of international treaties begins in 1951 with the Advisory Opinion on Reservations to the Genocide Convention by the International Court of Justice.⁵⁵¹ In that opinion, the Court's assessment of object and purpose derives primarily from its consideration of 'the objects pursued by the General Assembly and the contracting parties', based upon General Assembly resolutions, as well as by reference to the treaty preamble.⁵⁵² The European Court of Human Rights has also placed significance on the preambular section of a treaty, noting it 'is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed'.⁵⁵³

As it is used within the context of international law, the phrase 'object and purpose' is considered a single term.⁵⁵⁴ For example, the European Court of Human Rights takes an approach that under 'the general rule of interpretation laid down in Article 31...the process of discovering and ascertaining the true meaning of the terms of the treaty is a unity, a single

⁵⁵⁰ Bewley-Taylor, *International Drug Control* (n 172) 7.

⁵⁵¹ International Court of Justice, 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion of May 28th, 1951'.

⁵⁵² *ibid* 23. See also Klabbers (n 542) 156.

⁵⁵³ *Golder v United Kingdom* (n 538) para 34.

⁵⁵⁴ See Klabbers (n 542) 148.

combined operation'.⁵⁵⁵ However, this single term can be considered to refer to two separate concepts. The first of these could be described as utilitarian, that is the normative content of the treaty, or the rights and obligations to which it gives expression.⁵⁵⁶ The second is what might be described as the ultimate aim(s) or goal(s) of the treaty, sometimes called the *telos* of the treaty. As described by Linderfalk,

When two or more states enter into a treaty relation with each other, concluding the treaty usually is not seen as an end in itself. Of course, ensuring respect for the various provisions laid down in the treaty text is considered important. But above and beyond that it is most often a wish of the parties that some further state-of-affairs (or states-of-affairs) be attained - the *telos* (or *teloï*) of the treaty. From an extremist viewpoint it could be argued that fulfilling this wish is what the treaty is all about; if a treaty is applied without its *telos* (or *teloï*) being attained, then the conclusion of the treaty may indeed be considered in vain.⁵⁵⁷

Although separate concepts, they are in fact integrally related, in the sense that it is through the implementation of the obligations created by the treaty that States seek to fulfill or achieve the its broader aim(s) or goal(s). Article 31 of the Vienna Convention allows for such an approach. According to Villiger, 'Article 31...entrenches the teleological or functional approach. It enables consideration of the different aims of particular types of treaties'.⁵⁵⁸

Some scholars draw from the French origins of the concept of object and purpose, '*objet et but*', and elaborate 'a distinction between "*l'objet*" of a legal act or instrument, that is what

⁵⁵⁵ *Witold Litwa v Poland* (n 538) para 58.; See also *Golder v United Kingdom* (n 538) para 30.

⁵⁵⁶ Ulf Linderfalk, On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 *Nordic Journal of International Law* 429, 433-434.

⁵⁵⁷ *ibid*, p. 443.; See also Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 209.

⁵⁵⁸ Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 427.

it does in the sense of creating a particular set of rights and obligations, and “*le but*” as the reason for establishing “*l’objet*”.⁵⁵⁹ Buffard and Zemanek, for example, note that it is ‘a stream of French doctrine which gives special attention to the distinction between object and purpose of a treaty’, while ‘most scholars in the German, Austrian and English tradition treat “object and purpose” of a treaty as a joint notion’.⁵⁶⁰ They note that,

According to this French doctrine the term ‘object’ indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty’s purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty. While the object can be found in the provisions of the treaty, the purpose may not always be explicit and be prone to a more subjective understanding.⁵⁶¹

Similarly, Zoller suggests that the object and purpose describe separate concepts, the first being related to a treaty’s more immediate goal(s) and the second reflecting the treaty’s long term goal(s).⁵⁶²

An interesting example of this approach is found in the text of the 2103 Arms Trade Treaty.⁵⁶³ Article 1 of the Treaty, which is entitled ‘Object and Purpose’, breaks this concept down into two distinct components. The first part of Article 1 defines the treaty’s functional ‘object’ of establishing high international standards for regulating trade in conventional arms while preventing their diversion into illicit trade markets. This ‘object’ is described as

⁵⁵⁹ Gardiner, *Treaty Interpretation* (n 44) 192.

⁵⁶⁰ Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 *Austrian Review of International and European Law* 311, 325.

⁵⁶¹ *ibid* 326.; Also cited in Gardiner, *Treaty Interpretation* (n 44) 192.

⁵⁶² Elizabeth Zoller, *La bonnefoi en droit international public* (1977) 74. Cited in Klabbbers (n 542) 144-145.

⁵⁶³ Arms Trade Treaty (2 April 2013) UN Doc No A/RES/67/234B.

intended to achieve the treaty's more aspirational 'purpose', defined in the second part of Article 1 as 'contributing to international and regional peace, security and stability' and to 'reducing human suffering'.⁵⁶⁴ As will be explored below, the approach reflected in the Arms Trade Treaty has particular resonance when considering the object and purpose of the drug control regime.

5.3 The Object and Purpose of the International Drug Control Regime

As mentioned above, given the strongly prohibitionist legal regime established under the international drug control treaties, many would likely consider the question of the object and purpose of the conventions to be a simple one: the prohibition of illicit drugs (cultivation, manufacture, trafficking, sale, use). However, the development of the regime suggests otherwise, or at least something broader. Although the legal framework established by the drug treaties is clearly prohibitionist in both design and effect, this is a separate question to what that particular system of control is actually *intended to achieve*. Indeed, establishing the *intended outcome* of the drug control regime is critical to determining its object and purpose. A mere scrutiny of the structures and mechanisms of control is insufficient. As stated in 1943 by the Chief of the Drug Control Service of the Secretariat of the League of Nations, Bertil Renborg, activities to limit, supervise and regulate the availability of drugs were not the 'main object' of the regime, but rather the 'principal methods used' towards achieving its

⁵⁶⁴ *ibid* art 1.

goal.⁵⁶⁵ This in many ways reflects the approach enshrined in the Arms Trade Treaty, where the structures of weapons regulation and control it establishes do not define the broader aspirations of the treaty, but rather are intended to contribute to achieving them. If the structures of control established in the drug control treaties are simply the methods to be used to achieve the goal of the regime, this suggests that testing the object and purpose must move beyond a focus on these control structures and mechanisms alone, and explore both the immediate or utilitarian object and purpose of the regime, as well as the *telos*, to identify what these structures are intended to achieve.

Following this approach, the object and purpose of the drug conventions will be considered to be a single term embodying two separate concepts, the first being immediate or utilitarian object and purpose of the treaty, and second being the ultimate goals or *telos* of the treaty, the state of affairs the treaty hopes to achieve. Three primary sources will be used to explore these concepts in the context of drug control, in order to construct what Thirlway calls the ‘scaffolding for the reasoning on questions of treaty interpretation’.⁵⁶⁶ The first two elements of this scaffolding are the text and preambles of the three United Nations drug treaties, and the preparatory work and drafting histories of those conventions. However, this analysis will augment those two sources with a third historical legal source: the multilateral instruments on drug control that existed before the foundation of the United Nations in 1946. Given that the

⁵⁶⁵ Renborg, ‘Principles of International Control of Narcotics’ (n 78) 436.; Writing in 1957, Renborg reiterated this point. ‘To achieve [its] objectives, the international narcotic drug instruments not only prescribe rules in the international field, but also define the measures of control to be maintained within each country.’ Renborg, ‘International Control of Narcotics’ (n 51) 87.

⁵⁶⁶ Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice 1960-1989, Supplement 2006: Part Three’ (2006) 77 *British Yearbook of International Law* 1, 19.

original intention of the 1961 Single Convention on Narcotic Drugs was to bring together the normative content of the preceding fifty years of international treaty law into one ‘single’ treaty,⁵⁶⁷ the text and preambles of these earlier instruments will also be examined as an important historical legal source contributing to an understanding of the object and purpose of the modern international drug control regime.

5.3.1 Utilitarian Object and Purpose: ‘Medical and Scientific Purposes’

Perhaps the most immediate entry point for consideration of object and purpose of any treaty is its title. As described by Klabbbers, in some cases consideration of a treaty’s name can in fact be a very valuable element in this determination.

[W]hile one of the objectives of the Chemical Weapons Convention, as listed in its preamble, is the desire to ‘promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information...in order to enhance the economic and technological development of all States parties’, it can hardly be maintained that this particular objective should qualify as the object and purpose of a treaty bearing the title Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Of course, the title of a treaty will only offer a presumption regarding the treaty's object and purpose, which will have to be substantiated by closer analysis of other factors, but it does not appear to be a presumption which will often be rebutted in practice. And where it will be rebutted, the treaty has been seriously misnamed.⁵⁶⁸

⁵⁶⁷ The Single Convention was intended to replace the following agreements: International Opium Convention 23 Jan 1912 and subsequent protocols; Opium Agreement and Protocol and Final Act 11 Feb 1925; Convention, Protocol and Final Act 19 Feb 1925 and later protocol; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs 13 July 1931; Opium Agreement and Final Act 27 Nov 1931; Convention for the Suppression of Illicit Traffic in Dangerous Drugs 26 June 1936; Protocol to bring under international control drugs outside the scope of the 1932 convention.

⁵⁶⁸ Klabbbers (n 542) 158.

However, as an interpretive source, there is little obvious direction provided in this regard from the drug conventions. While the drafters' intent can be presumed from the titles of such instruments as the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, the relatively innocuous titles of Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances offer little in the way of interpretive guidance, other than identifying the subject matter they address. This is less so in the case of the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, where working to prevent or suppress illicit traffic is clearly suggested in the title. However, given the title of the 1988 convention, it is of note that the titles of the previous two treaties are not the Convention *Against* Narcotic Drugs or the Convention *Against* Psychotropic Substances. This would suggest that while the object and purpose of the 1988 treaty may well involve preventing or prohibiting an activity, that of the 1961 and 1971 Conventions are broader, different or at least more nuanced and open to interpretation. While the treaty titles themselves provide little guidance, a review of the other sources of interpretation lead to a conclusion that the immediate or utilitarian object and purpose of regime is to limit the production and use of controlled substances solely to 'medical and scientific purposes'.

Within the United Nations instruments on drug control, the concept of restricting drugs to medical and scientific purposes enters into use from a very early date, well before the adoption of the 1961 Single Convention. It first appears in the preamble to the 1948 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,⁵⁶⁹ the second ever instrument on drug control adopted by the UN General Assembly.⁵⁷⁰ Paragraph two of the preamble states

Desiring to supplement the provisions of the [1931] Convention and to place these drugs, including the preparations and compounds containing these drugs under control in order to limit by international agreement their manufacture to the world's legitimate requirements for medical and scientific purposes and to regulate their distribution.⁵⁷¹

Here the protocol clearly indicates that the object is to control drugs only for 'legitimate' purposes, with those purposes being defined as 'medical and scientific'. Article 1 of the protocol also uses the term medical and scientific purposes to describe the drugs of relevance to the instrument.⁵⁷² The protocol itself is updating the obligations found within the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, a treaty that is clearly intended to limit drugs to medical and scientific uses, an objective repeated throughout the instrument. Various provisions in the treaty refer to 'medical and scientific requirements' (Article 4), 'medical and scientific needs' (Articles 5, 6, 10, 11), 'medical or scientific purposes' (Article 11), 'medical or scientific value' (Article 11) and 'medical or scientific use' (Article 18). Therefore, both the protocol and its link to the 1931

⁵⁶⁹ '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' (19 November 1948, entry into force 1 December 1949) UNTS vol 44, 277 (1948 Protocol).

⁵⁷⁰ UN General Assembly, 'International provision for the control of certain drugs' (8 October 1948) UN Doc No A/RES/211(III).

⁵⁷¹ 1948 Protocol (n 569) preamble.

⁵⁷² *ibid* art 1.

convention clearly bring this concept of controlling drugs for medical and scientific purposes firmly within the UN regime.

The concept of limiting drugs to medical and scientific purposes becomes increasingly visible as the UN drug treaty regime evolves. For example, the preamble of the 1961 Convention expresses the ‘[d]esir[e] to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives’.⁵⁷³ Significantly, this preambular statement explicitly characterises ‘limiting such drugs to medical and scientific use’ among the ‘aims and objectives’ of the treaty provisions. The treaty’s General Obligations articulated at Article 4 state that ‘[t]he parties shall take such legislative and administrative measures as may be necessary...to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs’.⁵⁷⁴ Similarly, the 1971 Convention notes in its preambular section ‘that rigorous measures are necessary to restrict the use of such substances to legitimate purposes’ and further ‘[r]ecogniz[es] that the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted’.⁵⁷⁵ The convention also includes a specific article (Article 5) entitled ‘Limitation of Use to Medical and Scientific Purposes’, which applies varying degrees of control to all substances scheduled under the treaty.⁵⁷⁶ In addition to the use of the specific phrase within

⁵⁷³ 1961 Convention amended (n 203) preamble.

⁵⁷⁴ *ibid* art 4(c).

⁵⁷⁵ 1971 Convention (n 186) preamble.

⁵⁷⁶ *ibid* art 5.

the texts of the 1961 and 1971 Conventions, the centrality of the desire to limit the use of drugs to medical and scientific purposes is evident in the mechanisms of control the treaties establish. Of particular significance is the scheduling system established under the conventions, essentially the lists of substances placed under international control, and therefore the subjects of the controls created in international drug control law. In both treaties, the drugs listed in the schedules, and the level of control placed upon each, is explicitly linked to health risks,⁵⁷⁷ in particular the likelihood of ‘abuse’ or of producing ‘ill effects’.⁵⁷⁸ In both treaties, changes to the substances included in the scheduling list are made following the recommendation of the World Health Organization, based upon its assessment of the relative health risks of the drug in question.⁵⁷⁹ This background is significant when considering the text of the 1988 Convention, which does not refer to medical and scientific purposes but rather to ‘licit’ and ‘illicit’ traffic and use. However, the 1988 Convention defers to the two previous treaties for its definitions of both ‘narcotic drugs’⁵⁸⁰ and ‘psychotropic substances’.⁵⁸¹ Similarly, the 1988 Convention's primary operative provision, Article 3, which sets out the scope of ‘Offences and Sanctions’ required of States Parties for various offences, also cites the 1961 and 1971 Conventions as the sources of law for interpreting these provisions.⁵⁸² Therefore, despite the lack of specific language on medical

⁵⁷⁷ See generally, 1961 Convention amended (n 203) arts 2, 3.; 1971 Convention (n 186) art 2.

⁵⁷⁸ 1961 Convention amended (n 203) arts 2(9)(a), 3(3)(iii).; 1971 Convention (n 186) art 2(4)(a)(ii).

⁵⁷⁹ 1961 Convention amended (n 203) art 3.; 1971 Convention (n 186) art 2.

⁵⁸⁰ 1988 Convention (n 194) art 1(n).

⁵⁸¹ *ibid* art 1(r).

⁵⁸² *ibid* art 3(1)(a).

and scientific purposes within the 1988 treaty, its references to the previous two conventions clearly suggest such an approach also encompass consideration of its provisions.

The overriding objective of States to limit drugs to medical and scientific purposes is evident in the drafting histories of the three conventions. During the plenipotentiary conference that concluded the text of the 1961 Convention, for example, numerous delegations made reference to this objective. China commented that ‘[s]teady progress had been made towards the goal of limiting the use of narcotic drugs to medical and scientific purposes’.⁵⁸³ The USSR described that ‘[c]areful supervision was also necessary to ensure that the drugs were used for medical and scientific purposes only’, and that ‘[t]he success of international narcotics control depended entirely upon strict national control measures’ to achieve this aim.⁵⁸⁴ However, in using the *travaux préparatoires* as an interpretative source, statements made by individual parties are of little value on their own. What is much more significant is where the *travaux* document a ‘common understanding’ among States of the significance of a particular term.⁵⁸⁵ One example of this is apparent when the plenipotentiary in finalising the treaty text took the step to move the commitment ‘to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs’ from its original place as a basic treaty provision in draft Article 30 to a General Obligation of all States Parties in Article 4 of the final convention.⁵⁸⁶ Even during the drafting conference of the 1988 Convention, the only UN drug treaty not to

⁵⁸³ 1961 Official Records vol I (n 238) 13.

⁵⁸⁴ 1961 Official Records vol II (n 297) 9.

⁵⁸⁵ Humphrey Waldcock, ‘Third Report on the Law of Treaties’ (1964) Yearbook of the International Law Commission, vol II, 58.; Gardiner, ‘Vienna Convention Rules’ (n 535) 488.

⁵⁸⁶ 1961 Official Records vol II (n 297) 11.

explicitly reference medical and scientific purposes in the text, the delegates discussed that the objective of ‘the international drug control regime based on existing Conventions...was to limit the use of narcotic drugs and psychotropic substances to medical and scientific purposes’.⁵⁸⁷

The objective of limiting the availability of controlled drugs to medical and scientific uses is not a modern concept. It dates back to the very dawn of the international regime, and has been central to the regime for a hundred years, providing further support for this concept as the object and purpose of the UN regime that emerged from the League of Nations system. The term is found in Article 9 of the 1912 Opium Convention, which not only created controls to suppress opium use but also speaks of the need ‘to confine to medical and legitimate purposes the manufacture, sale, and use of morphine, cocaine and their respective salts’.⁵⁸⁸ It is also found under Article 5 of the 1925 International Opium Convention, which obligates States Parties to ‘enact effective laws or regulations to limit exclusively to medical and scientific purposes the manufacture, import, sale, distribution, export and use of the substances to which this Chapter applies’.⁵⁸⁹ Significantly, in the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, this concept is found in the preamble, and notes the ‘desir[e] to....rende[r] by effective international agreement the limitation of the manufacture of narcotic drugs to the world’s legitimate

⁵⁸⁷ United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records: Vol. I (25 November - 20 December 1988) UN Doc. No. E/CONF.82/16/Add.1, p 60, para 40

⁵⁸⁸ 1912 Convention (n 40) art 9. For a review of early debates in the League of Nations regarding the interpretation of ‘medical and scientific’ uses in the 1912 Hague Convention, see Wright, ‘The Opium Question’ (n 1).

