Drug control policies and human rights

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Drug Control Policies and Human Rights

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Declaration of Originality

I, Yingxi BI, do hereby declare that the work submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.

Signature:  yingxi BI

Date: 21/04/15
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1 Introduction

To what extent are drug control policies in line with human rights principles? More than half a century has passed since the adoption of the first modern international drug control convention. ¹ During this time, the human rights framework and issues relating to drug control have both undergone much development and change. It is also noteworthy that human rights norms are increasingly used as indicators for broad programmatic social goals, and a sort of a blueprint against which to develop and measure comprehensive social policies. In this connection, this study provides a comprehensive analysis of drug control policy through the lens of human rights.

It is undeniable that the drug epidemic makes drug control a pressing concern in every corner of the world. It is therefore expected, and oftentimes demanded, that states institute all necessary measures to prevent the production, trade and use of illicit drugs and protect against related harms. Pursuant to this, governments have created and employed policies designed to foster a drug-free environment. While acknowledging that combatting illicit drugs and its associated problems are legitimate objectives, measures undertaken to fulfill claimed goals can often cause more harm than good. In fact, a number of drug control policies are questionable when examined against applicable human rights principles. For example, an approach in the name of drug control that may constitute a departure from states’ human rights obligations is the imposition of the death penalty for persons convicted of drug crimes. Such legislation, which seeks justification in the notions of deterrence and fulfilling drug control mandate, fails to adequately safeguard the right to life. Another form of policy that may fall afoul of the human rights framework is forcing drug users to undergo drug treatment. Those subjected to such schemes have sometimes been detained in isolated institutions without due process and exposed to conditions constituting cruel, inhuman or degrading treatment and punishment. It is not only drug offenders and drug users that fall victim to potential rights violations in the context of drug control. Other

members of society may also be affected. For instance, to prevent public funding from being used to support drug users’ habits, drug testing has been made mandatory for applicants of public financial assistance; in the pursuit of stopping young people from becoming involved with drugs, strip searches are carried out in schools; to eradicate illicit crops, aerial fumigation is used despite the harmful impact it can have on health and the environment; in order to combat drug trafficking, people are prohibited from obtaining small amounts of drugs for religious or cultural purposes.

Drug control endeavours as such are questionable when considered through the prism of human rights. In this regard, an acceptable ground where human rights protection should be accommodated within the realm of drug control requires clarification. In doing so, the development and implementation of drug policies have to be carried out in a manner that strikes a balance between the need to combat drug problems and the obligation to protect individual rights. This is by no means an easy task; the most effective efforts to suppress illicit drugs may involve overly restrictive measures that encroach upon individual rights, while strict limitations on enforcement are likely to hamper the effectiveness of drug control policies. These approaches sit at opposite ends of the scale; in either case there will be space for further debate.

Despite the uneasy task of maintaining a balance between drug control and human rights protection, drug policy that is inconsistent with human rights principles should not be tolerated. Any restriction of individual rights should not be merely justified in the name of drug control. There are safeguards that must be applied and human rights norms that should be followed. It is dangerous to disregard or gloss over the basic standards of rights protection merely because of drug control. As questioned by one scholar almost three decades ago:

Is it fair to characterize these antidrug actions by the government as desperate or mean-spirited trashing of the Constitution? In a strictly positivist sense, of course, the new laws create their own legitimacy. But when law becomes purely instrumental, when it loses its mooring in precepts of fairness and fundamental
rights, then the notion of the rule of law degenerates into whatever majoritarian oppression commands a consensus at a given moment in history.  

There is a plethora of literature challenging drug control policy mainly by criticizing the “war on drugs”. The drug policy of the United States has attracted much attention in this regard. Scholarship in the area has identified that human rights are one of the many costs of the “war on drugs” but to date, no systematic analysis of the issue has been undertaken. The vast majority of drug policy studies come from the social science and medical disciplines. Topics including

de-criminalization\textsuperscript{7} and compulsory drug treatment\textsuperscript{8} have been examined from a legal perspective. Among these drug policy studies, human rights concepts are widely utilised in discussions on harm reduction programmes, particularly with regard to HIV control.\textsuperscript{9} As noted by Neil Hunt, “human rights is a defining feature of harm reduction.”\textsuperscript{10} Most of the discussions, however, are not focused on identifying human rights issues in the context of drug control. Instead, they use human rights concepts as a vehicle to advocate for harm reduction programmes when debating drug policy or as was the case with some of the earlier studies, to debate the meaning of human rights in the context of harm reduction.\textsuperscript{11} Some studies including the debate presented by Saul Takahashi\textsuperscript{12}


and responded to by Simon Flacks have extended the discussion to the right to health. Both considered the applicability of the right to the highest attainable standard of health in the context of drug control with Flack submitting that “human rights law provides the proper scope for determining where interference with individual human rights might be justified.” In this connection, Charlotte Walsh has offered a valuable study on the interplay between drug control and human rights in relation to issues such as religious practices and self-medication; her study is limited to an examination of the impact of the European Convention on Human Rights on drug policy in the United Kingdom. Based upon these reviews, the present study puts forward strategies designed to adopt human rights norms enshrined in international, regional and national human rights instruments to examine drug policies that are not limited to one jurisdiction.

It is noteworthy that the platform upon which drug policy has been most scrutinised with respect to human rights is within those critics of human rights abuse caused by drug control measures. Those criticisms are largely from NGO’s observations. For instance, Human Rights Watch has published a series of reports on drug detention centres in Southeast Asia. These reports catalogue and critique human rights abuses found in those centres including, forced labour, rape, corporal punishment, inhuman treatment, sub-standard living environments and

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etc. With regard to the right to life, the reports of the Harm Reduction Association provide comprehensive information regarding legislation on capital punishment for drug offences and about such practices globally. Generally, the Global Commission on Drug Policy claims that “drug policies must be based on human rights and public health principles.” A report from the Beckley Foundation also criticises drug policy on the basis of its lack conformity with human rights law and calls for a human rights based approach to drug control.

In addition to civil society, many UN bodies have prompted growing concerns about the human rights issues arising in the context of drug control. For instance, in 2009, the UN High Commissioner for Human Rights noted that, “[t]oo often, drug users suffer discrimination, are forced to accept treatment, marginalised and often harmed by approaches which over-emphasise criminalization and punishment while under-emphasizing harm reduction and respect for human rights”. Particular issues have attracted broad attention among UN entities. In 2012, for instance, 12 UN agencies issued a joint statement on the topic of compulsory drug treatment in drug detention centres. It is evident that the UN

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22 High Commissioner calls for focus on human rights and harm reduction in international drug policy, Press release, 10 March 2009.

Special Rapporteurs have been the most active in bringing human rights concerns in the context of drug control to the attention of the international community. This is particularly true in relation to issues involving the right to health and the prohibition of torture and cruel, inhuman, degrading treatment or punishment. On a broader note, the United Nations has called upon the international community to work towards bringing drug control policies in line with human rights principles.