⁵⁸⁹ 1925 Convention (n 14) art 5.

requirements for medical and scientific purposes'.⁵⁹⁰ This treaty was drafted at the Conference on the Limitation of the Manufacture of Narcotic Drugs, the official proceedings of which state that '[t]he object of the Conference is to embody in an international Convention a practicable scheme whereby the manufacture of narcotic drugs may be limited to the medical and scientific needs of the world'.⁵⁹¹

An unusual source providing further support for this conclusion is a 1933 memorandum prepared by the Secretary-General of the League of Nations for consideration during the Conference on the Reduction and Limitation of Armaments. Entitled 'Analogies between the Problem of the Traffic in Narcotic Drugs and that of the Trade in and Manufacture of Arms',⁵⁹² the document was prepared at the request of the Spanish delegation to determine what 'results obtained in the supervision of the manufacture of and traffic in opium...might be material for the supervision of the manufacture of and trade in arms'.⁵⁹³ The memorandum begins by comparing and contrasting the aims of the two international regimes, so that similarities and differences in the international control regimes might be discerned. In the case of the international drug control system, the memorandum states that:

As regards narcotics, the aim pursued by regulation is always the same - namely, to prohibit substances not required for medical or scientific purposes and which would only serve to foster drug addiction, and, above all, to prevent certain substances

⁵⁹⁰ 1931 Convention (n 14) preamble.

⁵⁹¹ League of Nations, 'Conference on the Limitation of the Manufacture of Narcotic Drugs', Information Secretariat, League of Nations, 1932, 3.

⁵⁹² League of Nations, 'Conference on the Reduction and Limitation of Armaments: Analogies between the Problem of the Traffic in Narcotic Drugs and that of the Trade in and Manufacture of Arms' (4 May 1933) Official No Conf D, 1959.

⁵⁹³ *ibid* 2.

capable of being used both for medical and scientific purposes and for addiction from being employed for the latter purpose.⁵⁹⁴

This clearly indicates that the systems and structures of narcotics control created in the treaty, and codified in its articles, are merely the functional machinery put in place to achieve greater goals. It also raises the question of whether this same case can be made for subsequent League of Nations, and even United Nations, drug treaties.

This conclusion also finds support among more modern sources. For example, the governments of Italy,⁵⁹⁵ the Netherlands⁵⁹⁶ and Ireland⁵⁹⁷ have all expressed the position that the object and purpose of the 1961 Convention is to limit the use of drugs to medical and scientific purposes. Neil Boister, one of the few international scholars who has done detailed critical legal analysis of the drug conventions, states that ‘the international multilateral conventions were established by the international community with the aim of preventing the non-scientific and non-medical production, supply and use of drugs while at the same time making them available for medical and scientific purposes’.⁵⁹⁸ Renborg also states his opinion that

⁵⁹⁴ *ibid.*

⁵⁹⁵ Permanent Mission of Italy to the United Nations, ‘Italy: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia’ (28 December 2012) UN Doc No C.N.101.2013.TREATIES-VI.18 (Depositary Notifications), 1.

⁵⁹⁶ Permanent Mission of the Kingdom of the Netherlands to the United Nations, ‘Netherlands: Objection to the Reservation contained in the communication by the Plurinational State of Bolivia’ (8 January 2013) UN Doc No C.N. 101.2013.TREATIES-VI.18 (Depositary Notifications), 1.

⁵⁹⁷ Permanent Mission of Ireland to the United Nations, ‘Ireland: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia’ (9 January 2013) UN Doc No C.N.101.2013.TREATIES-VI.18 (Depositary Notifications), 1.

⁵⁹⁸ Boister, *Penal Aspects* (n 46) 1.

The objectives of international control can be stated very simply: to prevent the abuse of narcotic drugs, while assuring their continued availability for medical and scientific purposes. To achieve these objectives, the international narcotic drug instruments not only prescribe rules in the international field, but also define the measures of control to be maintained within each country.⁵⁹⁹

Clearly in Renborg's estimation, the mechanisms of control are tools to advance the broader objectives of the regime. Therefore, the relevant legal and historical sources support a conclusion that the utilitarian object and purpose of the drug control regime is to limit controlled substances to medical and scientific purposes. The next question then becomes what broader purpose does this aspire to achieve?

5.3.2 *Telos* - To Promote the Health and Welfare of Mankind

If the immediate object and purpose of the international drug control regime is to limit the production and use of controlled substances solely to medical and scientific purposes, this objective is pursued in order to achieve a broader goal, which is to promote 'the health and welfare of mankind'. This represents the *telos* of the regime, the state of affairs that is hoped to be achieved by the treaty, and is one explicitly expressed in the preambles of all three UN drug control treaties. It is also a concept that finds its roots in the pre-United Nations instruments.

As detailed in chapter three, international legal instruments on drug control have articulated a core humanitarian mission since the foundation of the regime in the early 1900s, contextualising mechanisms and activities to control and suppress drugs as part of a

⁵⁹⁹ Renborg, 'International Control of Narcotics' (n 51) 88.

campaign to achieve a grander goal. Under the League of Nations regime, this mission was not simply rhetorical but was also reflected in the law. An interesting and unique provision of the 1931 Convention Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs enshrined a legitimate humanitarian limitation on the otherwise strict controls over the export of controlled drugs from one country to another, which was codified in the treaty. The provisions of the 1931 Convention establish mechanisms through which States could estimate their legitimate need for controlled substances, as well as guidelines for monitoring imports and exports to ensure they did not exceed those approved levels. Article 14 established a notification system and consequences for States whose exports ‘to any country or territory exceeds the total of the estimates for that country or territory’.⁶⁰⁰ However, a subclause within Article 14 suspends these punitive consequences ‘[i]n exceptional cases where the export in the opinion of the Government of the exporting country is essential in the interests of humanity or for the treatment of the sick’.⁶⁰¹ In effect, creating a derogation from the obligation.

The concept of derogation clauses that ‘provide legal avenues for states to break free of obligations that would normally constrain their actions’ is one common in international human rights treaties.⁶⁰² In effect, the subclause found in Article 14 of the 1931 drug convention is a derogation to this provision of the treaty, allowing States the legal basis to avoid the punitive sanctions it otherwise imposes. What makes this particular derogation significant is that it is a human rights-based derogation, allowing the State to opt out of the

⁶⁰⁰ 1931 Convention (n 14) art 14(2).

⁶⁰¹ *ibid* art 14(2)(ii).

⁶⁰² Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, Oxford University Press 2008) 385.

drug control obligation on the basis of humanitarian or medical reasons. Interestingly, it enshrines a perspective almost exactly the *opposite* of that found in the human rights regime. Within many international rights treaties, States may derogate from particular human rights obligations on the basis of public emergencies, most typically being linked to public security.⁶⁰³ Unusually, in this drug treaty, the provisions of which might arguably fall within the realm of public security, allowed a derogation in order to respond to human rights or humanitarian emergencies. The derogation also links to Article 5, the main operative provision in the treaty. In this case, the operational aspects of drug control are made to be secondary to broader human rights demands. The derogation in effect allows States to evade a central operative purpose of the treaty – to establish a system of estimates to regulate imports and exports – in circumstances where obeying those provisions would undermine humanitarian or medical responses. Although not replicated in modern international drug control law, this clause provides interesting historical legal support for the proposal that humanitarian objectives form the core aims of the regime, rather than strictly drug control, as in this instance humanitarian and medical needs legally trump one of the measures of control established by the treaty.

The humanitarian ethos expressed in the League of Nations treaties also finds its way into the core United Nations drug control instruments, and is conceptualised in both the 1961 and 1971 Conventions as a mission to promote ‘the health and welfare of mankind’. As described earlier, the preambular section of the Single Convention on Narcotic Drugs begins

The Parties,

⁶⁰³ See, for example, International Covenant on Civil and Political Rights (n 436) art 4(1).; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 15(1).

Concerned with the health and welfare of mankind,

Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,⁶⁰⁴

This opening statement on ‘the health and welfare of mankind’ is significant, suggesting that the treaty and its provisions are intended to advance broader health and humanitarian objectives. Furthermore, the preamble appears to link the utilitarian object and purpose of limiting the use of drugs for medical and scientific purposes with the achievement of this broader humanitarian aim. Indeed, the ‘[d]esir[e] to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use’ expressed in the preamble comes only at the end of the section, also suggesting that this is an operational objective intended as a mechanism to realise the larger goals of drug control.⁶⁰⁵

It is useful in this regard to consider the contributions of various Member States to the drafting of the 1961 Convention, during which the humanitarian objectives of the treaty were regularly cited. Iran, for example, stated that ‘drug addiction was like a contagious disease: no country could be certain that it would be spared’. However, the delegate continued with ‘when a country like Iran at great cost prohibited the cultivation of the poppy to abolish that evil, it was in fact eliminating a source of danger to the health of the whole world and benefiting all mankind’.⁶⁰⁶ Iran is therefore stating that the purpose of prohibiting poppy cultivation is to promote health and ‘benefit all mankind’. In other words, the prohibition

⁶⁰⁴ 1961 Convention amended (n 203) preamble.

⁶⁰⁵ *ibid.*

⁶⁰⁶ 1961 Official Records vol I (n 238) 6

itself is not an ends, but a means. Similarly, the United Arab Republic stated that ‘[e]very country was under a moral obligation to make the Convention an effective instrument serving the interests of the entire world. On behalf of mankind, therefore, his delegation urged all States to give it their full and whole-hearted support.’⁶⁰⁷ A particularly detailed exposition of this overarching humanitarian vision was evident in comments made by the Holy See.

[T]he Conference was to be congratulated on having drafted a convention which represented a substantial step forward in the moral and social welfare of mankind. His delegation attached great importance to the Convention, which would have a direct influence on the preservation of human dignity and contribute to the full development of the human personality. At the same time, the Convention recognized the fundamental necessity of providing for the rational use of drugs for medical and scientific purposes. In addition to its social, economic and legal content, the Convention had a moral aspect. The Holy See, which had always been concerned with the welfare of mankind and of civilization, was therefore happy to lend its moral support to the humanitarian aims of the Conference.⁶⁰⁸

Just as this broader concern for the well-being of humanity did not start with the Single Convention, it also did not end there. The preamble to the 1971 Convention reaffirms the concern for the health and welfare of mankind, while also linking the *telos* to the more immediate object and purpose by ‘[n]oting with concern the public health and social problems resulting from the abuse of certain psychotropic substances’.⁶⁰⁹ The preamble of 1988 Convention modifies this common language to some extent, but still notes that the States are ‘[d]eeply concerned’ at the ‘serious threat to the health and welfare of human beings’ posed by drugs.⁶¹⁰

⁶⁰⁷ *ibid.*

⁶⁰⁸ *ibid.* 216.

⁶⁰⁹ 1971 Convention (n 186) preamble.

⁶¹⁰ 1988 Convention (n 194) preamble.

5.4 Conclusion

Based on the textual and historical analysis above, it is evident that an object and purpose test is not only possible in the context of the international drug control regime, but that such a test clearly reveals both a utilitarian object and purpose, and a larger more aspirational goal of the treaties. Having identified these two layers, the next question is what is the import of this object and purpose test for the broader question of interpretation, and in particular interpretation of the drug conventions in a human rights context? These questions will be explored in chapter six.

Chapter Six - The Case for Dynamic Interpretation of the International Drug Control Conventions

All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.⁶¹¹

Report of the Study Group of the International Law Commission

6.1 Introduction

As explored in chapter five, the utilitarian or immediate object and purpose of international drug control law is to limit controlled substances to medical and scientific purposes. This, in turn, is intended to pursue the larger overarching goal, or *telos*, of the regime, to promote the health and welfare of mankind. The systems of administrative and penal control that characterise the international drug control regime are therefore designed to pursue the object and purpose, or, as described by Renborg, are the ‘principal methods used’ to achieve the goal of the regime.⁶¹² What then are the implications for treaty interpretation when these administrative or penal mechanisms of drug control engage, or even violate, obligations under international human rights law? How are the competing yet concurrent obligations under the two regimes to be balanced, and potential conflicts interpreted and resolved, in a manner that maintains the integrity of both legal systems, while not violating human rights

⁶¹¹ Fragmentation Report (n 43) p 208, para 414.

⁶¹² Renborg, ‘Principles of International Control of Narcotics’ (n 78) 436.

protections? This chapter will begin to explore this question by examining the application of a human rights-based interpretation of international drug control law.

There are generally considered to be three main approaches to treaty interpretation: an ‘objective’ approach, which focuses on the treaty text as an ‘authentic expression’ of the drafters’ intentions; a ‘subjective’ approach, which focusses on an assessment of the original intentions of the drafters, as a separate element from the text; and a ‘teleological’ approach, which interprets a treaty’s obligations in light of its object and purpose.⁶¹³ A teleological approach, which is often described as ‘dynamic’ or ‘evolutive’ interpretation,⁶¹⁴ is well established in international human rights law.⁶¹⁵ However, as described by the International Law Commission in 2006, it is an approach ‘much more deeply embedded in human rights law than in general international law’,⁶¹⁶ suggesting that its application in the context of international drug control law must be considered cautiously, not least because dynamic interpretation remains ‘[o]ne of the most contentious, disputed and discussed issues in treaty interpretation’.⁶¹⁷ Drawing on the object and purpose of the drug control regime identified in chapter five, this chapter will argue that a teleological approach is most appropriate to apply in this context, and that the international drug conventions must be interpreted dynamically in instances where drug control activities engage human rights obligations. Furthermore, it

⁶¹³ Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in M Evans (ed) *International Law* (3rd ed, Oxford University Press 2010) 184.; International Law Commission, ‘Yearbook vol II’ (n 545) p 218, para 2.

⁶¹⁴ Fragmentation Report (n 43) p 69, para 130.

⁶¹⁵ Gardiner, ‘Vienna Convention Rules’ (n 535) 499.; Malcolm N Shaw, *International Law* (6th ed, Cambridge University Press 2008) 937.

⁶¹⁶ Fragmentation Report (n 43) para 130.

⁶¹⁷ Fitzmaurice (n 613) 184.

will make the case that this evolutive interpretation must be driven by human rights considerations, and at minimum be consistent with, and at best advance, core human rights principles and obligations.

6.2 Dynamic Interpretation and International Human Rights Law

A teleological approach, or the process of ‘dynamic’ or ‘evolutive’ interpretation, ‘seek[s] the interpretation [of a treaty provision] that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties’.⁶¹⁸ In other words, the provisions of a treaty are interpreted in a manner consistent with, and so as to achieve, the overarching goals of the instrument itself, and not limited to a narrow textual assessment. In doing so, a dynamic interpretation may ‘go beyond, or even diverge from, the original intentions of the parties as expressed in the text’.⁶¹⁹ Dynamic or evolutive interpretation is perhaps most closely associated with international human rights law,⁶²⁰ in particular the jurisprudence of the European Court of Human Rights, which places a particular emphasis on interpreting the provisions of the European Convention on Human Rights in light of its object and purpose.⁶²¹ As first established in the case of *Tyrer v UK*, the Court views the Convention as ‘a living instrument which...must be interpreted in light of present day conditions’.⁶²² Following this

⁶¹⁸ *Wemhoff v FRG* (1968) Series A no 7, para A(8).

⁶¹⁹ International Law Commission, ‘Yearbook vol II’ (n 545) p 218, para 2.

⁶²⁰ Fragmentation Report (n 43) p 69, para 130.

⁶²¹ David J Harris, Michael O’Boyle, Ed Bates & Carla Buckley, *Law of the European Convention on Human Rights* (2nd ed, Oxford University Press 2009) 5-7.

⁶²² *Tyrer v United Kingdom*, App no 5856/72 (ECtHR, 25 April 1978) para 31.

approach, the European Court interprets treaty provisions in the context of contemporary social standards and norms, rather than those existing at the time of the treaty's conclusion.⁶²³

As described in the 1995 case of *Loizidou v Turkey*, the Convention's 'provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago'.⁶²⁴

Although most closely associated with the European Court, other human rights bodies have also adopted an evolutive approach to treaty interpretation. The Inter American Court of Human Rights, for example, takes the approach that 'human rights treaties are living instruments whose interpreters must consider changes over time and present-day conditions', and '[t]hat evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention'.⁶²⁵ According to the Inter-American Court,

[D]ynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.⁶²⁶

⁶²³ Harris, et al (n 621) 7.

⁶²⁴ *Loizidou v Turkey (Preliminary Objections)* (1995) Series A no 310, p 26, para 71.

⁶²⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999).

⁶²⁶ *ibid* para 115.

The UN Human Rights Committee also ‘considers that the Covenant [on Civil and Political Rights] should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present–day conditions’.⁶²⁷ For example, in the case of *Roger Judge v Canada*, the Committee found that ‘a broadening international consensus in favour of abolition of the death penalty’ was a sufficient basis to ‘review...the scope of the application of the rights protected’ under Article 6 of the International Covenant on Civil and Political Rights.⁶²⁸ In finding Canada in violation of its obligations under Article 6 for deporting a prisoner to the United States without seeking assurances he would not be subjected to the death penalty, the Committee noted,

As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place.⁶²⁹

However, the dynamic or evolutive approach is not without its detractors. As described by Fitzmaurice, ‘such an interpretative method was subject to much criticism...as overriding intention and the consent to be bound of Parties to the Convention and introducing the element of uncertainty to the Parties due to much more extensive interpretation of the provisions’.⁶³⁰ For its part, the International Narcotics Control Board, the treaty body established under the drug conventions, has traditionally adopted a static approach to

⁶²⁷ *Roger Judge v Canada* (2003) Communication No 829/1998 UN Doc CCPR/C/78/D/829/1998, para 10.3.

⁶²⁸ *ibid.*

⁶²⁹ *ibid* para 10.7.

⁶³⁰ Fitzmaurice (n 613) 188.

interpreting treaty provisions. As described by Bewley-Taylor, the Board's approach 'is shaped more by fears for the defence of the status quo regarding global prohibition than any broader concerns for the "health and welfare of humankind" as laid out in the conventions'.⁶³¹ Indeed, the Board's often repeated description of itself as being the 'guardian of the international drug control conventions' suggests a static, preservationist conception of its mandate, rather than a dynamic one that sees the conventions as in any way 'living instruments'.⁶³² These concerns, combined with the general association of the evolutive approach to the human rights context, urge a cautious approach when applying the principle of dynamic interpretation to the international drug control regime.

6.3 Dynamic Interpretation and other Legal Regimes

The first consideration when seeking to apply an evolutive interpretation to the international drug conventions is to examine whether, and in what context(s), the principle has been applied to treaty regimes other than international human rights law. After doing so, it is clear that a dynamic approach is not unique to human rights law, and has been adopted by courts and tribunals outside of the human rights regime to inform their interpretive approaches, and to advance the development of the relevant areas of law. The fact that a dynamic approach

⁶³¹ Bewley-Taylor, *International Drug Control* (n 172) 230.

⁶³² See, for example, United Nations Information Service, 'International Narcotics Control Board Elects New President' (16 May 2000) UN Doc No UNIS/NAR/688.; 'Statement by Professor Hamid Ghodse, President of the International Narcotics Control Board', 2001 substantive session of the Economic and Social Council, July 2001, 1.; International Narcotics Control Board, 'INCB Welcomes Bosnia and Herzegovina's Adoption of National Drug Control Legislation', Press Release No 5, 1 March 2006.; 'Improving the implementation of the international drug control conventions through enhanced capacity of national drug control administrations: Statement by Raymond Yans, President, International Narcotics Control Board', Rome, 10 October 2012.

has been considered appropriate within other treaty regimes supports the legitimacy of applying it to the drug conventions.

For example, in the case of *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, the European Court of Justice adopted an evolutive approach in order to resolve a dispute between Italian wool importers and the Ministry of Health on a dispute over inspection levies imposed on wool imported from outside the then European Economic Community. According to the Court, ‘every provision of [European Economic] Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied’.⁶³³ In this case, the European Court of Justice considered not only that the relevant treaty must be interpreted evolutively, but also that the relevant provision could not be considered in isolation, but must be assessed within the broader context of relevant law. Both of these conclusions are significant in the question of a human rights-based interpretation of the drug conventions.

The Appellate Body of the World Trade Organization has also adopted an evolutive approach in its jurisprudence. A particularly useful case in this regard is *Import Prohibition of Certain Shrimp and Shrimp Products*,⁶³⁴ sometimes known as ‘US-Shrimp’, which considered a challenge by four Asian States to a US prohibition on the import of shrimp harvested by countries whose fleets did not take precautions to minimise the inadvertent killing of sea

⁶³³ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 20.

⁶³⁴ World Trade Organization, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (22 October 2001) WT/DS58/AB/R (US-Shrimp).

turtles, a protected species in US environmental legislation. The Appellate Body took a dynamic interpretive approach to address the question, noting that the disputed treaty provision under the General Agreement on Tariffs and Trade, drafted fifty years earlier, ‘must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment’.⁶³⁵ In making this evolutive determination, the Appellate Body referred to the preambular section of the 1995 Agreement Establishing the World Trade Organization to inform its approach to reading the General Agreement on Tariffs and Trade, ‘not[ing] that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"’.⁶³⁶ Also of interest is the fact that, as part of the process of interpretation, the Appellate Body reached outside of world trade law into other international legal regimes - including the United Nations Convention on the Law of the Sea,⁶³⁷ the Convention on Biological Diversity⁶³⁸ and the Convention on the Conservation of Migratory Species of Wild Animals⁶³⁹ - to assist in its interpretation and inform its conclusions. Gardiner cites environmental law as an example showing there is ‘scope for evolutionary interpretation by reference to developments in the law outside the immediate confines of a particular treaty’.⁶⁴⁰ In a conclusion of interest to the matter of international drug control law and

⁶³⁵ *ibid* para 129.

⁶³⁶ *ibid* paras 129-130.

⁶³⁷ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) UN Doc No A/CONF.62/122.

⁶³⁸ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

⁶³⁹ Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals (23 June 1979) 19 International Legal Materials 11.

⁶⁴⁰ Gardiner, *Treaty Interpretation* (n 44) 252.

human rights, Gardiner states that ‘[s]uch [environmental] rules may need to be taken into account when interpreting treaties pre-dating these developments’.⁶⁴¹

It is clear from above that the application of dynamic interpretation is not limited to international human rights law, and has indeed influenced the approaches of the adjudication bodies in other legal regimes. Therefore, the use of an evolutive approach to the interpretation of the obligations of other treaty regimes, such as international drug control law, is not in and of itself unique or without precedent. However, this is not sufficient evidence alone to support a case that the drug conventions can and should be interpreted in such a fashion.

Reaching this conclusion requires a secondary test to determine the conditions necessary for the application of dynamic interpretation to a treaty outside of the human rights regime, and then whether those conditions exist in the context of international drug control law. Guidance in forming such a test is found in the jurisprudence of the International Court of Justice.

6.4 Dynamic Interpretation and the International Court of Justice

When examining the application of evolutive interpretation outside of the human rights system, the approach of the International Court of Justice is of particular interest, both because of the Court’s authoritative role in dispute settlement between States, and because the Court is the body empowered within the drug conventions to arbitrate treaty disputes between States Parties.⁶⁴² As will be explored, the International Court of Justice has taken an

⁶⁴¹ *ibid.*

⁶⁴² 1961 Convention amended (n 203) art 48.; 1971 Convention (n 186) art 31.; 1988 Convention (n 194) art 32.

evolutive approach to treaty interpretation in several cases, which has clear significance to the question of dynamic interpretation of international drug control law.⁶⁴³

The Court has adopted two separate approaches to determining when an evolutive approach to treaty interpretation should be engaged. These approaches are described by Helmersen as being ‘value driven’ and ‘non-value driven’ in nature,⁶⁴⁴ and both are of relevance to the question of international drug control law. The ‘value driven’ approach is based on a consideration of the original intention of the parties, and is drawn from the Court’s 1970 *Advisory Opinion on Namibia*.⁶⁴⁵ In considering language within Article 22(1) of the Covenant of the League of Nations,⁶⁴⁶ which was central to the case, the Court found that terms such as ‘the well-being and development’ of peoples, ‘sacred trust’ and ‘the strenuous conditions of the modern world’ were intended by the drafters to be read in evolutive manner. According to the Court, the concepts ‘were by definition evolutionary...[and] [t]he parties to the Covenant must consequently be deemed to have accepted them as such’.⁶⁴⁷ In this circumstance, where the terms in question were ‘value driven’ and therefore ‘by definition evolutionary’, the Court concluded that the intent of the drafters was that the language should

⁶⁴³ Sondre Torp Helmersen, ‘Evolutive Treaty Interpretation: Legality, Semantics and Distinctions’ (2013) 6/1 *European Journal of Legal Studies* 127, 132.

⁶⁴⁴ *ibid* 139.

⁶⁴⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Reports 16 (Namibia Case).; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (judgement of 13 July 2009) (Costa Rica v Nicaragua).

⁶⁴⁶ Covenant of the League of Nations (n 12) art 22(1).

⁶⁴⁷ *Namibia Case* (n 645) para 53.

be interpreted dynamically, ‘presumably because values inevitably change over time, as new generations will have their own views on what is (for example) “inhuman” or “fair”’.⁶⁴⁸

However, the absence of such ‘value driven’ language does not necessarily mean the Court will not find it appropriate to adopt a dynamic approach to interpreting a treaty. Where a dynamic, ‘value driven’ intent of the drafters cannot be reasonably inferred from the language in question, the Court has developed a test or ‘general rule’ to consider the question of interpretation. This ‘general rule’ originates in the 2009 judgement in the *Dispute Regarding Navigational and Related Rights*, in which the Court was required to apply the terms of an 1858 treaty between Costa Rica and Nicaragua. In doing so, the Court decided that,

[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into force for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.⁶⁴⁹

In the *Costa Rica v Nicaragua* case, the Court decided that the key treaty terminology at the heart of the dispute was intended by the drafters to evolve, and that therefore the Court should adjudicate the dispute in the context of the modern understanding of the terms.⁶⁵⁰ This ‘non-value driven’ approach, then, is utilised by the Court where clear intent of the drafters is not evident, yet where the language is also non-specific. As described in the judgement above, the ‘general rule’ has two components. The first element is the use of ‘generic terms’,

⁶⁴⁸ Helmersen (n 643) 139.

⁶⁴⁹ *Costa Rica v Nicaragua* (n 645) para 66

⁶⁵⁰ Helmersen (n 643) 136.

which the Court characterises as a ‘referring to a class of activity’.⁶⁵¹ In addition, these ‘generic terms’ must be ones that the parties would be ‘aware that the meaning of the terms was likely to evolve over time’.⁶⁵² The second element of the Court’s general rule is ‘where the treaty has been entered into force for a very long period or is “of continuing duration”’.⁶⁵³ Both of these conditions are relevant to the question of the international drug control treaties.

6.5 Dynamic Interpretation and International Drug Control Law

The International Court of Justice’s approach to dynamic interpretation is instructive in considering the question of whether the international drug control treaties should be considered in an evolutive or a static manner. The two approaches to this question reflected in the Court’s jurisprudence, ‘value driven’ and ‘non-value driven’,⁶⁵⁴ sit neatly alongside the teleological analysis of the drug conventions explored in chapter five, and in both cases support the case for a dynamic approach.

In the first instance, as seen in the *Namibia* case, the Court opted for an evolutive interpretation based on its determination that the language embodied in Article 22 of the Covenant of the League of Nations expressed values that were intended to be evolutive. The Court considered that the use of concepts such as ‘well-being and development’ and ‘sacred trust’ were intended to be read in a dynamic manner, as they ‘were by definition

⁶⁵¹ *Costa Rica v Nicaragua* (n 645) para 67

⁶⁵² *ibid* para 66.

⁶⁵³ *ibid*.

⁶⁵⁴ Helmersen (n 643) 139.

evolutionary'.⁶⁵⁵ This 'value driven' approach supports an evolutive reading of the drug conventions, where the *telos* - to promote 'the health and welfare of mankind' - is nearly identical in meaning, and indeed in actual textual formulation, to the obligation to promote 'the well-being and development of...peoples' enshrined in Article 22 of the Covenant. 'Health and welfare' in this context clearly describe societal values, the content and meaning of which necessarily change and evolve with each generation, and therefore meet the Court's criteria for applying dynamic interpretation to the drug conventions.

The Court's second, 'non-value driven' approach, which is engaged where clear intent of the drafters is not evident, also supports the case of an evolutive interpretation of the drug conventions when applied to the utilitarian object and purpose of the regime. The first element of the two part 'general rule' developed by the Court is use of 'generic terms' in the treaty, which the Court characterises as a one 'referring to a class of activity'.⁶⁵⁶ In addition, these 'generic terms' must be ones that the parties would be 'aware that the meaning of the terms was likely to evolve over time'.⁶⁵⁷ As an example, in discussing the use of generic terms in world trade law, Pauwelwn suggests

[I]t could be submitted that the use of broad, unspecified terms - such as 'exhaustible natural resources', 'public morals' or 'essential security interests'...is an indication that the drafters intended these terms to be interpreted in an 'evolutionary' manner. It may, indeed, be an indication that WTO members *wanted* these terms to evolve with society and international law or, at least, *should have realised* that the vagueness of these terms would result in their meaning being open to discussion and variation depending on the context and times.⁶⁵⁸

⁶⁵⁵ *Namibia Case* (n 645) para 53.

⁶⁵⁶ *Costa Rica v. Nicaragua* (n 645) para 67

⁶⁵⁷ *ibid* para 66.

⁶⁵⁸ Pauwelyn (n 44) 267.

This first element of the Court's test is clearly met by the term 'medical and scientific purposes' employed to describe the utilitarian object and purpose of the drug control regime. In a similar manner to that described by Pauwelyn, 'medical and scientific purposes' is a generic, blanket term, that refers to broad classes of activities. Furthermore, it is one clearly intended to evolve over time, in keeping with global medical and scientific progress. Medical and scientific knowledge is by its very nature constantly evolving, changing and expanding. What was known about legitimate medical and scientific purposes in 1912 is different than in 1961, and different again in the present day. Indeed, evidence can be found of the evolutive nature of the term 'medical and scientific' in the drafting history of the 1961 Convention, and a reluctance of States as a consequence to be locked into a static interpretation of treaty language.

During the drafting of Article 38 on the 'Treatment of Drug Addicts',⁶⁵⁹ the delegation of the United States proposed that the provision include specific language mandating 'compulsory drug treatment in closed institutions'.⁶⁶⁰ However, this proposal was opposed, and eventually rejected, in large part because it undermined the ability of States to interpret the language in a manner that evolved in keeping with modern medical knowledge. In arguing against the U.S. proposal, The Netherlands opposed this language as 'better methods of treatment might be devised in the future', while the delegate from Uruguay noted that 'modern techniques [of treatment] were being improved every day'.⁶⁶¹ The delegate from Canada stated that 'since

⁶⁵⁹ This article was draft Article 47 in the drafting history. It was renamed 'Measures against the Abuse of Drugs' when the Single Convention was amended by the 1972 Protocol.

⁶⁶⁰ 1961 Official Records vol I (n 238) 110.

⁶⁶¹ *ibid* 113.

the treatment of drug addicts involved medical responsibilities, it might unduly impede or hamper the development of improved treatment facilities or procedures in the future if the Convention limited treatment to that provided in closed institutions only'.⁶⁶² The United Kingdom expressed concern that as '[t]he Single Convention was intended to be a lasting instrument; it could hardly recommend methods which, even if they were the best at the moment, might not continue to be the best in the more or less distant future'.⁶⁶³ Making an even more specific case for the need for evolutive interpretation of the obligation, the delegation from Israel called for flexibility 'to allow for...eventual scientific progress' while Peru stated 'it would be better to adopt a wording which was not as likely to become outdated by scientific progress'.⁶⁶⁴ Similar concerns were voiced by the delegation of Yugoslavia, who stated that '[j]ust as some diseases which had formerly required long treatment were now quickly cured by a few injections, it might be hoped that, before the Single Convention ceased to be operative, new and more rapid means of treatment would have been discovered which would make the measures provided for in paragraph 2 obsolete'.⁶⁶⁵ In the end, the final agreed wording was 'desirable' that States 'establish adequate facilities for the effective treatment of drug addicts'.⁶⁶⁶ There are clearly limitations to extrapolating the significance of the drafting debate of a single article to apply to the regime as a whole. However, this record is notable in this context as it demonstrates that the drafters recognised that the concept of 'medical and scientific' knowledge within the drug conventions was one that would necessarily evolve over time. It also shows reluctance to enshrine language that would have

⁶⁶² 1961 Official Records vol II (n 297) 18, fn 47.

⁶⁶³ 1961 Official Records vol I (n 238) 111.

⁶⁶⁴ *ibid* 113.

⁶⁶⁵ *ibid* 111.

⁶⁶⁶ 1961 Convention (n 174) art 38(2).

the effect of limiting the ability of States Parties to apply evolving medical standards to the question of drug treatment. In this sense, it supports the application of the International Court of Justice's general rule in this case, and that 'medical and scientific' is a generic term whose nature was seen as evolving over time.

The second element of the Court's general rule is that evolutive interpretation may be appropriate 'where the treaty has been entered into force for a very long period or is "of continuing duration"'.⁶⁶⁷ Both of these conditions are applicable to the international drug control regime. Although not as old as the 1858 treaty at the heart of the *Costa Rica v Nicaragua* dispute in which the Court's test was established, the Single Convention on Narcotic Drugs was adopted in the early 1960s, and as described in chapter two, is based upon treaty law developed over the fifty years preceding it. In this sense, the core tenets of international drug control law have been in force for a century. In addition, the obligations enshrined in the drug control treaties are of a continuing character, in that they describe what is intended to be a framework of ongoing international control and cooperation in the area of drugs. Pauwelyn characterises 'continuing' treaties as instruments in which the 'regulatory framework or legal system...was created at one point in time but continues to exist and evolve over a mostly indefinite period'.⁶⁶⁸ He continues,

Most rules of modern multilateral conventions are of this nature...They are rules part of a framework or system which is continuously confirmed, implemented, adapted and expanded, for example, by means of judicial decisions, interpretations, new norms or the accession of new state parties...Such treaty norms were not only consented to when they originally emerged, but continue to be confirmed, either

⁶⁶⁷ *Costa Rica v. Nicaragua* (n 645) para 66.

⁶⁶⁸ Pauwelyn (n 44) 378.

directly or indirectly, throughout their existence, in particular when monitored and evolving within the context of an international organisation.⁶⁶⁹

This again is applicable to the international drug control conventions. Therefore, following the approach of the International Court of Justice to the question of evolutive interpretation of treaties, it is clear that the drug conventions meet both of the Court's tests for where dynamic interpretation is warranted.