Although the United Nations has made efforts in this field, academics continue to challenge international drug control system with regard to rights protection. Some scholars trace the evolution of the international drug control regime over the course of relatively long periods, simultaneously exploring the factors that may contribute to the lack of human rights concerns. Others have attempted to

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offer a reinterpretation of international drug control conventions with the aim of finding possible ways to improve current UN drug control mechanism. Calling for a human rights based approach to the international drug control regime is amongst the suggestions put forward by the latter group.

Drug control policy and its conformity with the human rights framework is a relative new topic; a few studies and works have addressed aspects of the subject. The present study diverges from the existing literature in that and it approaches the topic from a unique angle. The work undertaken herein is not concerned with demonstrating or cataloguing the many human rights violations that arise in the context of drug control or developing possible ways to solve any countries’ drug problems. Rather than denying the importance of drug control and dismissing implementation measures ab initio, the author investigates specific contexts that give rise to conflicts between human rights protection and drug control policy. This undertaking warrants an analysis of the political and judicial responses to the identified conflicts. The results garnered from the research will provide an original and important contribution towards the identification of the relationship between the framework of drug control and human rights.

### 1.1 Research Question

The research question underlying this project is: To what extent are drug policies in line with human rights principles? In answering this question, this study identifies the drug control policies that are applied to different categories of individuals, namely, drug offenders, drug users and other groups in society (public fund applicants, school children, religious and cultural minorities). Having established who is subject to drug control efforts, the project clarifies the

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human rights principles and standards triggered with regard to each of the policies identified. This exercise allows for an establishment of the areas in which conflicts between human rights and drug control arise. The examination of these conflicts goes with delineation of the political and judicial responses to the identified tensions between drug control and human rights in given cases.

The development of a sound answer to the research question warrants a consideration of a series of sub-questions. A determination as to the international legal framework for national drug control policy begins with a brief examination of international drug control systems. This exercise then raises the following questions: How do the UN drug control and human rights systems interact? What are the obligations of the international community with regard to human rights in the realm of drug control? In connection to the later question, the research questions that are examined regarding national drug policies include: What human rights concerns and risks arise in the context of national drug control? Has international drug control law been interpreted and implemented by states in line with human rights norms? Are domestic drug policies established and implemented in line with human rights standards? In cases where individual rights are restricted, are the justifications sufficient in light of human rights safeguards?

1.2 Outline of the Study

This study examines drug control policy through the prism of human rights norms. Emphasis is placed on identifying and analysing the conflicts that arise between rights protection and drug control. Chapter 1 begins by presenting the underlying research questions and outlining the content of work undertaken. It illustrates the methodology employed and the original contribution offered by the study. In order to set the stage for the analysis undertaken in subsequent chapters, the introductory part sets out the main issues to be addressed and forecasts that the research undertaken will illustrate that there are conflicts between human rights and drug control and that identified conflicts are often resolved in favour of drug control.
Chapter 2 lays the foundations of the study. In order to put the issues raised in context, a brief narrative of the international drug control system, including three international drug control conventions and the United Nations drug control related bodies, is offered. This exercise is followed by an exploration of the interaction between drug control and human rights at the international level. Discussion topics include: a) interpretation of international drug control law in line with human rights ideals; b) an illustration of the relationship between the UN drug control and human rights system; c) an outline of human rights obligations in the context of drug control. The last topic serves as a starting point for the discussion undertaken in the following three chapters. A clear illustration of human rights obligations in the context of drug control will serve to provide a better understanding of the relationship between rights protection and drugs control and, in turn, the foundation upon which to identify whether conflicts exist. In order to answer the underlying research questions, the study is systematically divided into three main sections as presented in the following three chapters.

Chapter 3 examines the arguments surrounding the imposition of the death penalty for convicted drug offenders. An overview of capital punishment drug legislation and its enforcement, along with the rationales put forward by retentionists, is presented. The discussion moves on to assess the extent to which drug related offences fall within the scope of the offences for which the imposition of the death penalty is permitted under international law. This undertaking addresses the question with reference to both international drug control conventions and human rights treaties; the emphasis has been given to the latter with detailed analysis of the “most serious crimes” clause within article 6(2) of the International Covenant on Civil and Political Rights. Once all the components of international law have been comprehensively unpacked, the interpretation and implementation of the relevant provisions of international law by states are presented. The final section draws on cases from both international law and national spheres that challenge the death penalty for drug offences in light of the right to life. The findings of this survey facilitate the inquiry as to whether there is a conflict between a state’s obligation to protect the right to life and drug legislation that prescribes the death penalty for drug offences.
Chapter 4 focuses on issues surrounding drug treatment for drug users. The study in this section provides a detailed analysis of the extent to which drug treatment measures are consistent with relevant human rights principles. In addressing this, a number of related issues arise. First, whether compulsory drug treatment is consistent with the principle of informed consent, as required by medical ethics and human rights law. Another issue that warrants consideration is whether certain factors can justify a state’s imposition of compulsory drug treatment for drug users despite the resultant restrictions on rights, such as the right to privacy. Second, detaining drug users for treatment is another issue that raises questions with regard to the right to liberty. Analysis of this issue demands consideration of relevant human rights law, particularly article 5 of the European Convention on Human Rights and article 9 of the International Covenant on Civil and Political Rights. Third, another question raised is whether drug users have been afforded the appropriate safeguards in the course of drug treatment. The investigation reveals that rights abuses, such as forced labour, torture or cruel, inhuman or degrading treatment or punishment, have been evidenced. Finally, the right to health is given particular attention in order to establish the extent to which drug policies protect drug users’ rights. In this connection, the impact of drug control policies on prisoners as a special group and the public in general is briefly examined in light of the right to health to further illustrate the conflict between drug control and human rights protection.

Drawing mainly on the findings of case studies, Chapter 5 examines drug control policies that affect the rights of certain groups in society, inter alia, those who apply for government benefits, school children, people who live in areas where drug crops have been planted, and people who use drugs for cultural and religious purposes. This part of the study raises the question as to whether states adequately respect, protect and fulfil citizen’s rights in the context of drug control. In addressing the questions posed, the chapter discusses the following issues: drug testing as a prerequisite for public benefit applicants and its compatibility with states’ obligation to respect and protect individuals’ right to privacy; drug searches in schools and how such intrusive measures sit with children’s rights; the fumigation of illicit drug crops and the negative environmental and health consequences that can result from such actions; and the
impact of blanket bans on personal drug use on the right to freely enjoy religious and cultural rights. All these issues are analysed against the backdrop of international and regional human rights instruments as well as states’ constitutions. The aim here is to reinforce and further develop the previous chapters’ findings that there are conflicts between drug control and rights protection. These conflicts are too often resolved by relaxing states’ human rights obligations.