6.6 The Case for a Dynamic, Human Rights-based Interpretation of International Drug Control Law

Taking these conclusions a step further, and considering the utilitarian object and purpose alongside the *telos* of the regime, not only should the interpretation of drug treaty obligations evolve, but it should evolve in a dynamic manner consistent with, and in some cases directed by, obligations in international human rights law. The necessity of engaging other concurrent international legal regimes in interpreting the drug conventions is supported by the Vienna Convention on the Law of Treaties. Returning to the Article 31, which defines the 'General rule of interpretation' under the treaty, subsection (3)(c) identifies that 'any relevant rules of international law applicable in the relations between the parties' is one of the elements to 'be thrown into a crucible, and their interaction would give the legally relevant interpretation', using the description of the International Law Commission.⁶⁷⁰ Article 31(3)(c) allows for consideration not only of laws of custom, but also of other treaty obligations, in the process

⁶⁶⁹ *ibid.*

⁶⁷⁰ International Law Commission, 'Yearbook vol II' (n 545) 218-219, para 8.; Gardiner, 'Vienna Convention Rules' (n 535) 480.

of interpretation.⁶⁷¹ As explained by Villiger, '[i]t is assumed that in entering treaty obligations, the parties did not intend to act inconsistently with other previous obligations'.⁶⁷² Indeed, according to Sorel and Eveno, the 'context [of interpretation] also includes agreements with a bearing on the treaty [in question] as well as similar agreements between certain parties to the treaty which have been approved by other parties'.⁶⁷³ McLachlan describes this as reflecting the principle of 'systemic integration', arguing that 'treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.'⁶⁷⁴

Article 31(3)(c) has been engaged by several international courts and tribunals to inform their interpretation of treaty provisions. The European Court of Human Rights, for example, has a long history of citing the Article 31 in its jurisprudence,⁶⁷⁵ accepting it as a 'generally accepted principle of international law.'⁶⁷⁶ For example, in the 1975 case of *Golder v United Kingdom*, the Court explicitly cited Article 31(3)(c) in finding that 'for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been

⁶⁷¹ Gardiner, 'Vienna Convention Rules' (n 535) 485-487.; Fragmentation Report (n 43) p 215.; Villiger, *Commentary* (n 558) 433.; Gardiner, *Treaty Interpretation* (n 44) 260-263.

⁶⁷² Villiger, *Commentary* (n 558) 433.

⁶⁷³ Sorel and Eveno (n 536) 808.

⁶⁷⁴ McLachlan (n 42) 280.

⁶⁷⁵ Sorel and Eveno (n 536) 821, 828.

⁶⁷⁶ *Golder v United Kingdom* (n 538) para 29.

adopted'.⁶⁷⁷ It has subsequently reaffirmed its embrace of Article 31 in a number of cases, noting in *Saadi v United Kingdom*, for example, that 'the Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties'.⁶⁷⁸ In the case of *Al-Adsani v United Kingdom*, the Court again cited Article 31(3)(c), noting that the European 'Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.⁶⁷⁹ The International Court of Justice has also cited Article 31(3)(c) in its jurisprudence, noting in the *Oil Platforms Case* that, when interpreting a provision of the Friendship Treaty between the United States and Iran, '[t]he Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law'.⁶⁸⁰ Similarly, the Appellate Body of the World Trade Organization has invoked the principle, if not the actual provision, in its work, noting that the General Agreement on Tariffs and Trade should not be interpreted 'in clinical isolation from public international law'.⁶⁸¹

As the Vienna Convention rule allows for the consideration of other treaty regimes within the interpretive process, and given the explicit invocation of this provision within the interpretative approaches of major international courts and adjudicatory bodies, it is

⁶⁷⁷ *ibid.*

⁶⁷⁸ *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008) para 62.

⁶⁷⁹ *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR, 21 November 2001) para 55.

⁶⁸⁰ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, judgement of 6 November 2003, para 41.; Sorel and Eveno (n 536) 828.

⁶⁸¹ World Trade Organization, *Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, 19.; Sorel and Eveno (n 536) 828-829.

reasonable to conclude that the application of this principle to international drug control is a legitimate exercise. The question then becomes one of how should the obligations within the drug control treaties be interpreted in the context of concurrent commitments within international human rights law? Consideration of the object and purpose of the drug control regime explored in chapter five, in the context of the interpretive rules explored above, suggests not only that the principle of dynamic interpretation should be applied when interpreting international drug control law, but also that this interpretation should be done in a manner that is consistent with principles and parallel obligations under international human rights law. As described in the 2006 Report of the Study Group on Fragmentation of International Law,

[A]ll international law exists in systemic relationship with other law, no such application [of interpretation] can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say “other” international law.⁶⁸² [emphasis in original]

This question of situating a treaty within its ‘normative environment’ for the purposes of interpretation is key, as the object and purpose test applied to the international drug control regime illustrates that, in core areas, the normative environment of the drug control regime is also one shared by international human rights law. This is important to the interpretive process as, in order for Article 31(3)(c) to be engaged, the other rules in question ‘have to be relevant, i.e., concern the subject-matter of the treaty term at issue’.⁶⁸³

⁶⁸² Fragmentation Report (n 43) p 212-213, para 423.

⁶⁸³ Villiger, *Commentary* (n 558) 433.

In this case, both the concepts of ‘medical and scientific purposes’ and ‘concern for the health and welfare of mankind’ are integrally linked, if not inextricable, from international human rights norms. For example, the 1948 Universal Declaration of Human Rights, under Article 25, enshrines the ‘right to a standard of living adequate for the health and well-being of himself and of his family’,⁶⁸⁴ language very similar in both construction and content to ‘the health and welfare of mankind’ found in the preambles of the 1961 and 1971 drug treaties. Similarly, the 1946 Constitution of the World Health Organization describes ‘the enjoyment of the highest attainable standard of health’ as being ‘one of the fundamental rights of every human being’.⁶⁸⁵ The consideration of health and well-being within a human rights framework was therefore enshrined in important early United Nations instruments, suggesting that concepts of health, welfare and medical purposes as described in the drug treaties engaged human rights norms even at the time of their drafting. In a present day context, where ‘the right to the highest attainable standard of physical and mental health’ has been enshrined within both the International Covenant on Economic, Social and Cultural Rights⁶⁸⁶ and the Convention on the Rights of the Child,⁶⁸⁷ the argument that the normative environment for international drug control law is one shared by international human rights law is compelling. Indeed, in addition to the right to health, the specific concept of medical and scientific purposes relates to, and must be considered alongside, the right to enjoy the benefit of scientific progress, originally enshrined under Article 27 of Universal Declaration

⁶⁸⁴ Universal Declaration of Human Rights (n 338) art 25(1).

⁶⁸⁵ Constitution of the World Health Organization (adopted 22 July 1946, entered into force on 7 April 1948), Official Records of the World Health Organization no 2, p 100, preamble.

⁶⁸⁶ International Covenant on Economic, Social and Cultural Rights (n 421) art 12.

⁶⁸⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 24.

of Human Rights⁶⁸⁸ and later expressed under Article 15 of the Covenant on Economic, Social and Cultural Rights.⁶⁸⁹

Examples of this common normative environment in practice, and the engagement between the two regimes, can be found in both the human rights and drug control systems. For example, the Committee on the Rights of the Child, in its General Comment on the right to health, ‘encourages States...to ratify the international drug conventions’, in this context viewing the obligations the drug treaties create within the context of Article 24 of the Convention on the Rights of the Child.⁶⁹⁰ In doing so, the Committee conceptualises drug control efforts as measures towards fulfillment of the right to health. This suggests that the drug control regime’s overarching goal of promoting the health and welfare of mankind is not one that can be measured in drug control terms, as the presence of effective drug control does not in itself mean the presence of health and welfare. Realising this overarching purpose is one that can only be measured and achieved in human rights terms, where the success of drug control efforts is a single component. In the same General Comment, the Committee also ‘underscores the importance of adopting a rights-based approach to substance use’, again demonstrating its perspective that drug control obligations engage, and must be interpreted in a manner consistent with, human rights norms.⁶⁹¹

⁶⁸⁸ Universal Declaration of Human Rights (n 338) art 27.

⁶⁸⁹ International Covenant on Economic, Social and Cultural Rights (n 421) art 15.

⁶⁹⁰ Committee on the Rights of the Child, ‘General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health’ (17 April 2013) UN Doc No CRC/C/GC/15, para 66

⁶⁹¹ *ibid.*

Another example is found in the Single Convention's preambular statement on the importance of the 'adequate provision' of medicines, and the need for States to 'ensure the availability of narcotic drugs' for the purpose of 'the relief of pain and suffering'.⁶⁹² This preambular section specifically engages State obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights,⁶⁹³ as the Committee on Economic, Social and Cultural Rights considers that the fulfillment of the right to health includes proper access to essential drugs.⁶⁹⁴ In its General Comment on the right to health, the Committee includes such access among the Core Obligations of States.⁶⁹⁵ The Single Convention's language on the importance of 'ensur[ing] availability' of controlled medicines also engages State obligations 'to take positive measures that enable and assist individuals and communities to enjoy the right to health', as described in the Committee's General Comment.⁶⁹⁶ The failure of States to provide access to medicines to alleviate pain and suffering has also prompted critical comment from the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,⁶⁹⁷ evidence that the shared normative environment of the drug treaties extends beyond the right to health and also engages other human rights regimes.

The example of access to controlled medicines also offers an illustration of the limitations of drug control alone as a tool in measuring progress towards achieving the regime's object and

⁶⁹² 1961 Convention amended (n 203) preamble.

⁶⁹³ International Covenant on Economic, Social and Cultural Rights (n 421) art 12.

⁶⁹⁴ UN Committee of Economic, Social and Cultural Rights, 'General Comment No. 14' (n 422) paras 12(a), 17.

⁶⁹⁵ *ibid* para 43(c).

⁶⁹⁶ UN Committee of Economic, Social and Cultural Rights, 'General Comment No. 14' (n 422) para 37.

⁶⁹⁷ UN Human Rights Council, 'Nowak Report' (n 36) paras 68-70.

purpose. While the system of estimates and import/export controls established by the drug treaties can, in theory, measure the supplies of controlled medicines reaching an individual State, it does nothing to measure the impact of those medicines. It does not measure, for example, whether medicines are being appropriately distributed within a State, or if they are having the desired impact of promoting health and welfare of the populace. This requires human rights-based indicators and measurements, as illustrated by the comments of both the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on torture on this issue, again demonstrating the interconnectedness of the regimes and the common normative environment in which they exist.

Although significant, the right to the highest attainable standard of health is only one example where human rights law and drug control law intersect, and where an interpretation of drug control obligations must incorporate concurrent human rights obligations. According to the Committee on Economic, Social and Cultural Rights, the right to health itself incorporates a broad range of other rights.

The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.⁶⁹⁸

Based upon the Committee's approach, the normative environment in which the drug conventions operate and must be interpreted is extremely broad. As a result, according to the Barrett and Nowak, '[t]here are inevitable crossovers [between the two legal regimes], and

⁶⁹⁸ UN Committee of Economic, Social and Cultural Rights, 'General Comment No. 14' (n 422) para 3.

upon analysis, there is a strong case that the drug conventions are insufficient, alone, as a legal framework for the range and complexity of issues involved'.⁶⁹⁹ They argue that in many cases, human rights law must be the guide for what constitutes appropriate measures in drug control. They argue that '[w]here the drug conventions fail to legislate or are unclear, human rights law must fill the gaps'.⁷⁰⁰

Explicit examples illustrating this point can be found within the core instruments of the two regimes. For example, Article 14(2) of the 1988 drug convention, which creates obligations for States to 'Eradicate Illicit Cultivation of Narcotic Plants',⁷⁰¹ states that

Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.⁷⁰²

In this instance, engagement between the two regimes is not inferred, but is specifically prescribed. Article 14(2) is in fact the only provision within the three UN drug treaties that explicitly mentions human rights. While this is itself significant and worthy of attention, the context is of particular relevance to the question of evolutive treaty interpretation. In directing that States take 'appropriate measures' to prevent cultivation and to eradicate illicit crops, it necessitates that a determination of what measures are, or are not, 'appropriate' must include an assessment of the human rights impacts of the measure in question. In essence, a

⁶⁹⁹ Barrett and Nowak (n 19) 462.

⁷⁰⁰ *ibid* 465.

⁷⁰¹ 1988 Convention (n 194) art 14.

⁷⁰² *ibid* art 14(2).

process of interpretation must be undertaken, and this process must include consideration of human rights norms, which are generally agreed to be evolutive. Therefore, any interpretation of the obligation created under Article 14(2) must *by definition* not only be dynamic, but dynamic *and* human rights-based. It is also notable that Article 14(2) includes environmental protection as an element that must be considered in determining whether a measure is ‘appropriate’. As described above, the Appellate Body of the World Trade Organization considers that concepts of environmental protection are also evolutive in nature, again suggesting that this specific provision of the drug treaties must be subject to dynamic interpretation, and an interpretation be consistent with international environmental treaties. Barrett and Veerman make a similar point in their work on Article 33 of the Convention on the Rights of the Child,⁷⁰³ the only provision within the United Nations human rights treaty regime to explicitly mention drugs.⁷⁰⁴ Under Article 33,

States parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.⁷⁰⁵

⁷⁰³ Damon Barrett and Philip E Veerman, ‘Article 33: Protection from Narcotic, Drugs and Psychotropic Substances’ in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde and B Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2012).

⁷⁰⁴ Within the regional systems, a further explicit reference to drugs is found in Article 5 of the European Convention on Human Rights, where Article 5(1)(e) lists ‘drug addiction’ as a legitimate limitation on the right to liberty and security. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 5. For further analysis of this provision see Lines, ‘Treatment in Liberty’ (n 467).

⁷⁰⁵ Convention on the Rights of the Child (n 687) art 33.

In addressing the question of how drug control obligations should be interpreted in the context of children's rights, Barrett and Veerman argue that '[w]hen it comes to children, the drug treaties must be read in the light of the [Convention on the Rights of the Child] to ensure appropriate interpretation'.⁷⁰⁶ Focussing on the language of 'appropriate measures' common to both Article 33 of the Convention on the Rights of the Child and Article 14(2) of the 1988 drug treaty, they argue that any assessment of what is or is not 'appropriate' in the context of drug control or enforcement measures where children are affected must be made with best interests of the child at the centre, and therefore be consistent with and supportive of children's rights norms, as '[t]he reverse would be anathema to the role of human rights as a check and balance against the impact of law and policy on individuals and groups'.⁷⁰⁷ Using a number of case examples from the drug control regime, including crop eradication and drug treatment, the authors conclude that in order for these obligations 'to have relevance to children, and if their rights are to be respected, protected and fulfilled, [the obligations] must be read in the light of the [Convention on the Rights of the Child]'.⁷⁰⁸

Returning to the drug conventions, while the case for dynamic interpretation of Article 14(2) is clear, it would be nonsensical to suggest that evolutive interpretation of international drug control law be limited to this single provision. Given the multiple areas in which drug treaty obligations engage other human rights norms, and applying Barrett and Veerman's child rights approach to encompass the broader tapestry of rights protections, it is clear that a dynamic, human rights-based approach should also be applied when interpreting other areas

⁷⁰⁶ Barrett and Veerman (n 703) 79, para 180.

⁷⁰⁷ *ibid.*

⁷⁰⁸ *ibid* 84, para 187.

of the drug control regime. For example, all three drug treaties include provisions on extradition⁷⁰⁹ and on penal sanctions.⁷¹⁰ In both of these cases, international human rights law provide essential rules and safeguards regulating the behaviour of States that contribute to the normative environment occupied by the drug treaties. While international drug control law may define the content of State response, or the circumstances in which the response is triggered in the context of drugs, human rights law defines the limitations of those responses as they affect the rights of individuals. Without such balances and safeguards, ‘appropriate’ drug control and enforcement measures ‘could be read to justify anything’.⁷¹¹

Therefore, rather than a limitation on where such a balancing process is warranted, Article 14(2) should instead be seen as a window into how drug control measures emerging from treaty obligations should be interpreted in light of the normative environment as a whole. If measures deemed ‘appropriate’ for controlling cultivation must include consideration of human rights, then surely those addressing penal laws and sanctions, extradition and health concerns must similarly undertake this same process, an interpretive process that is both *dynamic* and *human rights-based*. When interpreting drug control obligations within the broader normative environment in which the treaties exist, for example, it cannot be the case that an ‘appropriate’ measure in drug control terms is one fundamentally ‘inappropriate’ in human rights terms. As described by the Study Group on the Fragmentation of International Law, ‘[i]n international law, there is a strong presumption against normative conflict. Treaty

⁷⁰⁹ 1961 Convention amended (n 203) art 36(2)(b).; 1971 Convention (n 186) art 22(2).; 1988 Convention (n 194) art 6.

⁷¹⁰ 1961 Convention amended (n 203) art 36.; 1971 Convention (n 186) art 22.; 1988 Convention (n 194) art 3.

⁷¹¹ Barrett and Veerman (n 703) p 63, para 137.

interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well.⁷¹² Similarly, Jenks states it is ‘reasonable to presume, when the interpretation of an instrument is doubtful, that the parties intended it to be construed in a manner consistent with the obligations of some or all of them under other instruments’.⁷¹³ This is also the approach of the European Court of Human Rights.

Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law.⁷¹⁴

Clearly, then, the ‘correct’, or at least most preferable, interpretation is one that strives for consistency between all concurrent obligations.

6.7 Conclusion

Chapter six has proposed a dynamic, human-rights based interpretive approach be applied to international drug control law. Despite the strong case supporting such an approach, and the need for such a process to resolve current or future conflicts, the question remains as to where such matters are to be adjudicated, and how the progressive development of international law

⁷¹² Fragmentation Report (n 43) p 25, para 37.

⁷¹³ Jenks (n 412) 429.

⁷¹⁴ *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012) para 170.

will therefore take place. The areas of engagement between the two legal regimes is clear, as are some of the potential human rights impacts of State activities implemented to meet drug treaty obligations. However, unlike other legal regimes, such as world trade law, or even human rights law, international drug control law creates no judicial or adjudicatory body where such questions or disputes might be considered, and where such dynamic interpretation of drug control obligations might take place. Therefore, dynamic interpretation of international drug control law will necessarily take place outside of the structures of the drug control regime itself. The following chapter will explore the question of potential adjudicatory bodies, and examine existing jurisprudence where such conflicts have been addressed.