Chapter 6 summarises the main conclusions of the research project and identifies topics for further study. The research findings establish that there is a tension between drug control and human rights protection, and further demonstrates the necessity and possibility of constructing a human rights based approach to drug control. Concerns are raised with regard to how a human rights based approach can be constructed in practice. In this connection, suggestions for further study are offered.

1.3 Methodology and Significance of the Study

1.3.1 Methodology

This study is carried out in light of human rights principles and states’ human rights and drug control obligations. Arguments are drawn from an analysis of the relevant provisions of major human rights treaties and materials generated from these treaties, such as recommendations, observations, periodic reports and the Universal Periodic Review. Documents related to drug control, such as international drug control conventions, their travaux préparatoires, Commentaries and related Declarations, as well as the periodic reports of the UN drug control bodies have been examined and analysed. The study also consults existing research from the disciplines of sociology, criminology, medical science and political science.

General recommendations made by international human rights bodies and drug control bodies serve as authoritative interpretations of treaty provisions. The observations, recommendations and resolutions evince states’ human rights obligations. Annual reports issued by drug control bodies represent important
resources in the understanding of updated drug control policies. In addition, the resolutions, decisions and reports adopted by the UN drug control bodies as well as other organizations, in particular the World Health Organization; facilitate a better understanding of the development of drug related issues. Some of these publications play a significant role in developing arguments on particular issues, such as the right to health in the context of drug treatment.\footnote{See for instance, World Health Organization, \textit{Guidelines for the Psychosocially Assisted Pharmacological Treatment of Opioid Dependence}, 2009; World Health Organization, \textit{Atlas on substance use (2010)}, Resources for the prevention and treatment of substance use disorders; World Medical Association, \textit{Medical Ethics Manual, 2nd edition}, 2009;\textit{The International Code of Medical Ethics}, adopted by the 3\textsuperscript{rd} General Assembly of the World Medical Association, London, England, October 1949, amended August 1968,October 1983 and October 2006.} The \textit{travaux préparatoires} of international drug control law must be approached with caution as significant changes have taken place with regard to drug problems and the understanding of drug related issues. In this regard, while treaty drafting documents can be referenced when interpreting treaty provisions, developments in relation to issues such as the death penalty and approach of proper treatment for drug users must be recognised; and evolutive interpretation is therefore required.

This study also draws upon case studies as well as court judgments from several jurisdictions and the work of regional and international human rights bodies. These materials provide a good platform upon which to display how international and national bodies respond to cases where an individual’s rights are restricted, infringed or violated due to drug control policies. Court arguments put forward by officials offer valuable insight into how governments view their human rights obligations in the context of drug control and how they respond to the tension between drug control and human rights obligations.

In addition to the instruments and legal documents mentioned above, NGO publications, especially on issues of capital punishment and drug detention, are also utilised. These works serve as a good source of information. However, it must be noted that such pronouncements can sometimes be biased. For that reason, the application of this type of material is approached with caution.
1.3.2 Significance of the Study

The human rights issue in the context of drug control remains an under-explored area within the existing academic research. As the literature review illustrates, the topic of drug policy has aroused debates in the fields of sociology, criminology, political science and medical science circles but, thus far, it has not been thoroughly examined in light of human rights law. No comprehensive study into the extent to which drug control policy is in line with human rights principles has been undertaken to date. Research projects, which connect human rights and drug control policies, have largely confined themselves to listing human rights concerns or focusing on specific issues. In fact, most of the studies undertaken are carried out by NGOs, which often neglect to consider the rationale of policy makers and are sometimes tainted with bias. Occasionally, discussion of drug policy from an international human rights law perspective has been carried out with regard to certain issues. In saying that, academic research on human rights and drug policy has not identified the conflict between drug control and human rights or scrutinised the human rights obligations of states in the realm of drug control. In this connection, this study takes the first major step in an important field of academic research and practice.


This project addresses and offers an analysis on a range of issues that require clarification and urgent attention. Amongst the important questions tackled is the permissibility of the death penalty for drug related offences under international law. Despite the existence of comprehensive studies on the topic of capital punishment, the imposition of the death penalty for drug offences in light of human rights norms had not been thoroughly addressed. The detention of drug users for drug treatment represents another important issue that has largely gone without study. The latter is a drug policy that is widely applied in practice, but little academic research has been undertaken, particularly with regard to the restriction of drug users’ right to liberty.

In addition, this study goes beyond an analysis of the impact of drug policy on drug offenders and drug users; it broadens the examination by considering the effect on other societal groups whose rights are also infringed due to drug control policies. In this regard, it draws attention to the phenomenon whereby many governments invoke the need for drug control to justify policies that restrict, infringe and/or violate individuals’ rights. Judicial responses to the issue of rights restriction by drug legislation also demonstrate that priority is often given to drug control over rights protection. Although the legitimacy of states’ drug legislation is not the focus of this study, the question of whether there is room for rights protection under these said legislation is an issue worthy of exploration. Pursuant to this, the present study conveys a message that states cannot simply use their drug control mandate to free themselves from human rights obligations. In other words, individual’s rights still need to be respected, protected and fulfilled in the context of drug control; any rights restriction under drug control regime must be justified and brought in line with human rights principles. In this regard, the study draws briefly upon political initiations and judicial opinions to show how states can accommodate human rights protection in the context of drug control. This exercise assists in testing the boundaries between the states’ drug control mandates and human rights obligations.

It is hoped that this study will inspire further research into the human rights issues that arise in the context of drug control, such as the right to education, the right to work, and rights that are connected to civil and criminal procedures as well as the protection of special groups in society. These are all interesting and
important topics and it is therefore expected that the research conducted here will lead to meaningful discussions on the construction of a human rights based approach to drug control.
Chapter 2: International Drug Control and Human Rights

The first widely applicable international drug control instrument was negotiated more than 100 years ago. A treaty structure of international drug control has been in place for over 90 years. The modern drug control regime attained its current shape more than 50 years ago. However, the development of the international drug control regime has consistently lacked consideration for human rights. For example, normative guidance on appropriate drug control measures in line with human rights principles is absent from the interpretation and implementation of the three international drug control conventions. In addition, the UN drug control related bodies seldom refer to human rights when fulfilling their drug control mandates. Meanwhile, guidance and supervision of drug control efforts in line with human rights principles are also lacking within the international human rights machinery. In short, the international environment is such that human rights progress is not pursued in the drug control regime, while human rights crises connected to drug control efforts have not been addressed. Notwithstanding these deficiencies, attention has increased over the last two decades with regard to human rights issues within the context of drug control. A call for bringing drug control in line with human rights norms is emerging.