Chapter Seven — Moving the ‘thumb on the scales’ - Towards a Dynamic Human Rights-based Interpretation of International Drug Control Law

Drug abuse and illicit trafficking are dynamic processes; consequently any effective response to them must also be dynamic.⁷¹⁵

International Narcotics Control Board

For the purposes of balancing, some laws (or parts of laws) will of necessity be more equal than others.⁷¹⁶

Justice Albie Sachs

7.1 Introduction

Previous chapters have explored the evolution of the international legal regime of drug control. They have examined the historic tensions within the regime, and their impacts on human rights in the modern era; the object and purpose of the international drug conventions; and made the case that the drug treaties must be interpreted in a dynamic fashion, particularly where their provisions engage human rights. The final questions to be considered are where such a process of dynamic interpretation should take place, and how it might be applied. In short, what might a ‘fifth stage’ of international drug control law look like in practice? This chapter will explore these questions. It will review the key international and domestic fora through which a dynamic interpretation of drug control law might take place. It will also consider how a dynamic human rights-based interpretation of international drug control law

⁷¹⁵ International Narcotics Control Board, ‘Report of the International Narcotics Control Board for 1994’ (1995) para 33(d).

⁷¹⁶ Justice Albie Sachs (dissenting opinion), *Prince v President, Cape Law Society and Others* [2002] 2 SA 794 (SACC), para 154.

might proceed, using the examples examined in chapter four, that resolve regime tensions and conflicts in a manner that promotes human rights. Through this process, the chapter will offer principles of how a ‘fifth stage’ of international drug control law should develop.

7.2 Key Interpretive Bodies

It has been observed that treaty ‘interpretation occupies a prime position on the crossroads between law and politics’.⁷¹⁷ This assessment is certainly appropriate to describe the interpretive challenges in this context, where both international drug control law and international human rights law are regimes intertwined with domestic and international history and politics. Coupled with this existential challenge is the more immediate one of identifying in what venue(s) the dynamic human rights-based interpretation of international drug control law might take place. As explored in chapter two, international drug control law establishes a system of indirect control, in which the treaties define the laws and administrative practices that States are required to implement within their own territories, as well as creating a supervisory organ to monitor and assist States in fulfilling these obligations. Unlike some other areas of international law, international drug control law provides no formal adjudication mechanism or body through which tensions or conflicts might be examined, and dynamic interpretation might occur. Therefore, rather than taking place via the jurisprudence of a central court or other body, a ‘fifth stage’ of international drug control must necessarily emerge from the interaction between several key fora, each with its own role to play in, and mandate to influence, this process. The most influential

⁷¹⁷ Sorel and Eveno (n 536) 807.

actors in this context are the International Narcotics Control Board, domestic constitutional courts and international human rights courts and treaty bodies.

7.2.1 International Narcotics Control Board

As was described in chapter two, the International Narcotics Control Board is the treaty body established under the 1961 drug convention to monitor State compliance with the regime.⁷¹⁸ Although the Board's primary functions are technical in nature, over the years it has taken on what it describes itself as a 'quasi-judicial' role regarding the treaties,⁷¹⁹ and is often characterised as being the 'guardian of the conventions'.⁷²⁰ While it possesses no direct powers of sanction for treaty violation, the Board does wield significant moral authority through its ability to 'name and shame' States via its high profile annual reports, as well as to influence an overall tone of the regime towards drug control and related issues.⁷²¹ Therefore, the Board has a potentially significant role in 'fifth stage' interpretive processes.

That said, numerous human rights criticisms have been legitimately leveled at the Board in the past, ranging from its failure to criticise abusive State policies and practices, to its

⁷¹⁸ 1961 Convention amended (n 203) art 9.

⁷¹⁹ See, for example, International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2013' (2014) UN Doc No E/INCB/2013/1, 107.

⁷²⁰ See, for example, Raymond Yans, 'Improving the implementation of the international drug control conventions through enhanced capacity of national drug control administrations: Statement by Raymond Yans, President, International Narcotics Control Board', *Prevention Strategy and Policy Makers: A 'Solidarity Consortium'* (10 October 2010) 4.

⁷²¹ Bewley-Taylor, *International Drug Control* (n 172) 224-229.

praising of human rights violating governments for their supposed success in combatting drug trafficking.⁷²² In addition, the Board has historically resisted any suggestion that it has a human rights mandate, or that its deliberations should be informed by human rights concerns.⁷²³ As a result, the response from some observers has been to argue that the Board's functions should be limited to narrow technical parameters, and therefore isolate it from engagement with broader policy and rights issues.⁷²⁴ Others have suggested that the principle of State sovereignty means that the Board's ability to legitimately criticise individual governments on drug control should be curtailed.⁷²⁵ Such proposals appear rooted in critiques of the Board's practice and public statements on key issues, which, it can be argued, is more reflective of the individual membership of the Board, rather than its mandate as an international treaty organ. On the other hand, Barrett and Nowak argue against the narrowing of the Board's mandate and functions, proposing instead an 'alternative view, that the INCB has an important role in ensuring not only that the drug conventions are applied, but applied in full conformity with human rights. This would mean expanding the Board's mandate, rather than limiting it, demanding an invigorated Board membership.'⁷²⁶

⁷²² See, for example, Barrett and Nowak (n 19) 474.; Csete, 'Overhauling Oversight' (n 456).; Joanne Csete and Daniel Wolfe, 'The International Narcotics Control Board and HIV/AIDS' (Canadian HIV/AIDS Legal Network/Open Society Institute 2007).

⁷²³ Koli Kouame, Secretary of the International Narcotics Control Board, UN Press Conference, 7 March 2007, cited in Barrett and Nowak (n 19) 457-458.; Patrick Gallahue, 'Narcotics Watchdog Turns Blind Eye to Rights Abuses' *Inter Press Service* (28 March 2012) (Watchdog).

⁷²⁴ See, for example, Bewley-Taylor, *International Drug Control* (n 172) 245-249.; International Drug Policy Consortium (n 494) 8.

⁷²⁵ See, for example, Bewley-Taylor, *International Drug Control* (n 172) 246, 248.; Transnational Institute, 'The Erratic Crusade of the INCB', TNI Drug Policy Briefing, Nr (Transnational Institute 2003) 3.

⁷²⁶ Barrett and Nowak (n 19) 474.

If a ‘fifth stage’ drug control regime is to emerge, in which human rights become a central feature, the role of the International Narcotics Control Board is indeed a critical one, not least because the tone of the Board’s work, and whether or not it chooses to embrace human rights norms, has an influence on State practice. For example, in a 2014 case before the Supreme Court of India on the death penalty for drug offences, the State’s submission in defense of its capital drug laws cited the absence of Board criticism of such laws as evidence that the practice was supported under the international drug control treaties. According to the State,

[T]here has never been any objection from the INCB regarding the provision of the death penalty in the NDPS [Narcotic Drugs and Psychotropic Substances] Act...It is therefore apparent that even the body which is mandated to ensure compliance of the UN Drug Conventions has no objection to the presence of capital punishment in the NDPS Act. It is, therefore, wrong to say that such provisions are contrary to the UN Conventions.⁷²⁷

Given its central role within the regime, and its influence on States’ perceptions and practice, a ‘fifth stage’ of international drug control law cannot emerge without the active engagement and support of the International Narcotics Control Board. While the role of the Board is critical, playing such a constructive role would require a fundamental shift in the way the Board conceptualises its mandate, and carries out its activities. Csete details a number of needed areas of Board reform in this regard, in order for it to play a positive role in limiting ‘the ready tendency of states to limit human rights in the name of drug control’.⁷²⁸ While the challenges in moving the Board forward in this fashion should not be underestimated, they are less difficult than are the challenges of shaping a human-rights based approach to drug

⁷²⁷ Supreme Court of India (n 444) para 4(v).

⁷²⁸ Csete, ‘Overhauling Oversight’ (n 456) 68.

control in the face of an openly obstructionist treaty organ at the centre of the drug control regime.

7.2.2 Domestic Courts

As the Indian Supreme Court case above illustrates, a second critical forum for the dynamic human rights-based interpretation of international drug control law are domestic Constitutional Courts. The role of national high courts in this regard is crucial for a number of reasons. The first is that the system of indirect control established by the drug treaties means that drug administrative, control and enforcement practices are the responsibility of States to implement, therefore placing these activities and policies squarely within the realm of national legislation and domestic court oversight. The second is that all three drug treaties contain various caveats on key provisions, specifying that the relevant obligations are subject to domestic or constitutional law. These are generally described as ‘safeguard clauses’,⁷²⁹ examples of which are found in Articles 35 (‘Action Against the Illicit Traffic’) and Article 36 (‘Penal Provisions’) of the 1961 Convention.⁷³⁰ Article 36 specifies that its obligations are ‘[s]ubject to...constitutional limitations’,⁷³¹ and that ‘[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party’.⁷³² Similar safeguard clauses are

⁷²⁹ See, for example, 1988 Commentary (n 523) 41, fn 93.; Neil Boister, ‘Human Rights Protections in the Suppression Conventions’ (2002) 2 Human Rights Law Review 199, 210 (Suppression Conventions).

⁷³⁰ 1961 Convention amended (n 203) arts 35, 36.

⁷³¹ *ibid* arts 36(1), 36(2).

⁷³² *ibid* art 36(4).

present in the 1988 Convention, particularly in ‘the more contentious penal provisions’⁷³³ under several parts of Article 3, which are ‘subject to [the State’s] constitutional principles and the basic concepts of its legal system’.⁷³⁴ Similar clauses within the 1988 treaty are found at Article 5 on confiscation of property⁷³⁵ and Article 6 on extradition,⁷³⁶ among others.⁷³⁷ As mentioned in chapter six, one safeguard clause worthy of particular note is Article 14 on the eradication of illicit crops, the only provision within the three treaties with a specific provision specifying that the ‘measures adopted shall respect fundamental human rights’.⁷³⁸ Therefore, domestic high courts have a clear role to play in the evolution of a ‘fifth stage’ of drug control, and in applying national constitutional rights to issues of drugs.⁷³⁹ However, such balancing tests are not without their own risks and challenges. As described by Boister, ‘limitation clauses provide no guarantee of constitutional limitation. A municipal court may...choose to limit the constitutional protection rather than the domestic law flowing from the treaty provision and justify doing so by giving disproportionate weight to the international authority behind the domestic law’.⁷⁴⁰ Therefore, in order for domestic courts to contribute to the development of the ‘fifth stage’ of international drug control, they would be required to adopt a dynamic human rights-based approach to considering tensions and conflicts taking

⁷³³ Boister, ‘Suppression Conventions’ (n 729) 208.

⁷³⁴ 1988 Convention (n 194) arts 3(1), 3(2), 3(5), 3(10).

⁷³⁵ *ibid* art 5(7).

⁷³⁶ *ibid* arts 6(8), 6(10).

⁷³⁷ 1988 Commentary (n 523) 41, fn 93.

⁷³⁸ 1988 Convention (n 194) art 14(2).

⁷³⁹ Indeed, South African Constitutional Court Justice Ngcobo cited the safeguard clauses in his dissent in the case of *Prince v President, Cape Law Society and Others*, discussed later in this chapter.

⁷⁴⁰ Boister, ‘Suppression Conventions’ (n 729) 208-209.

place within national law, or between national law and international obligations, as will be explored below.

7.2.3 United Nations and Regional Human Rights Mechanisms

A third key forum for dynamic interpretation to emerge is within international human rights courts and treaty bodies themselves. Given the multiple areas in which drug control and enforcement activities have an impact on human rights protection, as discussed in previous chapters, there is a clear role for human rights courts and treaty bodies to be active agents in shaping ‘fifth stage’ drug control. This could take place through specific challenges before courts, though periodic reporting functions, general comments or the consideration of individual complaints (where such a mechanism exists) of treaty bodies. Given that the principle of evolutive interpretation is well established within international human rights jurisprudence,⁷⁴¹ the potential to expand this approach in the context of drug control issues is significant. However, this will again require the human rights bodies to confidently embrace their role as a legitimate voice of oversight on drug control issues, which, as was explored in earlier chapters, has been far from common practice. Indeed, human rights bodies have traditionally been quite silent in commenting directly on drug control issues.

7.3 ‘Nullification’ as an Obstacle to Dynamic Interpretation

Several different domestic and international legal fora have potentially significant roles to play in shaping a ‘fifth stage’ of international drug control law. Indeed, questions of drug

⁷⁴¹ See chapter six.

control law and human rights law have been considered before domestic constitutional courts, as well as international courts and treaty bodies in both the human rights and drug control regimes. However, in reviewing the approach of these bodies, a trend is often apparent that stands in the way of the development of a dynamic, human rights-based approach to treaty interpretation. This trend might be described as a process of ‘nullification’, which is exhibited in two divergent but equally problematic ways, and might be described as ‘passive nullification’ and ‘active nullification’.

As explored in previous chapters, the relevant drug control and human rights treaty bodies rarely consider the intersection between these two international legal regimes in their deliberations, or do not embrace a mandate to comment in an inter-disciplinary fashion on an area often seen as outside their mandates. As a result, the UN human rights treaty bodies rarely comment on drug control issues, and the International Narcotics Control Board rarely mentions human rights issues. The result is a process of passive nullification, in which a narrow focus solely on their own legal regimes creates institutional blinders, nullifying any consideration of the many important areas where those regimes intersect and mutually affect the realisation of both objectives. The proportionally tiny number of examples where the treaty bodies of one regime have commented robustly on the other is evidence that passive nullification represents a clear institutional barrier to the development of a ‘fifth stage’ of drug control. Indeed, a continuation of passive nullification in this manner will mean dynamic interpretation cannot develop, as the failure of each regime to engage with the legal obligations of the other means no interpretative process even takes place.

The second form, active nullification, is found where an interpretative process has taken place. In these cases, the court or other adjudicative body has decided that drug control law either supersedes the relevant human right protections, or that the objective of drug suppression is so pressing that the human rights questions need not be considered at all, or not considered in a robust manner. In effect, the objectives of drug control are allowed to trump human rights obligations. Examples of active nullification are evident at both domestic and international level, and within both legal regimes.

For example, the International Narcotics Control Board has traditionally maintained a position that it has no human rights mandate, an opinion expressed both by the Board's Secretariat⁷⁴² as well as by its past President.⁷⁴³ As a consequence, the Board has, on numerous occasions, failed to express concerns about human rights abuses committed in the name of drug control. Going even further, the narrow focus on drug control in isolation from human rights considerations has led to instances where the Board's influential Annual Report has praised States for what are known to be fundamentally abusive policies. For example, in Thailand in 2003 more than two thousand people were killed by police during a government led 'war on drugs'. Despite wide criticism of the government by human rights monitors,⁷⁴⁴ the Board failed to criticise the execution campaign, commenting only that it 'trusts that the Government will continue to provide information to it regarding the progress of those

⁷⁴² Kouame (n 723).

⁷⁴³ Gallahue, 'Watchdog' (n 723); Audio recording of former INCB President Hamid Ghodse's remarks is available online <<http://www.ihra.net/contents/1196>> accessed 11 June 2014.

⁷⁴⁴ See, for example, Human Rights Watch, 'Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights' (Human Rights Watch 2004), vol 16, no 8 (C).; 'UN Expert on Extrajudicial Executions Expresses Concern over Recent Killings in Thailand', United Nations Press Release HR/4645 (24 February 2003).

investigations'.⁷⁴⁵ The Board's Annual Reports also have a history of commending governments for their 'success' in combatting drugs, in cases where the drug policies of the countries in question have been criticised as human rights violations.⁷⁴⁶ On the other side, the Board has been openly hostile towards governments that have implemented harm reduction programmes to prevent HIV infections among people who inject drugs,⁷⁴⁷ approaches that are widely supported by other United Nations agencies.⁷⁴⁸ In effect, the Board's exclusive focus on drug control has actively nullified any consideration of the human rights impacts, both negative and positive, of the drug control policies and activities it is mandated to monitor, a result that has been widely criticised by human rights advocates.⁷⁴⁹ Indeed, the Board has in the past gone on record to affirm that commenting on domestic laws and policies, such as the death penalty for drug offences, 'lie beyond the mandate and powers which have been conferred upon the Board by the international community'.⁷⁵⁰

⁷⁴⁵ International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2004' (n 487) para 388.

⁷⁴⁶ For the example of Vietnam, see International Narcotics Control Board 2011 (n 454) para 117. See, also for example, Human Rights Watch, 'Rehab Archipelago' (n 449).; World Health Organization Western Pacific Region (n 449).

⁷⁴⁷ See, for example, International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2010' (2011) UN Doc No E/INCB/2010/1, para 123.; 'Concerns Over Heroin Use for Addicts Remain After Swiss Project Evaluated, INCB Says', Press Statement, UN Doc No UNIS/NAR/663 (19 May 1999).; International Narcotics Control Board, 'Report of the International Narcotics Control Board for 2008' (2009) UN Doc No E/INCB/2008/1, para 430.

⁷⁴⁸ See, for example, World Health Organization, UN Office on Drugs and Crime and UNAIDS, 'Technical Guide for Countries to set targets for Universal Access to HIV Prevention, Treatment and Care for Injecting Drug Users' (World Health Organization 2009).

⁷⁴⁹ See, for example, Barrett and Nowak (n 19) 457-458.; Joanne Csete, 'Overhauling Oversight' (n 456).; Csete and Wolfe (n 722).

⁷⁵⁰ Secretariat, International Narcotics Control Board (N 443).