34 The first international conference about drug control, the Opium Commission, met in Shanghai in the year of 1909.
35 The first international drug control treaty, the International Opium Convention, is passed in Hague in the year of 1912.
In this context, the focus of this chapter is twofold: First, in order to provide a background for further discussion, an overview of the international drug control system, including the international drug control law as well as the relevant UN drug control bodies is presented. Second, an examination of the international drug control regime in line with human rights is conducted. Attention is given to topics including: the international drug control law in respect of human rights ideals; a study of the relationship between the drug control and human rights system; and the human rights obligation in the context of drug control.

2.1 The International Drug Control System

2.1.1 The International Drug Control Conventions

The international drug control regime mainly rests on three pillars: the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs (1961 Single Convention),\(^{38}\) the Convention on Psychotropic Substances (1971 Convention),\(^{39}\) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention).\(^{40}\) According to the definition of these three international drug control conventions, drugs comprise two major categories: narcotic drugs and psychotropic substances.\(^{41}\) Alcohol and tobacco, referred to as drugs on some occasions, are not included in the three drug control conventions and are therefore outside the ambit of the international drug control regime. The three international drug control conventions enjoy worldwide adherence; nearly every state in the world is a party to at least one of the three drug control conventions. As of 1 February 2014, there are 184 States parties to

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\(^{41}\) The concrete substances under control are listed in the schedules of the 1961 Single Convention and the 1971 Convention.
the 1961 Single Convention, 183 States parties to the 1971 Convention and 188 States parties to the 1988 Convention.

2.1.1.1 1961 Single Convention on Narcotic Drugs as amended by Protocol 1972

The 1961 Single Convention on Narcotic Drugs has been considered as a milestone in the history of the international drug control system. It codifies the international drug control treaties that have developed since the early 19th century and places them under the supervision of the United Nations. It has been amended by protocol in 1972. The 1961 Single Convention consists of 51 articles that cover, inter alia, the framework for the operations of the drug control bodies; reporting obligations of member states; and penal provisions against drug crimes. Besides the 51 articles, the convention includes four schedules that list over one hundred illicit substances that have been classified into different control levels.

The appearance of the 1961 Single Convention established the prohibitionist foundation of the modern international drug control system. Particularly the punitive oriented drug control regime is supported by the penal provisions, according to which the States parties, subject to their constitutional limitations, should develop criminal legislation for each of the following activities in contravention of the Convention:

cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs… and other action which in the opinion of such party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to

44 Article 4(c), 1961 Single Convention.
adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.\textsuperscript{45}

Apart from the punitive oriented provision, the 1961 Single Convention laid no rights safeguards. The lack of human rights guidelines has nourished the drug control realm with a human rights risk. For instance, there are a high number of death sentences and executions for drug offences; the denial of access to medical treatment for drug users; arbitrary detention of drug users and infringement of many other economic, social and culture rights in various sections of the society. These matters, along with many human rights issues in the context of drug control, have come to the spotlight in recent years. Some will be discussed in later parts of the study.

\textbf{2.1.1.2 Convention on Psychotropic Substances 1971}

An unregulated market for psychotropic substances emerged in the late 1960s due to the growth in the manufacture of synthetic drugs. In order to regulate these new types of drugs, which are not covered by the 1961 Single Convention, the 1971 Convention on Psychotropic Substances was adopted. The 1971 Convention consists of 33 articles and four schedules and has been developed mainly based on the module of the 1961 Single Convention. For instance, article 5 of the 1971 Convention, which is articulated similar to article 4 of the 1961 Single Convention, states its general goal as: the manufacture, trade and use of controlled psychotropic substances should be limited to scientific and medical use.\textsuperscript{46} However, when compared with the controls imposed on plant based narcotic drugs, which are the main focus of the 1961 Single Convention; the 1971 Convention adopted a weaker approach to psychotropic substances. For instance, the 1961 Single Convention requires states parties subject offences such as cultivation, production and production of illicit drugs under criminal law.\textsuperscript{47} The same offences under 1971 Convention are required to subject under domestic law.\textsuperscript{48} On another point, the 1971 Convention gives more attention to

\textsuperscript{45} Article 36, 1961 Single Convention.
\textsuperscript{46} Article 5, 1971 Convention.
\textsuperscript{47} Article 36, 1961 Single Convention.
\textsuperscript{48} Article 22, 1971 Convention.
the demand side of drug related problems. When compared to article 38 of the 1961 Single Convention, article 20 of the 1971 Convention is considered as a milestone of the international drug control system with regard to the demand side issues, as it proposes public education and abuse prevention as one of the approaches of drug control.49

2.1.1.3 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

Even with the 1961 Single Convention and 1971 Convention, global illicit drug use, production and trafficking had reached “unprecedented dimensions” by the mid-1980s.50 The international community realised that a wider ranged anti-drug trafficking control system was urgently needed. Therefore, in 1984 the General Assembly adopted Resolution 39/141, in which it requested the Economic and Social Council to guide the Commission on Narcotic Drugs to prepare a draft convention on illicit drug trafficking to complement the two existing international drug control conventions that would increase international law enforcement and implement stronger domestic criminal drug control legislation.51 To this end, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted in 1988. It consists of 34 articles and an annex of two lists of substances.

The 1988 Convention has often been considered as international criminal law due to the fact that the preamble emphasises “the importance of strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic”.52 The scope of the 1988 Convention is to combat illicit drug trafficking through criminalisation and punitive measures.53 To fulfill this goal, States parties are

49Article 20, 1971 Convention.
51UN Doc. A/RES/39/141.
52Preamble, 1988 Convention.(my emphasis)
53Article 2, 1988 Convention.
obligated to change or create national criminal laws specifically to repress illicit drug trafficking. It is noteworthy that the 1988 Convention is the only one among the three international drug control conventions that mentions human rights, though it may not offer much substantive protection of human rights within the scope of drug control.

2.1.2 The Political Declarations and Action Plans

Although there are already three conventions underpinning the international drug control system, the global drug problems have remained unsolved. The international community has witnessed increasing criminal, social and health problems associated with the illicit use of drugs since the late 1990s all over the world. Given such a situation, in 1990, the Political Declaration and Global Programme of Action was adopted by the General Assembly at its seventeenth special session. It is devoted to the question of international cooperation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances and enhances the international drug control regime. With regard to human rights protection, the 1990 Political Declaration and Global Programme of Action stipulates,

National strategies in the health, social, legal and penal fields shall contain programmes for the social reintegration, rehabilitation and treatment of drug abusers and drug-addicted offenders. Such programmes shall be in conformity with national laws and regulations and be based on respect for basic human rights and the dignity of the individual, showing due regard for the diverse needs of individual drug addicts.

However, whether states’ drug control policy is compatible with the requirement of “respect for basic human rights and the dignity of the individual” has not been

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56 UN Doc. A/RES/S-17/2.
57 UN Doc. A/RES/S-17/2, p. 8. (my emphasis)
examined in the years following.\textsuperscript{58} This can be demonstrated by the following years’ reports on the implementation of the \textit{1990 Political Declaration and Global Programme of Action}, in which human rights issues were mentioned but not sufficiently addressed.\textsuperscript{59} This lack of application of human rights norms in the context of drug control is contrasted with human rights developments during the same period of time. For instance, the World Conference on Human Rights, held in June 1993, adopted the \textit{Vienna Declaration and Programme of Action}, in which it claimed that: “human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of Government”.\textsuperscript{60}

Less than one decade after the adoption of the \textit{1990 Political Declaration}, the UN General Assembly convened a Special Session in 1998 aimed at initiating a new understanding of the global drug problem. As a result, the \textit{1998 Political Declaration} was adopted at the twentieth special session of the General Assembly in 1998.\textsuperscript{61} Along with the \textit{1998 Political Declaration},\textsuperscript{62} the General Assembly also adopted the \textit{Declaration on the Guiding Principles of Drug Demand Reduction},\textsuperscript{63} the \textit{Action Plan on International Cooperation on the Eradication of Illicit Drug Crops and on Alternative Development},\textsuperscript{64} and the \textit{Action Plan for the Implementation of the Declaration on the Guiding Principles of Drug Demand Reduction}.\textsuperscript{65} In the \textit{1998 Political Declaration}, with regard to human rights, Members States claimed that:

\begin{quote}
Action against the world drug problem is a common and shared responsibility requiring an integrated and balanced approach in full conformity with the purposes and principles of the Charter of the United Nations and international
\end{quote}

\begin{flushright}
\textsuperscript{58} UN Doc. A/RES/S-17/2,p. 8.
\textsuperscript{59} UN Doc. A/RES/45/148.
\textsuperscript{60} UN Doc. A/CONF.157/23, para.1.
\textsuperscript{61} UN Doc. A/RES/S-20/2, annex.
\textsuperscript{62} UN Doc. A/RES/S-20/2, annex.
\textsuperscript{63} UN Doc. A/RES/S-20/3, annex.
\textsuperscript{64} UN Doc. A/RES/S-20/4 E.
\textsuperscript{65} UN Doc. A/RES/54/132, annex.
\end{flushright}
law, and particularly with full respect for … all human rights and fundamental freedoms. 66

In addition to the Political Declaration, the Declaration on the Guiding Principles of Drug Demand Reduction also points out that “the principles of the Universal Declaration of Human Rights” shall guide the formulation of the “national and international drug control strategies”. 67

Although it is believed that the political declaration would lead the international and national drug control efforts with full respect for human rights, 68 further examination of the official records of the General Assembly’s twentieth special session did not demonstrate any meaningful progress in this respect. 69 The human rights language scattered in the official records of the nine plenary meetings of the General Assembly Twentieth Special Session was mostly, if not completely, delivered routinely without any substantive discussion and conclusions. For instance: Mr. Jan-Erik Enestam, Minister of the Interior of Finland, stated: “More international consideration needs to be given to the examination of new investigative techniques, with the…respect for human rights”. 70 The representative of Luxembourg stated that the creation and implementation of programmes that eradicate illicit crops must respect human rights principles. 71 No further discussion was followed, nor any concrete guidance provided. In addition, the lack of human rights attention can be further illustrated by the five biennial reports on the implementation of the 1998 Declaration and Action plan. 72 Reading these reports, one can tell that the states’ drug policies and implementation have not been examined in line with human rights standards, as was expected. In fact, the only time that “human rights” was

66 UN Doc. A/RES/S-20/2, p. 2.
67 UN Doc. A/RES/S-20/3, p. 3.
68 UN Doc. A/S-20/PV.5, p. 16.
70 UN Doc. A/S-20/PV.2, p. 21.
71 UN Doc. A/S-20/PV.8, p. 12.
mentioned in the five reports was in its presentation as a barrier for effective drug control policy.\textsuperscript{73}

The goal of the \textit{1998 Declaration} had not been met by the year 2008, which was originally set as the target date for achieving the goals therein. In reality, the global drug problem did not ease during the period from 1998 to 2008. The global drug problems raised grave concern among the international community. As noted in the General Assembly resolution 64/182:

\begin{quote}
[d]espite continuing increased efforts by States, relevant organizations, civil society and non-governmental organizations, the world drug problem continues to constitute a serious threat to public health and safety and the well-being of humanity, in particular children and young people and their families, and to the national security and sovereignty of States, and that it undermines socio-economic and political stability and sustainable development.\textsuperscript{74}
\end{quote}

To this extent, the \textit{Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem (2009 Political Declaration)} were adopted in 2009.\textsuperscript{75} Similar to the \textit{1998 Declarations}, in the \textit{2009 Political Declaration} Member States reaffirmed that drug control must be addressed “with full respect for …all human rights, fundamental freedoms, the inherent dignity of all individuals and the principles of equal rights and mutual respect among States”.\textsuperscript{76} The \textit{2009 Political Declaration} also encourages “dialogue regarding drug demand reduction with the International Narcotics Control Board, and other relevant United Nations bodies including, as appropriate, human rights bodies, in accordance with the three international drug control conventions”.\textsuperscript{77} In spite of the fact that calling for member states to fully respect human rights has been presented in aforementioned UN Declarations since the early 1990s, anything beyond mere rhetorical pronouncements instead of concrete actions is still open for discussion.

\textsuperscript{73} UN Doc. E/CN.7/2003/2, p. 20. (footnote omitted)
\textsuperscript{74} UN Doc. A/RES/64/182, p. 1.
\textsuperscript{75} UN Doc. A/RES/64/182.
\textsuperscript{76} UN Doc. A/RES/64/182.
\textsuperscript{77} UN Doc. A/RES/64/182, p. 18.
2.1.3 UN Drug Control Bodies

There are three UN bodies that carry out the main activities in relation to international drug control: the Commission on Narcotic Drugs, the International Narcotics Control Board, and the United Nations Office on Drugs and Crime. Some other UN bodies are also involved in the international drug control, including but not limited to: the World Health Organization and the United Nations Educational, Scientific, and Cultural Organization.

2.1.3.1 Commission on Narcotic Drugs

The Commission on Narcotic Drugs is the central policy making body for the UN drug control regime. As a functional commission of the Economic and Social Council, it assists the Council in supervising the application of the three international drug control conventions. When necessary, the Commission gives advice to the Economic and Social Council on all matters related to the control of narcotic drugs, psychotropic substances and their precursors. In addition, as a treaty organ under the international drug control conventions, the Commission on Narcotic Drugs is “authorized to consider all matters pertaining to the aims of the Conventions” and it must “see to the implementation of its provisions, and may make recommendations relating thereto”.78 Special functions are also assigned to the Commission under international drug control law. For instance, pursuant to the 1988 Convention, the Commission decides, upon the recommendation of the International Narcotics Control Board, on placing or transferring precursor chemicals in Schedule I or Schedule II of the 1988 Convention. Furthermore, according to article 20 of the 1998 Political Declaration, states are obliged to submit biennial reports to the Commission on Narcotic Drugs on their efforts to meet the goals and targets agreed upon in the Political Declaration. The Commission on Narcotic Drugs then is also requested by the General Assembly to analyse these reports in order to enhance the combined effort on global drug control.