While one might expect to find active nullification in the work of the International Narcotics Control Board, given its location within the drug control regime, this approach is also found in the work of UN and regional human rights treaty bodies. A particularly illustrative example is the case of *Prince v South Africa* of the UN Human Rights Committee in 2007. The case concerned a qualified attorney (Prince), who was Rastafarian. The use of cannabis is a central tenet of the Rastafarian faith, and Prince had two convictions for cannabis offences on his criminal record as a result. These drug charges, along with Prince's assertion that he would continue to use cannabis as part of his religious practice, led the Law Society to reject his application for registration as a lawyer. In effect, he was 'placed in a position where he must choose between his faith and his legal career'.⁷⁵¹ Prince unsuccessfully took his case as far as the South African Constitutional Court, where a narrowly divided Court ruled against him.⁷⁵² Before the Human Rights Committee, he argued that the decisions of the South African courts violated his rights under Article 18(1) of the International Covenant on Civil and Political Rights, which enshrines both the freedom of religion and the right 'to manifest his religion or belief in worship, observance, practice and teaching'.⁷⁵³

Whether or not one agrees with Prince on the merits, there are clearly legal questions to be balanced in coming to a reasoned judgement. Indeed, both the majority and minority opinions in the judgement from the South African Constitutional Court engaged in such tests, coming to a divided 5-4 decision against him.⁷⁵⁴ However, the approach of the Human Rights

⁷⁵¹ UN Human Rights Committee, 'Prince v South Africa, Communication No 1474/2006' (14 November 2007) UN Doc No CCPR/C/91/D/1474/2006, para 2.4.

⁷⁵² *Prince v President, Cape Law Society and Others* (n 716).

⁷⁵³ International Covenant on Civil and Political Rights (n 436) art 18(1).

⁷⁵⁴ *Prince v President, Cape Law Society and Others* (n 716).

Committee was that such a robust test was not necessary or warranted. In the key paragraph of the judgement,

The Committee observes that the prohibition of the possession and use of cannabis, which constitutes the limitation on the author's freedom to manifest his religion, is prescribed by the law....It further notes the State party's conclusion that the law in question was designed to protect public safety, order, health, morals or the fundamental rights and freedoms of others, based on the harmful effects of cannabis, and that an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis enter into general circulation. ***Under these circumstances the Committee cannot conclude that the prohibition of the possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose.*** The Committee finds that the failure of the State party to grant Rastafarians an exemption to its general prohibition of possession and use of cannabis is, in the circumstances of the present case, justified under article 18, paragraph 3, and accordingly finds that the facts of the case do not disclose a violation of article 18, paragraph 1.⁷⁵⁵ (emphasis added)

In its judgement, the Committee cites Article 18(3) of the Covenant, which states that the freedom of religion 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁷⁵⁶ Article 18(3) demands a proportionality test. However, the Committee failed to conduct a thoughtful test in this instance.

In its opinion, the Committee notes that cannabis prohibition, which was the source of the limitation on Prince, was prescribed by law. However, this fact was not in dispute. Rather, the test should have focussed on whether that law was in fact proper and proportionate response 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Yet rather than interrogate the merits of the Government law in this

⁷⁵⁵ UN Human Rights Committee, 'Prince v South Africa' (n 751) para 7.3.

⁷⁵⁶ International Covenant on Civil and Political Rights (n 436) art 18(3).

regard, the Committee instead deferred to the ‘State party’s [own] conclusion’ that the legislation met these thresholds. It can hardly be imagined that the State would suggest its own law was anything other than appropriate. Therefore, the Committee’s uncritical acceptance of the State’s own assessment of the purpose and effect of its drug laws not only actively nullified consideration of the freedom of religion, it also nullified the need to properly weigh the merits of the case. Such an outcome was presciently described by Justice Albie Sachs in his dissent to the majority opinion in *Prince* before the South African Constitutional Court. Wrote Sachs,

[T]here is the tendency somnambulistically to sustain the existing system of administration of justice and the mind-set that goes with it, simply because, like Everest, it is there; in the words of Burger CJ, it is necessary to be aware of “requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.”⁷⁵⁷

The African Commission on Human and People’s Rights also adopted an active nullification approach in its hearing of the *Prince* case, finding that ‘the respondent state’s interest to do away with the use of cannabis and its abuse/trafficking...constitutes a legitimate limitation on the exercise of the right to freedom of religion within the spirit of article 27(2) cum article 8’.⁷⁵⁸ *Prince* also argued before the African Commission that his right to occupational choice under Article 15 had also been violated in the decision of the Law Society. Again, the Commission took an active nullification approach, noting ‘the legitimate interest the state has in restricting the use and possession of cannabis’ and that his right to choose a profession was not violated ‘as he himself chose...to disqualify himself from inclusion by choosing to

⁷⁵⁷ Sachs dissenting opinion, *Prince v President, Cape Law Society and Others* (n 716) para 154.

⁷⁵⁸ African Commission on Human and People’s Rights, *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 43.

confront the legitimate restrictions’ of the Law Society.⁷⁵⁹ In effect, the Commission found that in choosing to observe his religious practice and use cannabis, Price was also making the decision to be barred from registration as an attorney.

Examples of an active nullification approach are also evident in domestic jurisprudence. One example is the 2007 case of *Edith Yunita Sianturi and others*, before the Constitutional Court of Indonesia.⁷⁶⁰ The case examined the question of the death penalty for drug offences, and whether such offences met the threshold of ‘most serious crimes’ necessary for capital punishment under Article 6(2) of the International Covenant on Civil and Political Rights.⁷⁶¹

Although recognising the evidence from the petitioners that the UN Human Rights Committee, the body that oversees the Covenant, had found that drug offences do not meet this threshold, the majority of the Constitutional Court justices ruled that Indonesia’s status as a State Party to the 1988 drug convention superseded its international human rights obligations. Specifically, the judgement referred to Article 24 of the 1988 Convention, which states that, ‘[a] Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic’.⁷⁶² Referring to Article 24, the Court stated,

In other words...if according to Indonesia, more severe measures are needed to prevent and eradicate such crimes, such measures are not contradictory to but rather are justified and suggested instead by the [1988 drug] Convention. This means that Indonesia as a state party adopting the system of capital punishment against certain

⁷⁵⁹ *ibid* para 46.

⁷⁶⁰ *Edith Yunita Sianturi and others* (n 527).

⁷⁶¹ International Covenant on Civil and Political Rights (n 436) art 6(2).

⁷⁶² 1988 Convention (n 194) art 24.

Narcotics criminals has the right to determine capital punishment to the Narcotics criminals.⁷⁶³

In its judgment, the Court found that Article 24 of the 1988 drug convention actively nullified the effect of Article 6(2) of the International Covenant on Civil and Political Rights. The majority opinion judgement took this logic a step further, commenting that the drug conventions, or at least the Court's own interpretation of them, occupied a higher status in law than did the Covenant as interpreted by the Human Rights Committee.

The consequences of Indonesia's participation in the Narcotic Drugs and Psychotropic Substances Convention [sic] in order to take more strict national measures in legally eradicating Narcotics crimes shall have a higher degree of binding force in the light of international law sources, as regulated in Article 38 Paragraph (1) of the Statute of International Court of Justice than the opinion of the Human Rights Commission of the United Nations [sic] to the effect that crimes related to the drugs abuse do not belong to the category of the most serious crimes.⁷⁶⁴

The examples cited above illustrate the degree to which both passive and active nullification act as impediments to the evolution of a 'fifth stage' of international drug control law. Were passive nullification the only barrier, then the challenges could be met simply by encouraging the relevant legal bodies to adopt more inter-disciplinary and holistic approaches to their respective mandates. In doing so, the legal contours of a 'fifth stage' approach would organically begin to evolve. However, the risk of active nullification demonstrates that simply promoting inter-disciplinary thinking between the regimes is insufficient to ensure that the outcome is an interpretive approach that safeguards human rights. Therefore, the question of how actual tensions and conflicts between the regimes should be balanced in a manner that avoids active nullification is critical.

⁷⁶³ *Edith Yunita Sianturi and others* (n 527) 103, para (i).

⁷⁶⁴ *ibid* 103, para (j).

7.4 Towards a ‘Fifth Stage’ of Drug Control Law

Chapter five examined how the norms of international drug control law and international human rights law interact in one of three ways: complementarity, tension or conflict. For the purposes of a dynamic ‘fifth stage’ of drug control, consideration of complementary or accumulating norms is of little concern, as these norms by definition add to or reinforce the normative content of each other. The challenge instead is how to resolve those instances of regime tension, where the implementation of drug control law, policy or enforcement breach human rights protections without an explicit treaty obligation to undertake such actions; and regime conflict, where a Party to the drug control and human rights treaties cannot simultaneously comply with its obligations under both regimes.

In the words of South African Supreme Court Justice Albie Sachs, in his spirited dissent to the Court’s majority opinion against Prince,

In my view the majority judgment [against Prince] puts a thumb on the scales in favour of ease of law enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his...community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society.⁷⁶⁵

As explored above, Justice Sachs’s metaphor of a ‘a thumb on the scales in favour of ease of law enforcement’ neatly describes the process of active nullification of human rights considerations. Therefore, a central challenge in developing a ‘fifth stage’ of international drug control is, at minimum, to remove the drug enforcement ‘thumb on the scales’ of justice

⁷⁶⁵ Sachs dissenting opinion, *Prince v President, Cape Law Society and Others* (n 716) para 149.

that causes active nullification, thereby allowing the regimes to rebalance in favour of human rights. Indeed, in some cases a dynamic, human-rights based interpretation will require not simply removing the thumb, but moving its force squarely onto the human rights side of the scales. Although engaging different interpretive processes and logics, a dynamic interpretive approach demands that both tensions and conflicts between the regimes be resolved in a manner in which the thumb is clearly on the side of the scales that ensures human rights are safeguarded.

7.4.1 Resolving Regime Tensions

Regime tensions are, by definition, not the outcome of a State implementing explicit drug treaty obligations, but rather are the result of how an obligation is be interpreted. Because tensions are not a consequence of explicit regime conflicts, and because ‘[i]n international law, there is a strong presumption against normative conflict’,⁷⁶⁶ a dynamic interpretive approach must necessarily be one that brings these laws, policies or practices into conformity with international human rights law. The process for resolving tensions through a dynamic approach can be illustrated using the three areas of regime tension explored in chapter four: the death penalty for drug offences, compulsory detention in the name of drug treatment and the provision of harm reduction services to active drug users.

7.4.1.1 Death Penalty for Drug Offences

⁷⁶⁶ Fragmentation Report (n 43) 25, para 37.

As discussed previously, the death penalty for drugs has been a key area of regime tension between States and international human rights bodies. As seen in the Indonesian case above, it is also an issue that has led to some troubling jurisprudence at domestic level, where international drug control obligations have been used to actively nullify human rights. However, despite the controversial history of the issue of the death penalty for drug offences, it is actually a question for which a dynamic interpretive approach offers a clear resolution. Given the ‘strong presumption against normative conflict’ in international law,⁷⁶⁷ when balancing competing, or apparently competing, treaty obligations, the preferred interpretation is one that strives for consistency between all concurrent obligations for, as characterised by Jenks, ‘[i]t seems reasonable to start from a general presumption against conflict’.⁷⁶⁸

A dynamic interpretive approach to international drug control law takes this premise and operationalises it. In this case, none of the three drug treaties make mention of capital punishment. However, even if one were to accept a suggestion that the silence of the treaties on this question means that the death penalty is an allowable sanction within international drug control law, as was the opinion of the Constitutional Court of Indonesia⁷⁶⁹ and the argument of the Government of India,⁷⁷⁰ at the same time the drug treaties clearly do not obligate or compel States to enact capital drug laws. Therefore, even if allowed within the terms of the drug conventions, legislating for capital punishment for drug offences is clearly not *required* by the treaties. On the other hand, executions for drug offences are illegal under international human rights law, as described in chapter four. As a consequence, the only

⁷⁶⁷ *ibid.*

⁷⁶⁸ Jenks (n 412) 427.

⁷⁶⁹ *Edith Yunita Sianturi and others* (n 527).

⁷⁷⁰ Supreme Court of India (n 444).

interpretive conclusion consistent with the international legal environment as a whole, avoiding normative conflict, is that capital punishment for drugs is unacceptable. International drug control law does not obligate capital punishment, therefore *not* executing people for drug offences does not violate any drug treaty obligations. At the same time, executions for drug offences *do* violate international human rights law. Therefore, an abolitionist national drug law is the only option consistent with both legal regimes, violating neither. This approach is again one consistent with the findings of the Fragmentation Report, which concluded that '[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.⁷⁷¹

7.4.1.2 *Compulsory Detention in the name of 'Drug Treatment'*

A similar exercise undertaken on the question of compulsory detention for drug use again illustrates that adopting a dynamic interpretive approach results in a conclusion that safeguards human rights, and repudiates repressive drug policies. As described in chapter four, the compulsory detention *en masse* of persons who use, or are suspected of using, illegal drugs is a widespread issue of concern in a number of countries. It is also a policy that has received criticism from human rights bodies as constituting a form of arbitrary detention, violating the right to liberty and security. The 1961 and 1971 drug treaties create clear obligations for States to provide drug treatment services.⁷⁷² However, similar to the question of the death penalty above, this obligation to provide treatment does not create a requirement

⁷⁷¹ International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (adopted at its Fifty-eighth session, 2006), para 4.

⁷⁷² 1961 Convention amended (n 203) art 38.; 1971 Convention (n 186) art 20.

to force people into treatment, or to detain them against their will for such purpose. In fact, the draft history of Article 28 of the 1961 Convention reveals just the opposite.

The question of whether involuntary or compulsory drug treatment should be explicitly included within Article 38 was the source of significant debate during the plenipotentiary conference that finalised the draft treaty, driven primarily by the United States delegation, which argued that ‘[t]reatment in liberty had failed wherever it had been tried’.⁷⁷³ The U.S. proposed language that States Parties ‘shall use their best endeavours to establish facilities for the compulsory treatment of drug addicts in closed institutions’.⁷⁷⁴ Although the U.S. proposal received some support,⁷⁷⁵ it was eventually amended to remove reference to compulsory treatment in closed facilities, and instead the term ‘adequate facilities’ was agreed for use in the final treaty text.⁷⁷⁶ Given the content of these drafting debates, and the specific and deliberate decision to delete reference to ‘compulsory treatment of drug addicts in closed institutions’ from the final 1961 treaty, it is difficult to make the case that international drug control law requires the use of involuntary detention or compulsory drug treatment. Moreover, from the perspective of international human rights law, the practice is clearly illegal, constituting breaches of both the right to liberty and security and the right to consent to treatment.⁷⁷⁷ As compulsory detention is not required by treaty, the failure to

⁷⁷³ 1961 Official Records vol I (n 238) 103

⁷⁷⁴ 1961 Official Records vol II (n 297) 18. Article 38 of the final treaty was debated as draft Article 47.

⁷⁷⁵ The Official Records indicate support from Canada, China, India, Iran and the United Arab Republic. 1961 Official Records vol I (n 238) 103, 106.

⁷⁷⁶ 1961 Convention amended (n 203) art 38.

⁷⁷⁷ See, for example, UN General Assembly, ‘Special Rapporteur Health 2010’ (n 23) para 38.; Lines, ‘Treatment in Liberty’ (n 467).

provide it is not a breach of international drug control law. However, the compulsory detention of persons on the basis of providing drug treatment is a violation of international human rights law. Therefore, this tension again is one that is necessarily resolved in favour of human rights, as the prohibition of mass detention for the purposes of drug treatment is the only solution that is consistent with both legal regimes, violating neither.

7.4.1.3 Harm Reduction

The same result is found when a dynamic process is applied to the question of the provision of harm reduction services such as needle and syringe programmes, access to opioid substitution treatments such as methadone and safe injecting facilities for people who use illicit drugs. Despite the controversy that discussions of harm reduction create at the international level,⁷⁷⁸ the provision of harm reduction services is not prohibited by the international drug control treaties. Although the approach of the International Narcotics Control Board towards harm reduction has been at best ‘lukewarm’⁷⁷⁹ and at worst ‘generally hostile’,⁷⁸⁰ the Board does not, in the main, argue that key harm reduction interventions such as needle exchange and methadone are illegal. A significant departure is the Board’s opposition to safe injecting facilities, which was discussed in chapter four. In addition, the conclusion of the Legal Affairs Section of the UN Drug Control Program in 2002 on the question of harm reduction within the framework of the international drug control treaties was that not only needle exchange and opioid substitution, but also safe injecting facilities,

⁷⁷⁸ See generally, Bewley-Taylor, *International Drug Control* (n 172) chaps 2, 3.

⁷⁷⁹ *ibid* 232.

⁷⁸⁰ *ibid* 230.

were legal health interventions under the treaties.⁷⁸¹ Therefore, despite the contentious nature of the harm reduction question within many UN bodies, there is no credible basis upon which to suggest the approach is prohibited under the drug treaties. Within international human rights law, on the other hand, there is growing recognition that access to harm reduction constitutes a component element of the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights,⁷⁸² essential to the fulfillment of that right among people who use drugs. The UN Special Rapporteur on the Right to Health has specifically highlighted access to harm reduction within the context of Article 12, calling on States to ‘ensure that all harm-reduction measures...are available to people who use drugs’.⁷⁸³ Therefore, taking a dynamic approach, the provision of harm reduction services does not breach the drug conventions, while the failure to provide them is increasingly seen to be a violation of the right to health under international human rights law. As a result, provision of harm reduction services by States is the only solution that is consistent with both regimes, violating neither.

A dynamic approach therefore offers a clear interpretive process for the resolution of the vast majority of human rights violations taking place under the auspices of drug control, namely those resulting from tensions rather than conflicts between the two regimes. Significantly, it offers an approach that has the effect of ensuring human rights are safeguarded, even as drug control treaty obligations are themselves fulfilled. In doing so, the risk of the active

⁷⁸¹ See generally, Legal Affairs Section (n 497).

⁷⁸² See, for example, UN Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Tajikistan’ (n 480) para 70.; ‘Concluding Observations: Ukraine’ (n 480) para 28.

⁷⁸³ UN General Assembly, ‘Special Rapporteur Health 2010’ (n 23) para 76. See also UN Human Rights Council, ‘Hunt Sweden Report’ (n 483) para 60.

nullification of internal human rights law is minimised or even eliminated. The second question is how a dynamic approach should be undertaken in instances where the two regimes come into explicit conflict.