2.1.3.2 International Narcotics Control Board

The International Narcotics Control Board is the “independent and quasi-judicial” monitoring organ for the implementation of the international drug control conventions. It was established in 1968 under the 1961 Single Convention. Originally, the International Narcotics Control Board consisted of nine members, but the 1972 Protocol extended the numbers of the members to thirteen. The members are individuals serving in their personal capacities, not as government representatives. They are all elected by the Economic and Social Council. As prescribed by the 1961 Single Convention, at least three members amongst them must have a medical, pharmacological or pharmaceutical background and are nominated by the World Health Organization. Generally speaking, the main tasks of the International Narcotics Control Board include the following three parts.

First, the International Narcotics Control Board endeavours to monitor and screen the production, distribution and use of drugs. According to article 14 of the 1961 Single Convention and article 19 of the 1971 Convention, if the International Narcotics Control Board has any reason to believe that a State party has a serious problem of drug control, it may request the state to explain the situation and may also propose opening a consultation or initiate a study on the identified issue. Second, the International Narcotics Control Board publishes annual reports detailing its activities and statistical information, which provide a comprehensive survey of the drug control situation in various parts of the world and detailed estimates of annual legitimate requirements of the licit drugs production, manufacturing, trade and consumption in each country. Third, the International Narcotics Control Board provides training programmes aimed at enhancing the functions of national administrations of drug control, particularly those from developing countries.

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79 Article 9(1), 1961 Single Convention.
80 Article 12, 13, 19, 1961 Single Convention; Article 16(4), 1971 Convention.
2.1.3.3 United Nations Office on Drugs and Crime

Compared to the other two organs, the United Nations Office on Drugs and Crime is a relatively new and multi-functional institution. It operates to address the interrelated issues of drug control, crime prevention and international terrorism in all its forms and in all regions of the world. To fulfill its task on the drug control side, the United Nations Office on Drugs and Crime mainly relies on two approaches. One is the research and publication of studies on global drug issues; for example, the World Drug Report is one of the most authoritative and widely cited documents in the field of drug control study. Another is by focusing on drug abuse prevention and drug dependence treatment or rehabilitation programmes, which have often been neglected by the International Narcotics Control Board and the Commission on Narcotic Drugs.

2.2 Drug Control and Human Rights

2.2.1 International Drug Control Law and Human Rights

One of the purposes of international drug control is to prevent harms of illicit drugs from spreading among human beings. Such humanitarian concerns are illustrated in the preambles of the three international drug control conventions. In spite of the humanitarian concerns expressed in the preambles, no detailed human rights safeguards have been provided in the three drug control conventions. Such insufficient human rights protection of individuals from the purview of international drug control laws can be traced back to the time when these drug control conventions were being drafted. As observed by historian William B. McAllister:

The most important objective of the delegates to the 1961 and 1971 conventions was to protect sundry economic, social, cultural, religious, and/or geopolitical interests. The amount of time actually spent at the conferences discussing the problems of addicted individuals, how to help them, and how to prevent more people from joining their ranks was minimal. Until these priorities change,

problems with widespread drug abuse, and the attendant cost in human and material capital, will continue.  

In fact, the only occasion human rights is mentioned in the three international drug control conventions is in the context of regulating illicit drug cultivation. Accordingly, article 14(2) of the 1988 Convention addresses:

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 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.

Nevertheless, this provision has not offered much substantive protection for individual’s rights within the realm of drug control.

Due to the absence of human rights guidelines, the interpretation and implementation of drug control law can be inconsistent with human rights principles. This problem may also be aggravated by the fact that the international drug control conventions contain considerable room for varying interpretations. As the Canadian Department of Justice noted after ratifying the drug control convention, “the deliberate vagueness of some critical treaty provisions and the discretion permitted each party allow for a considerable variety of cannabis control regimes”. To this extent, the States parties may implement the international drug control conventions in a way that raises considerable human rights concerns. For instance, there are provisions in the international drug


\[\text{83 Article 14(2), 1988 Convention.}\]

\[\text{84 Article 14(2), 1988 Convention.}\]


control conventions that recommend States parties to provide treatment to drug users.\textsuperscript{87} Where no particular measures of treatment have been prescribed, the approaches undertaken by States parties are various. In some jurisdictions, compulsory drug treatments are carried out where there is an absence of informed consent from the individuals subjected to such treatments. In other cases, drug users are detained in isolated institutions without due process for long periods of time.\textsuperscript{88}

No matter how the international drug control law has been developed and interpreted, it is still required to work within the framework of international law, including international human rights law.\textsuperscript{89} Also, human rights can be seen as the baseline for determining whether a drug control policy is appropriated in pursuit of the goal of the three international drug control conventions.\textsuperscript{90} This is a notion that has been underpinned by the Commentary on the 1988 Convention. The Commentary on article 3 of the 1988 Convention states:

\begin{quote}
While it is important to stress that the Convention seeks to establish a common minimum standard for implementation…subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights.\textsuperscript{91}
\end{quote}

In this respect, the availability of international human rights norms as an external benchmark for interpretation and implementation of drug control law is important. Where the issues are not clear cut, the importance of human rights principles, for the purpose of the interpretation, must be emphasised.

\textsuperscript{87}Article 38, 1961 Single Convention; article 20, 1971 Convention; article 3(2), 1988 Convention.
\textsuperscript{88}World Health Organization, Assessment of Compulsory Treatment of People Who Use Drugs in Cambodia, China, Malaysia and Vietnam, 2009.
\textsuperscript{89}High Commissioner calls for focus on human rights and harm reduction in international drug policy, press release, 10 March 2009.
\textsuperscript{91}Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc. E/CN.7/590, paras. 3.3. (footnote omitted)
2.2.2 The Drug Control and Human Rights System: Parallels, Conflicts and Interactions

The drug control and human rights regimes have developed as distinct systems. When the first modern international drug control instrument, the 1961 Single Convention on Narcotic Drugs was drafted, the international human rights framework underpinned by numerous human rights treaties was not yet well established. Since the mid-twentieth century when the normative framework for international drug control law was established, the field of human rights has undergone significant transformation. For instance, the changes in the approach to certain groups’ rights have altered the landscape for considering the appropriate objects of rights infringements and the legitimate targets for accusations of human rights violations. In this connection, human rights discussions have interacted with particular vulnerable sections of the society, such as children, women, indigenous peoples, and people with HIV, amongst others. Also, the active recognition of human rights concerns associated with issues such as climate change, business, immigration and counter-terrorism is emerging and attracting broad discussion. In spite of these developments, there is little interaction between drug control and human rights. As a matter of fact, these two systems work in parallel, with their discourse rarely coming into contact with one another.

This situation has been well demonstrated within the UN system where drug control and human rights are unbalanced. First of all, compared with other fields of the UN’s work, no particular mandate is attached to drug control entities to ensure their drug control measures are in accordance with international human rights law. For instance, the International Narcotics Control Board has long been criticised for its reluctance toward bringing drug control strategies in line with

human rights principles. The Commission on Narcotic Drugs has never once condemned any human rights abuses, such as the detention of drug users without trial, inhuman treatment toward drug users, and denial of access to essential medicines, which occurs in the context of drug control. Meanwhile, the monitoring of drug control in line with human rights is also insufficient from UN human rights bodies. For instance, despite of the strong evidences that individuals in drug detention centres suffer human rights abuses, the Working Group on Arbitrary Detention of Office of the High Commissioner for Human Rights has paid little attention to this issue. Among its many annual reports for the past two decades, only in the 2010 report did it mentioned that the issue of “the detention of drug users” will be given “particular attention in 2010” by the Working group. Nevertheless, “particular attention” did not attract any substantive discussion, and no meaningful action has been taken in the following years. The insufficient connection between drug control and the human rights system within the UN has been observed and noted by the Secretary General:

[T]here is a lack of coordination and discussion between the actors involved in drug control and human rights at the international level. Law enforcement approaches are ingrained institutionally in the international drug control regime, as drug control is housed within UNODC, which leads the United Nations efforts on organized crime. This association between law enforcement and drug control, in part, precludes adoption of a human rights-based approach and interaction with the human rights bodies of the United Nations.

The lack of human rights discussions with regard to drug control can be further demonstrated by the Universal Periodic Review procedure. The Universal Periodic Review is believed to have “great potential to promote and protect

98 UN Doc. A/65/255, para. 48.
human rights in the darkest corners of the world”. 99 However, it pays little attention to human rights issues in the context of drug control. Contrary to well documented cases of human rights violations in the context of drug control in countries such as China, Cambodia, Russia, the United States, Ukraine and many Latin American countries, there are few discussions in the Universal Periodic Review proceedings with regard to those issues. For instance, even though issues such as the death penalty for drug offenders, arbitrary detention and compulsory drug treatment are prevalent in Singapore; 100 no reference was made to human rights issues in Singapore as regards its drug law and practices in the compilation report prepared by the Office of the High Commissioner for Human Rights. 101 In point of fact, in cases where human rights concerns with regard to drug control policies are raised in the Universal Periodic Review procedure, it is usually at the behest of civil society rather than UN bodies. Among all the UN entities, only the Committee on the Rights of the Child has raised concern over human rights issues related to children in the context of drug control. 102 The Committee on Economic, Social and Cultural Rights only observed that drug users’ accessing to drug dependence treatment is limited and that the situation in places of detention is even worse. 103

The parallel development and functioning between the drug control and human rights systems result in noticeable conflict in practice. Tensions have emerged from the need to curtail the illicit drug market and its damaging effects on society while respecting and protecting individual’s rights. One example of this tension lies at the heart of contemporary drug control within the UN over harm reduction programmes. Harm reduction is an evidence-based approach rooted in public health and human rights. It has been considered as a way to protect and promote

102 UN Doc. CRC/C/15/Add.184, para.50; UN Doc. CRC/C/15/Add.225, para. 63; UN Doc. A/HRC/WG.6/13/GBR/2, para. 49; CRC/C/TTO/CO/2, paras. 63,64.
103 UN Doc. A/HRC/WG.6/13/POL/2,p.11, para. 49.
the rights, such as the right to health, of those who use drugs, while also benefitting the society. For instance, injection drug use is associated with risks such as the transmission of HIV and fatal overdosing. Access to harm reduction programmes, including clean needle and syringe exchange, opioid substitution therapies and naloxone distribution, is a way to reduce these risks, improving the health of drug users and protect public health. This approach has been proven and promoted by General Assembly and UN agencies such as the World Health Organization and UNAIDS. However, while the High Commissioner for Human Rights calls for a focus on human rights and harm reduction, the International Narcotics Control Board condemns states that carry out harm reduction programmes by viewing them as against their drug control obligations under the international drug control conventions.

Regardless the parallels and conflicts, drug control and human rights as two mechanisms under the UN are expected to integrate. For instance, the General Assembly encouraged the United Nations Office on Drugs and Crime to cooperate with other relevant UN bodies, including the UN High Commissioner for Human Rights. In this regard, it is noteworthy that there is a beginning of cooperation between the drug control and human rights systems. In 2012, for instance, a Joint Statement on Compulsory Drug Detention and Rehabilitation

Centres was issued by 12 UN bodies, including the World Health Organization, the United Nations Office on Drugs and Crime and the Office of the High Commissioner for Human Rights. The Joint Statement highlights the concerns associated with drug detention and human rights protection and calls on states to implement drug treatment in line with human rights standards.\textsuperscript{110} Such collaboration among UN bodies to promote human rights in the context of drug control is a step forward in addressing the conflict between human rights and drug control, though the effectiveness of such efforts is still open for discussion.

\textbf{2.2.3 Human Rights Obligations in the Realm of Drug Control}

Despite the fact that the details of how the human rights framework fits into drug control mechanism are still under discussion and development, it is difficult to refute that human rights obligations are required to be met in all fields, include drug control. The General Assembly has confirmed that human rights are guiding principles of the UN and this applies to all UN bodies in the fulfilment of their mandates.\textsuperscript{111} Also, the Secretary-General noted in 2006 that “all United Nations agencies and programmes must further support the development of policies, directives and guidelines to integrate human rights into all aspects of United Nations work”.\textsuperscript{112} In the area of drug control, particularly, the General Assembly continually states that the international drug control must be carried out in full conformity with the UN Charter and human rights standards.\textsuperscript{113} Pursuant to this spirit, UN drug control related bodies are required to fulfill their human rights obligations.


\textsuperscript{111} UN Doc. A/RES/63/197.

\textsuperscript{112} UN Doc. A/61/583, p. 38.

obligations under the UN regime. For example, the Commission on Narcotic Drugs, as the central policy-making body for the international drug control, has a duty to respect and promote human rights norms, such as the freedom from arbitrary detention, freedom from discrimination and prohibition of torture, inhuman and degrading treatment all of which are invoked in the development and implementation of drug control policy. In addition, while the UN drug control mechanism is expected to apply human rights principles to their deliberations, the human rights mechanism also has a mandate to monitor that drug control policies are carried out in conformity with human rights norms.