7.4.2 Resolving Regime Conflicts

Human rights violations resulting from regime tensions are perhaps the most obvious and widespread, and as discussed above are perhaps easiest to resolve in favour of human rights protection using established rules of interpretation. However, the question of conflicts between treaty obligations within the two regimes, ‘where simultaneous compliance with the obligations of different instruments is impossible’,⁷⁸⁴ must also be considered. Although these instances are less frequent in the context of human rights and drug control than are the tensions, they nonetheless require attention when considering the development of a ‘fifth stage’ of drug control. This section will explore a dynamic interpretative approach using the two examples of regime conflict described in chapter four, the traditional uses of coca and the application of more severe measures.

7.4.2.1 Traditional Uses of Coca

Article 49 of the 1961 Convention is perhaps the clearest example of regime conflict between the drug control and human rights legal systems, creating a positive obligation to eradicate the chewing of the coca leaf,⁷⁸⁵ a traditional practice of cultural significance to many

⁷⁸⁴ Jenks (n 412) 451.

⁷⁸⁵ 1961 Convention amended (n 203) art 49(2)(e).

indigenous peoples in the Andean region of South America. Article 49 therefore comes into explicit conflict with State obligations to protect the traditional cultural practices of indigenous peoples reflected in multiple human rights instruments and the work of human rights bodies.⁷⁸⁶ The challenge of resolving this conflict was addressed in a 2013 article by Pfeiffer, which serves to illustrate the inherent limitations of a traditional interpretive approach when balancing obligations in drug control law and human rights law. While not intending to do so, the article affirms the need for a dynamic approach to prevent human rights protection from being actively nullified by drug control law.

Pfeiffer's interpretive approach is built on the assumption that '[g]iven the rigidity of the rules on drug control, it is necessary to consider whether the rules on the rights of indigenous peoples are more flexible in allowing for harmonization and systemic integration'.⁷⁸⁷ In other words, he begins the balancing process from the presumption that only human rights obligations offer flexibility or interpretative space in this matter, which has the inevitable consequence of putting 'a thumb on the scales' in favour of international drugs control law over international human rights law. The analysis adopts a proportionality test using a human rights framework, yet one in which the drug control norm is deemed sacrosanct and the only relevant interpretive question is to what degree, and under what conditions, it is acceptable to limit indigenous rights. The idea that drug control norms should themselves be open to evolutive interpretation, particularly in the context of the codification and expansion of the

⁷⁸⁶ Universal Declaration of Human Rights (n 338) art 27.; International Covenant on Civil and Political Rights (n 436) art 27.; International Covenant on Economic, Social and Cultural Rights (n 421) art 15.; Committee on the Elimination of All Forms of Racial Discrimination (n 510) paras 4-5.; United Nations Declaration on the Rights of Indigenous Peoples (n 511) art 31.

⁷⁸⁷ Pfeiffer (n 49) 313.

international law on indigenous rights in the decades subsequent to the entry into force of the 1961 drug treaty, does not enter into the analysis. Pfeiffer himself recognises the limitations of this approach, which he admits inevitably undermines human rights protection, as ‘the rules in question can be harmonized only by restricting the right of indigenous peoples to their customs and traditions’.⁷⁸⁸ He continues,

States who are obliged to implement the prohibition on coca leaf chewing can restrict the right of indigenous peoples to their customs and traditions, but should follow the appropriate procedures to do so in consultation with the peoples concerned, in line with the object and purpose of the relevant instruments. Although this outcome appears legally sound, it is not very favorable to the rights of indigenous peoples, because the balance to be drawn will be tilted in favor of the abolition of coca leaf chewing.⁷⁸⁹

Pfeiffer’s conclusion touches on the critical question in the context of dynamic interpretation, ‘whether the rule to abolish coca leaf chewing has lost its legitimacy and whether the principle of harmonization should be applied in this case’.⁷⁹⁰ Given the extensive framework of international legal protection for indigenous rights that has emerged since 1961, any interpretive process occurring in a modern legal context cannot be anchored on the notion of Article 49 as a rigid norm. Pauwelyn characterises this type of conflict as a ‘conflict in the applicable law’, or a case in which ‘[c]ompliance with, or exercise of the rights under, one of the two norms constitutes breach under the other norm’.⁷⁹¹ In resolving such situations, the question is not ‘which of the two norms survives, but which of the two norms applies. In that

⁷⁸⁸ *ibid* 323.

⁷⁸⁹ *ibid* 318.

⁷⁹⁰ *ibid* 324.

⁷⁹¹ Pauwelyn (n 44) 275.

sense, “conflict of applicable law” is a question of “choice of law”; not one of validity or legality of one norm in the light of another norm.⁷⁹² Says Pauwelyn,

In terms of state responsibility...only the rule that must finally be applied can be breached and result in responsibility. The discarded rule does not apply and can hence *a fortiori* not be breached. However, although this rule is disapplied in the particular circumstances, it is not declared invalid nor is it in any way seen as an ‘illegal’ rule. It is simply a rule that must give way to another in one in the circumstances. In other circumstances, the discarded rule may continue to apply.⁷⁹³

The circumstances described by Pauwelyn neatly characterise the conflict regarding the traditional uses of coca. The application of Article 49 on coca does not universally conflict with international human rights obligations on indigenous rights. For States without a tradition of coca chewing, even those with large indigenous populations, Article 49 poses no inherent human rights conflict. However, for those few countries where traditional indigenous use of coca is evident, a conflict exists for those governments seeking to fulfil their obligations under both regimes. Resolving this conflict demands an evolutive, human rights-based approach. As written by Justice Albie Sachs in his dissent in the Prince case, ‘[f]or the purposes of balancing, some laws (or parts of laws) will of necessity be more equal than others.’⁷⁹⁴

In this case, and in these States, the laws on indigenous rights are the ‘more equal’ laws for the purposes of interpretation, and adopting a dynamic approach requires that the international legal protection of the cultural rights of indigenous coca-using communities

⁷⁹² *ibid* 327.

⁷⁹³ *ibid*.

⁷⁹⁴ Sachs dissenting opinion, *Prince v President, Cape Law Society and Others* (n 716) para 154.

should prevail over Article 49 of the 1961 drug convention. To paraphrase Pauwelyn, the rule in the drug treaty must ‘give way’ to the rule in human rights law in this particular circumstance, given the current development of international law as a whole. The *Judge v Canada* case before the Human Rights Committee, where the Committee found that ‘a broadening international consensus in favour of abolition of the death penalty’ was a sufficient basis to ‘review...the scope of the application of the rights protected’ under Article 6 of the International Covenant on Civil and Political Rights⁷⁹⁵ offers an instructive parallel example of how a dynamic interpretive approach might look in the case of coca. The Committee found ‘that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place’.⁷⁹⁶ Considering Article 49 of the 1961 drug treaty in this light, it is impossible to conceive of a modern international instrument being adopted in which the eradication of a historically documented indigenous practice is made a core State obligation. Resolving this conflict is therefore not a question of how and where to restrict indigenous rights in order to satisfy the rules of drug control, as suggested by Pfeiffer, but instead an instance where the logic of drug control is not applicable to a modern international legal environment in which indigenous rights have achieved a protected status that did not exist in 1961. The onus should not be on States to restrict their interpretation of human rights law to that as existed at the time the 1961 drug treaty was adopted, but rather to interpret 1961 drug control obligations that engage human rights as evolving in the context of modern international law, or in the

⁷⁹⁵ *ibid.*

⁷⁹⁶ *ibid.*, para 10.7.

words of the Human Rights Committee, it should ‘be interpreted by reference to the time of examination’.

Boister writes that although the drug ‘conventions are principally concerned with effective crime control, one of their functions should be to protect the human rights of the individuals subject to their processes’.⁷⁹⁷ In this context, and in keeping with the *telos* of the drug control regime, protecting and promoting the cultural rights of indigenous communities in the Andean region means that the obligation defined in Article 49 regarding coca must give way. This is not to say the obligation as a whole has ‘lost its legitimacy’, to use Pfeiffer’s term, but rather that in these particular circumstances, in the specific countries where the conflict is extant, international human rights norms must take precedence. Otherwise, what is left is a process that actively nullifies indigenous cultural rights.

The case for dynamic interpretation in this instance is made even more compelling when weighing counter arguments, which are essentially based on the premise that allowing for the indigenous use of coca will weaken the international drug control regime. This was a common theme among the States lodging objections to Bolivia’s 2012 reservation to Article 49, which had the effect of allowing traditional uses of coca within the country. The United States, for example, argued that this would mean ‘more cocaine will be available for the global cocaine market, further fueling narcotics trafficking and related criminal activities’.⁷⁹⁸

Similarly, the United Kingdom objected that allowing traditional uses of coca ‘could lead to

⁷⁹⁷ Boister, ‘Suppression Conventions’ (n 729) 201.

⁷⁹⁸ Permanent Mission of the United States to the United Nations, ‘United States: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia’ (3 July 2012), UN Doc. No. C.N. 101.2012.TREATIES-VI.18 (Depositary Notifications) 1.

increases in coca production and...weaken international law as it relates to the global effort to tackle drugs'.⁷⁹⁹ The International Narcotics Control Board also issued a similar statement.⁸⁰⁰ However, given the huge scope of the international illicit market in cocaine, it is difficult to make the case that allowing licit traditional uses among indigenous communities in a handful of countries will truly undermine global drug prohibition. Interestingly, the 2013 UN World Drug Report reports a decline in coca bush cultivation in Bolivia, not the increase predicted in the statements above.⁸⁰¹ It also suggests that 'the growth in global population may be a major driving force in setting the trend for global demand', rather than the available supply driving use.⁸⁰²

In testing this opposition to a dynamic approach it is also useful to draw insight from other areas of international law. For example, the United Nations Convention on Biological Diversity provides guidance on interpretation under Article 22, 'Relationship with Other International Conventions'.⁸⁰³ It states that the Convention will only 'affect the rights and obligations...deriving from any existing international agreement...where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity'.⁸⁰⁴

⁷⁹⁹ Permanent Mission of the United Kingdom to the United Nations, 'United Kingdom: Objection to the Reservation contained in the in the communication by the Plurinational State of Bolivia' (14 December 2012), UN Doc No C.N. 719.2012.TREATIES-VI.18 (Depositary Notifications) 2.

⁸⁰⁰ International Narcotics Control Board, 'International Narcotics Control Board Regrets Bolivia's Denunciation of the Single Convention on Narcotic Drugs' (n 519).

⁸⁰¹ UN Office on Drugs and Crime, *World Drug Report 2013* (n 17) 37.

⁸⁰² *ibid.*

⁸⁰³ Convention on Biological Diversity (n 638) art 22.

⁸⁰⁴ *ibid* art 22.; Pauwelyn (n 44) 330.

Using this threshold as guidance, it is difficult to credibly argue that allowing the traditional use of coca in a handful of States presents ‘serious damage or threat’ to the fabric of the international drug control regime. However, it can easily be argued that the obligation to eradicate the use of coca represents a ‘serious damage or threat’ to the rights of those indigenous communities in which coca forms an important traditional and cultural practice. Using another example from a separate body of international law, the International Whaling Commission recognises ‘that indigenous or “aboriginal subsistence” whaling is of a different nature to commercial whaling. It is thus not subject to the [international commercial whaling] moratorium’.⁸⁰⁵ This accommodation by the International Whaling Commission to respect the cultural practices of indigenous communities is allowed in only four countries,⁸⁰⁶ approximately the same number of States for which there is history of indigenous coca use, and offers a clear example of a regime in which global prohibition (in this case on commercial whaling) is not considered to be weakened or threatened by a specific exception for indigenous cultural practices. Therefore, a dynamic interpretation of this particular conflict must be resolved by placing the ‘thumb on the scales’ of human rights in those States where the conflict is apparent.

7.4.2.2 *Application of More Severe Measures*

A second area of conflict explored in chapter four is the permissive obligation common to all three drug treaties allowing States to adopt ‘more strict or severe measures’ than those

⁸⁰⁵ International Whaling Commission, ‘Aboriginal Subsistence Whaling’ <www.iwc.int/aboriginal> accessed 14 April 2014.

⁸⁰⁶ Denmark, the Russian Federation, St Vincent and The Grenadines and the United States, *ibid.*

required in the treaties themselves.⁸⁰⁷ As explored above, the Indonesian Constitutional Court cited Article 24 of the 1988 Convention as a basis to uphold the legality of the death penalty for drug offences.⁸⁰⁸ This case demonstrates how these permissive obligations, enshrined without safeguards or limitations,⁸⁰⁹ create a potential justification for the active nullification of human rights obligations, and violation of international human rights law. The mere existence of these permissive norms alongside parallel human rights treaties does not in itself create a conflict.⁸¹⁰ The conflict only emerges where the permissive norm is invoked to violate another norm, as occurred in the Indonesian case. In adopting a dynamic approach to considering these permissive norms, it is apparent that appropriate conflict resolution, or even conflict avoidance, must be a process that again places the ‘thumb on the scales’ of human rights. This conclusion is evident for two reasons.

The first is the consideration of the context of the permissive articles themselves. Although each allows for the application of ‘more strict or severe measures’, the context of this permission is limited specifically to the terms of the drug conventions. For example, Article 39 of the 1961 Convention states that ‘a Party shall not be, or be deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention’.⁸¹¹ Article 24 of the 1988 Convention similarly states that ‘[a] Party may adopt

⁸⁰⁷ 1961 Convention amended (n 203) art 39.; 1971 Convention (n 186) art 23.; 1988 Convention (n 194) art 24.

⁸⁰⁸ 1988 Convention amended (n 194) art 24.

⁸⁰⁹ Boister, *Penal Aspects* (n 46) 527.

⁸¹⁰ Jenks (n 412) 451.

⁸¹¹ 1961 Convention amended (n 203) art 39.

more strict or severe measures than those provided by this Convention'.⁸¹² Identical wording is used to frame the permissive article in the 1971 Convention.⁸¹³ In each case, the provision is situated specifically within the relevant drug treaty, and defines permission to adopt measures only beyond those prescribed in each convention. It does not permit the adoption of more strict or severe measures than those legally allowed elsewhere in international law, or provide permission to exceed safeguards established in other legal regimes.

The context now established, the second consideration is one of appropriate balance. As the nature of the permissive norm is strictly limited to the scope of the drug conventions themselves, the question then is how this obligation interacts with those of other legal regimes, specifically international human rights law. In this case, applying more strict and severe measures of drug control than those outlined in the treaties is allowable only to the degree that the measures in question do not violate other international legal obligations. Given the presumption in international law against normative conflict, the correct application of these permissive obligations must be one that maintains coherence with parallel international human rights obligations, and places a 'thumb on the scales' of human rights. Herein lies the essential error at the heart of the Indonesian Constitutional Court's application of this provision. As the permissive obligations within the drug conventions are limited narrowly to the measures within the drug treaties, the Court's invoking Article 24 as justification to override Article 6(2) of the International Covenant on Civil and Political Rights is a misapplication of the provision, creating a breach of international human rights law. As described by Jenks, '[t]here is no conflict if...it is possible to comply with the

⁸¹² 1988 Convention (n 194) art 24.

⁸¹³ 1971 Convention (n 186) art 23.

obligations of one instrument by refraining from exercising a privilege or discretion accorded by another.⁸¹⁴ Therefore, international human rights law must always act as a limiting control on the interpretation of these permissive obligations in order to avoid or mediate regime conflict.

7.5 Conclusion

International drug control law and international human rights law engage each other in multiple ways, and in multiple fora, both international and domestic. In many cases, this engagement results in tensions or even conflicts between the regimes, resulting in undermining human rights protections. Resolving these engagements in a manner that protects fundamental human rights norms is the key challenge in the evolution of a ‘fifth stage’ of drug control. Chapter seven has explored how this evolution might look in practice, outlining the legal bodies and fora through which a dynamic, human rights-based approach to drug control must evolve, and outlining the basic principles that should guide the necessary balancing tests. Moving beyond the approaches of passive and active nullification that have historically impeded progressive legal evolution in this area, a dynamic approach offers clear guidance to ensure that the balancing exercise between human rights and drug control, upholding that human rights standards in a manner consistent with the *telos* of the drug control regime, and in most cases the obligations it enshrines.

⁸¹⁴ Jenks (n 412) 451.

Chapter Eight - Conclusion: The Future for a ‘Fifth Stage’ of Drug Control?

This thesis has explored the question of treaty interpretation within international drug control law. Specifically, it has addressed the problem of human rights violations occurring in the name of drug control and enforcement, and proposed an interpretive approach to resolving tensions and conflicts between drug control law and human rights law to prevent such abuses. Through this process, it has proposed a framework and possible interpretive fora for the development of a ‘fifth stage’ of drug control, one that ensures obligations enshrined within international drug control law are carried out in a manner that is human rights compliant.

At the time of this writing, such a ‘fifth stage’ of drug control remains far from being achieved. Although United Nations human rights mechanisms and Special Procedures have in recent years become more active in addressing drug control issues within their mandates, examples are still so rare as to be notable when they occur. The Office of the High Commissioner for Human Rights, for example, only made its first public statement on drug control in 2009.⁸¹⁵ While the Special Rapporteurs on torture and on the right to health have done thematic work on drug control within their mandates, in 2009⁸¹⁶ and 2010⁸¹⁷ respectively, such cross-cutting work remains the exception.

⁸¹⁵ Office of the UN High Commissioner for Human Rights, ‘High Commissioner calls for focus on human rights and harm reduction in international drug policy’ (n 482).

⁸¹⁶ UN Human Rights Council, ‘Nowak Report’ (n 36).

⁸¹⁷ UN General Assembly, ‘Special Rapporteur Health 2010’ (n 23).

The UN drug control system has also taken some steps towards recognising human rights concerns, although the examples are again rare. The first ever human rights resolution by the Commission on Narcotic Drugs was adopted in 2008.⁸¹⁸ Although highly contentious at the time, use of basic language acknowledging human rights has subsequently become relatively routine in Commission resolutions.⁸¹⁹ In 2010, the outgoing Executive Director of the UN Office on Drugs and Crime released an important conference room paper during the Commission on Narcotic Drugs session, addressing the question of a human rights perspective on drug control and crime prevention.⁸²⁰ This was followed two years later by a guidance paper on human rights and drug enforcement by the Office on Drugs and Crime.⁸²¹

However, despite these positive steps, the UN drug control bodies still struggle to fully embrace a human rights perspective in their deliberations, let alone their activities. The more common appearance of the term ‘human rights’ in resolutions of the Commission on Narcotic Drugs has not resulted in concrete operational commitments. Despite the progress on human rights within the Office on Drugs and Crime, a paper on international drug control law

⁸¹⁸ UN Commission on Narcotic Drugs, ‘Strengthening cooperation between the United Nations Office on Drugs and Crime and other United Nations entities for the promotion of human rights in the implementation of the international drug control treaties’ (March 2008) Res 51/12.

⁸¹⁹ See, for example, UN Commission on Narcotic Drugs, ‘Preventing the use of illicit drugs within Member States and strengthening international cooperation on policies of drug abuse prevention’ (March 2010) Res 53/2, preamble.; ‘Achieving universal access to prevention, treatment, care and support for drug users and people living with or affected by HIV’ (March 2010) Res 53/9, preamble.;

⁸²⁰ UN Commission on Narcotic Drugs, ‘Drug control, crime prevention and criminal justice: A Human Rights perspective. Note by the Executive Director’ (March 2010) UN Doc No E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1.

⁸²¹ UN Office on Drugs and Crime, ‘UNODC and the Promotion and Protection of Human Rights: A Position Paper’ (2012) United Nations Office on Drugs and Crime.

prepared for the Commission on Narcotic Drugs in 2014 fell back into the ‘evil’, threat-based language explored in chapter three. According to that document, ‘people become dependent on drugs, slaves of drug dealers, isolated from the community, deprived of mental health and cognitive/affective abilities. This is inconsistent with basic human rights.’⁸²² Despite the positive recommendations contained in the 2014 human rights guidance paper, the Office on Drugs and Crime has yet to operationalise its key recommendations. Given this context, what is the future outlook for a ‘fifth stage’ of drug control?

The challenges and barriers inherent to overcoming fifty years of institutional inertia on these issues within both systems, and of bridging the ‘parallel universes’ identified by Paul Hunt, should not be underestimated. For example, every year since 1990, the UN General Assembly has adopted a major resolution on drug control, in part ‘[r]ecognizing that the fight against drug abuse and illicit trafficking should be pursued in full conformity with the principles enshrined in the Charter of the United Nations, and the principles of international law’.⁸²³ In 1993, the resolution ‘[re]affirm[ed] that the international fight against drug trafficking should not in any way justify violation of the principles enshrined in the Charter of the United Nations and international law’.⁸²⁴ Beginning in 1997, this annual resolution began to make specific reference to human rights, that year ‘[s]tressing that respect for

⁸²² UN Commission on Narcotic Drugs, ‘Drug policy provisions from the international drug control Conventions’ (10 February 2014) UN Doc No E/CN.7/2014/CRP.5, 14.

⁸²³ UN General Assembly, ‘Respect for the principles enshrined in the Charter of the United Nations and international law in the fight against drug abuse and illicit trafficking’ (18 December 1990) UN Doc No A/RES/45/147, paras 2, 8.

⁸²⁴ UN General Assembly, ‘International action to combat drug abuse and illicit production and trafficking’ (20 December 1993) UN Doc No A/Res/48/112, para I(3).

human rights is and must be an essential component of measures taken to address the drug problem'.⁸²⁵ In more recent years, the agreed language in this regard has been strengthened, and the 2011 resolution read that the General Assembly,

Reaffirms that countering the world drug problem...must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and other provisions of international law, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action on human rights, and, in particular, with full respect for the sovereignty and territorial integrity of States, for the principle of non-intervention in the internal affairs of States and for all human rights and fundamental freedoms, and on the basis of the principles of equal rights and mutual respect.⁸²⁶

In one sense then, the need to reconcile international drug control law obligations with those of other international legal regimes has been repeatedly articulated. However, despite more than twenty years of General Assembly acknowledgement of this gap, examples of these principles being put into practice remain few, as described above. In recent years there have been some instances of promise, where the potential impacts of a 'fifth stage' interpretive process have been demonstrated.

For example, in March 2014, the International Narcotics Control Board issued a public statement 'encourag[ing] States to consider the abolition of the death penalty for drug related offences'.⁸²⁷ This statement was important for at least two reasons. The first is that it was a reversal of the Board's long standing position that the drug treaties gave States the latitude to

⁸²⁵ UN General Assembly, 'International action to combat drug abuse and illicit production and trafficking' (28 January 1997) UN Doc No A/RES/51/64, 3.

⁸²⁶ UN General Assembly, 'International cooperation against the world drug problem' (n 364) p 4, para 2.

⁸²⁷ United Nations Information Service, 'INCB encourages States to consider the abolition of the death penalty for drug related offences' (5 March 2014) UN Doc No UNIS/NAR/1199.

determine criminal penalties and sanctions themselves, making it beyond the mandate of the Board to comment upon issues such as capital punishment.⁸²⁸ More significant, however, was the Board's assertion that in reaching this new position, it was accepting the relevance of international human rights law. While re-affirming its previous position that 'specific sanctions applicable to drug-related offences remains the prerogative of States Parties', it explained that its new position 'takes into account the relevant international conventions and protocols, and resolutions of the General Assembly, the Economic and Social Council and UN bodies pertaining to the death penalty'.⁸²⁹ While conspicuously avoiding any explicit acknowledgement of such, the Board's statement accepts the relevance of human rights norms and standards within its own deliberations, and in doing so exhibits a human rights-based evolution of its interpretation of the question of capital punishment. When questioned by the author at a meeting during the 2014 session of the Commission on Narcotic Drugs, Board President Raymond Yans refused to acknowledge that this approach was relevant to other areas of the Board's mandate, such as harm reduction.⁸³⁰ However, it is a clear example of the potential for the Board to be a forum where an evolutive human rights-based interpretation can occur, and also hints at its (as yet unrealised) potential to promote human rights-based approaches to drug policy in its engagement with States.

Evidence of the positive human rights impact of a dynamic, as opposed to a nullification, approach can also be found at the domestic level. Perhaps the most important example of this is drawn from the jurisprudence of the Supreme Court of Canada. As described in chapter

⁸²⁸ See chapter four.

⁸²⁹ United Nations Information Service (n 827).

⁸³⁰ Author's notes from the meeting, 18 March 2014, United Nations Headquarters, Vienna.

four, a series of domestic court cases were taken by the Canadian federal government in an attempt to force the closure of ‘Insite’, a safe injecting facility in Vancouver, British Columbia, which operated with the support of both the city and the province. Specifically, the federal government argued that in knowingly allowing people to possess and consume illegal drugs within the facility, Insite was in violation of the federal Controlled Drugs and Substances Act (CDSA).⁸³¹ When the facility was first established some years earlier, the previous liberal federal government has issued a waiver to the relevant provisions of the Act to enable the facility to operate its health services within the law. However, the new conservative federal government was refusing to renew the waiver, thereby placing Insite in violation of the Act. The case eventually went to the Supreme Court in 2011.

An element of the Court’s deliberations in this case, and one of direct relevance to a ‘fifth stage’ approach to interpretation, was its testing of the relevant drug control provisions in light of Article 7 of the Canadian Charter of Rights and Freedoms,⁸³² assessing whether subsections ‘4(1) and 5(1) of the CDSA, which prohibit possession and trafficking respectively, are invalid because they limit the claimants’ s[ection] 7 rights to life, liberty and security of the person’.⁸³³ The Court found that subsection 4(1) of the Controlled Drugs and Substances Act prohibiting possession constituted a violation of the rights to life, liberty and security of the person of Insite staff because ‘by operating the premises — opening the doors and welcoming prohibited drugs inside — the staff responsible for the centre may be “in

⁸³¹ Controlled Drugs and Substances Act (S.C. 1996, c. 19).

⁸³² Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁸³³ *Attorney General v. PHS Community Services Society*, 2011 SCC 44 (SSC), para 75.

possession” of drugs brought in by clients’ and ‘their minimal involvement with clients’ drugs may bring them within the legal concept of illegal possession of drugs, contrary to s. 4(1).⁸³⁴ The Court concluded that the violations of the rights of staff in this regard would inevitably result in further violations of the rights of the people using the health clinic.

According to the judgment,

[W]ithout an exemption from the application of the CDSA, the health professionals who provide the supervised services at Insite will be unable to offer medical supervision and counselling to Insite’s clients. This deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person. The result is that the limits on the s. 7 rights of staff will in turn result in limits on the s. 7 rights of clients.⁸³⁵

The justices took this argument a step further, finding not only an indirect violation of the rights of people who use Insite, but also a direct violation of their rights, as ‘[i]n order to make use of the lifesaving and health-protecting services offered at Insite, clients must be allowed to be in possession of drugs on the premises. To prohibit possession by drug users *anywhere* engages their liberty interests; to prohibit possession at Insite engages their rights to life and to security of the person.’⁸³⁶

In an approach relevant to that proposed in this thesis, the Supreme Court’s consideration of the case was informed by its assessment of what it called ‘the dual purpose of the *CDSA*: the protection of both public safety and public health’.⁸³⁷ In effect, the objective of the control measures defined within the national drug legislation was not control for the sake of control,

⁸³⁴ *ibid* paras 89-90.

⁸³⁵ *ibid* para 91.

⁸³⁶ *ibid* para 92.

⁸³⁷ *ibid* para 41.

but rather control to promote other public interests, in this case public health. If elements of that law were found to undermine public health, then clearly those measures were neither consistent with human rights protections, nor with the objectives of the drug legislation itself. The *Insite* decision offers a clear window into the potential benefits of a ‘fifth stage’ interpretive approach at domestic level, where a nullification approach is pushed aside in favour of a human rights-based balancing of the relevant legal tensions.

While the mandate of national courts in providing human rights checks and balances on abusive domestic laws and practices is clear, as is the potential role of the International Narcotics Control Board on influencing treaty interpretation, the role of international human rights bodies is somewhat more ambiguous. The primary challenge is to determine whether international human rights bodies have a mandate to influence the interpretation of international drug control law, above and beyond the scope to adjudicate individual complaints.⁸³⁸ Is there any possibility of a systemic influence of human rights bodies on the development of the international drug control regime as a whole? A useful approach to this question, one that provides a model for dynamic human rights interpretation of the drug conventions, is found in the jurisprudence of the Inter-American Court of Human Rights.

As was discussed in chapter six, the Inter-American Court embraces an evolutive approach, finding that ‘to determine the legal status of the American Declaration [of the Rights and Duties of Man] it is appropriate to look at the inter-American system of today in light of the

⁸³⁸ The lone exception to this is the Committee on the Rights of the Child, as Article 33 of the Convention on the Rights of the Child makes specific mention of drug control, bringing consideration of these issues clearly within the Committee’s mandate.

evolution it has undergone since the adoption of the Declaration'.⁸³⁹ Significant to the question of a dynamic human rights-based interpretation of the drug control conventions is the fact that, over the course of a series of opinions, the Court has established its 'jurisdiction to interpret, in addition to the American Convention [on Human Rights], "other treaties concerning the protection of human rights in the American States"'.⁸⁴⁰ The Court has furthermore adopted a broad perspective on the question of which 'other treaties' concern human rights, one not limited by either the subject matter of the treaty itself or the scope of the States Parties. According to its Advisory Opinion on *'Other Treaties' Subject to the Consultative Jurisdiction of the Court*,

By unanimous vote...the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.⁸⁴¹

In the Court's Advisory Opinion on *The Right to Information on Consular Assistance*, it utilised this approach to conclude that individual due process rights of detainees are contained the Vienna Convention on Consular Relations, an instrument of general international law outlining relations between States. In effect, the Court adopted a dynamic

⁸³⁹ *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-American Court of Human Rights Series A No 10 (14 July 1989), para 37.

⁸⁴⁰ *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law* (n 625) para 69.

⁸⁴¹ *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82, Inter-American Court of Human Rights Series A No 1 (24 September 1982), opinion para 1.

human-rights based approach to the Vienna Convention, in which it engaged parallel obligations within the International Covenant on Civil and Political Rights, concluding that ‘the individual’s right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases’.⁸⁴² According to Lixinski, ‘the Court said through that Opinion that human rights considerations permeate other areas of international law, and that when human rights interests are concerned legal obligations should be interpreted in a dynamic manner, so as to cover new situations on the basis of pre-existing rights’.⁸⁴³ As described in the Concurring Opinion of Court President Judge Cançado Trindade,

The progressive development of international law is likewise accomplished by means of application of human rights treaties...We are, thus, before a phenomenon much deeper than the sole recourse *per se* to rules and methods of interpretation of treaties. The intermingling between Public International Law and the International Law of Human Rights gives testimony of the recognition of the centrality, in this new *corpus juris*, of the universal human rights, what corresponds to a new *ethos* of our times.⁸⁴⁴

This approach has significance for the development of a human rights-based interpretation of international drug control. As has been explored in earlier chapters, there is a compelling case that the three drug conventions fall into that category of ‘other treaties concerning the protection of human rights’. First, as explored in chapter five, the *telos* of the drug control

⁸⁴² *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law* (n 625) opinion para 6.

⁸⁴³ Lucas Lixinski, ‘Treaty interpretation by the Inter-American Court of Human Rights: expansionism at the service of the unity of international law’ (2010) 21/3 *European Journal of International Law* 585, 590.

⁸⁴⁴ *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law* (n 625) Concurring Opinion of Judge AA Cançado Trindade, paras 33-34.

regime, to promote ‘the health and welfare of mankind’, itself engages human rights concepts, concerns and parallel treaty obligations. The second is because the nature of many obligations within the drug treaties potentially create an environment of heightened human rights risk. As described by Boister, ‘[t]he suppression conventions threaten the human rights of the individuals caught up in the panoply of national laws derived from the conventions in many different ways. Consider, for example, the drug suppression conventions....They have enormous potential for human rights violation.’⁸⁴⁵ If the approach of the Inter-American Court were to be embraced by other regional and international human rights bodies, it would provide an important mechanism to review and assess the human rights implications of the drug treaty obligations themselves, not simply their domestic implementation by various States. In this manner, the Inter-American Court’s approach to considering ‘other treaties’ opens a door to the international human rights system to engage directly with the terms of the international drug treaties, with a potential to influence the development of a ‘fifth stage’ drug control paradigm.

The need to bridge the ‘parallel universes’ of drug control and human rights is a clear one, and is a need increasingly acknowledged by both international regimes. The interpretative challenges to resolving or preventing conflicts and tensions between the two bodies of law are apparent. However, the potential for the development of drug control’s ‘fifth stage’ of international drug control exists in law and practice, and rare examples of this approach in action can be identified and built upon. In this process, the leadership of the international bodies established within both regimes is critical, and the institutional inertia that has historically characterised the relationship between drug control and human rights law be

⁸⁴⁵ Boister, ‘Suppression Conventions’ (n 729) 200-201.

broken down, and transformed into active leadership on human rights issues and the progressive development of international law. To paraphrase the words of Justice Albie Sachs, the ‘fifth stage’ of drug control must put a thumb on the scales in favour human rights,⁸⁴⁶ and ensure when balancing obligations between the two regimes that human rights, and the health and welfare of humankind, are promoted, protected and fulfilled.

⁸⁴⁶ Sachs dissenting opinion, *Prince v President, Cape Law Society and Others* (n 716) para 149.

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International Opium Convention (signed 23 January 1912) 1922 LNTS 189.

League of Nations

Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium (signed 11 February 1925) 51 LNTS 337.

International Opium Convention (adopted 19 February 1925) 81 LNTS 317.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (adopted 13 July 1931) 139 LNTS 303.

Agreement concerning the Suppression of Opium Smoking (signed 27 November 1931) 177 LNTS 375.

Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936) 198 LNTS 301.

United Nations

Protocol amending the Agreements, Conventional and Protocols on Narcotic Drugs concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936 (19 November 1946).

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 (19 November 1948, entry into force 1 December 1949) 44 UNTS 277.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and use of Opium (23 June 1953).

Single Convention on Narcotic Drugs, 1961 (30 March 1961) 520 UNTS 151.

1971 Convention on Psychotropic Substances (21 February 1971) 1019 UNTS 14956.

Protocol Amending the Single Convention on Narcotic Drugs, 1961 (25 March 1972) 976 UNTS 3.

Single Convention on Narcotic Drugs 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (entered into force 8 August 1975) 520 UNTS 7515.

UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 1582 UNTS 95.

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Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953).

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

Universal Declaration of Human Rights (adopted by the UN General Assembly 10 December 1948) UN Doc No A/RES/217 A (III).

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Charter of the United Nations (24 October 1945) 1 UNTS XVI.

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Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) UN Doc No A/RES/260.

Covenant of the League of Nations (adopted 28 April 1919).

Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed 3 March 1973, amended 22 June 1979).

Convention to Suppress the Slave Trade and Slavery (signed 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Reg no 141.

Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979) 19 ILM11.

International Convention for the Regulation of Whaling (concluded 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) UN Doc No A/RES/3068 (XXVIII).

Peace Treaty of Versailles (concluded 28 June 1919, entered into force 10 January 1920).

Third United Nations Convention on the Law of the Sea (adopted 14 December 1983) UN Doc No A/RES/38/59.

Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970) 729 UNTS 161.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) UN Doc No A/CONF.62/122.

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‘Preventing the use of illicit drugs within Member States and strengthening international cooperation on policies of drug abuse prevention’ (March 2010) Res 53/2.

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