It is also noted that no matter how the drug control and human rights system have been shaped and evolved at the international level, in the end it is the states’ duty to accommodate their human rights obligation while retaining the force of the drug control regime. In this respect, there are numerous international and regional human rights instruments that many states are parties to. The ratification of human rights treaties reflects the consent of States to create legal obligation to respect, protect and fulfil human rights. These human rights obligations also apply in the context of drug control. In practice, however, the balance between states’ drug control efforts and rights protection obligation has not been well addressed. Regardless of the developments of a human rights discourse that challenges national policymakers to follow the foundational concepts of human rights, not all states hold that there is a place for human rights in the realm of drug control. This failure to recognise and underline human rights obligations in the context of drug control has led to the enactment and implementation of

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114 For example, UN General Assembly resolution stating that drug control “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, and in particular with full respect for all human rights and fundamental freedoms, and on the basis of the principles of equal rights and mutual respect.” UN Doc. A/RES/61/183, para. 1.

115 UN Doc. A/RES/60/251.

national drug control policies that are incompatible with international human rights law.\textsuperscript{117}

In this connection, states’ drug policy is questionable in line with their human rights obligations. For instance, drug legislation that prescribes the death penalty is open for discussion with regard to the respect for the fundamental right to life. Measures that impose compulsory drug treatment without the consent of drug users are questionable with regard to protection of the right to privacy. Detaining drug users in the name of drug treatment is also challengeable regarding the protection of their right to liberty. In addition, the obligation to fulfil means that states must take positive actions to facilitate individuals’ enjoyment of their rights.\textsuperscript{118} That is to say, states must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realisation of human rights and freedoms. In this regard, drug control policy that denies the access to evidence-based harm reduction programmes is a departure from the obligation to fulfil individual’s right to health. Moreover, states’ obligations under international human rights laws include “obligations of conduct and obligations of result”.\textsuperscript{119} That is to say, even with good intentions when initiating certain drug control policies, the implementation and consequences of these policies should not infringe or violate individuals’ rights. In this respect, aerial fumigation carried out to eradicate crops of illicit drugs that also damages environment and health is questionable. Based upon this understanding, the


\textsuperscript{118} The nature of the legal obligation under article 2(1) of the International Covenant on Civil and Political Rights is both negative and positive and the “positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.” See Human Rights Committee, General Comment No. 31 [80], \textit{The Nature of the General Legal Obligation Imposed on States Parties to the Covenant}, CCPR/C/21/Rev.1/Add. 13, paras 6, 8.

following parts of the present study will examine selected domestic drug control policies in line with human rights principles.
3 Chapter 3: The Death Penalty for Drug Related Offences

3.1 Background

3.1.1 Legislation and Practice Overview

Drug related offences attract the death penalty in a number of jurisdictions worldwide. According to a survey of drug laws prepared for the 1948 session of the United Nations Commission on Narcotic Drugs, China was the only country that had the death penalty for drug related offences at that time. Over the following three decades the number of countries that applied capital punishment for drug related offences increased. Ten countries engaged in this practice by 1979, and that number had risen to 22 by 1985. By 2000, there were 36 jurisdictions that applied the death penalty for drug related offences. By the end of 2012, among the 47 countries that retained capital punishment in the world, 30 countries and two territories prescribed the death penalty.

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121 UN Commission on Narcotic Drugs (May 1948) Annual Summary of Law and Regulations Relating. The offence applicable the death penalty included: manufacture, planting, transportation and sale of drugs, and relapsing drug use to the Control of Narcotic Drugs, 1947. UN Doc. E/NL.1947/Summary, pp. 25, 27.
124 Note by the Secretariat transmitting the report of the Secretary-General on capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, UN Doc. E/2010/10, 29 March 2001.
125 They are: Bahrain, Bangladesh, Brunei-Darussalam, China, Cuba, Egypt, India, Indonesia, Iran, Iraq, Kuwait, Lao PDR, Libya, Malaysia, Myanmar, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, South Korea, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, United States of America, Viet Nam and Yemen.
126 Taiwan and Gaza (Occupied Palestinian Territories).
for drug related offences. Among those 32 countries and territories, twelve had laws that prescribed capital punishment as the mandatory penalty for certain drug offences.127

There are also on-going executions of drug offenders globally.128 Even though the exact number of executed drug offenders is hard to obtain, the number of people sentenced to death for drug related offences represented a large proportion of the total number of capital sentences in some of those retentionist countries.129 For instance, between 1994 and 1999, 76 percent of those executed in Singapore were drug offenders.130 In 2003, more than half of executions in Saudi Arabia were for drug related offences.131 This situation has been observed by the former United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, who reported that in 2006alone, at least one third of all publicised death sentences in Vietnam were imposed for drug related offences.132 Reports also show that in 2011, of the 676 ordered executions in Iran, over 80 percent were drug offenders.133 Further, according to the summary of

127 Harm Reduction International has identified these twelve states as: Brunei-Darussalam, Egypt, Iran, Kuwait, Lao PDR, Malaysia, Oman, Singapore, Sudan, Syria, United Arab Emirates and Yemen. See further, Patrick Gallahue, *The Death Penalty for Drug Offences: Global Overview, Shared Responsibility and Shared Consequences*, Harm Reduction International, 2011, p.11.


129 Those have been reported in certain countries can only be regarded as being approximate. Patrick Gallahue, *The Death Penalty for Drug Offences: Global Overview, Shared Responsibility and Shared Consequences*, Harm Reduction International, 2011, p. 5. As in the report claimed, “that number would likely reach a thousand if those countries that keep their death penalty figures a secret were counted.”


stakeholders’ submissions to the Universal Periodic Review, until January 2010 there were 708 persons on death row in Thailand, 339 of whom were sentenced to the death penalty for drug related offences. However, it must be noted that most of these executions were carried out in a few countries and the numbers of jurisdictions that execute drug offenders in practice is relatively small. According to International Harm Reduction, executions for drug offences were carried out in between 12 and 14 countries between 2005 and 2010.

3.1.2 The Trends

It is noteworthy that, generally speaking, there is a marked trend towards abolition and restriction of the application of the death penalty globally. Professor William Schabas, a leading scholar in this field, sees the progress towards abolition of the death penalty worldwide as “dramatic examples of the spread and success of human rights law”. This international trend is also reflected by drug legislation. For instance, Nigeria abolished the death penalty for drug offences in 1986. Turkey abolished the death penalty for drug trafficking in 1990 as part of a general reduction in the number of crimes punishable by death. In Mauritius, the law that introduced the death penalty for drug trafficking in 1986 was declared unconstitutional in 1992. Some countries where the death penalty was imposed for drug related crimes, like Uzbekistan and the Kyrgyz Republic, have now abolished the death penalty

134 UN Doc. A/HRC/WG.6/12/THA/3, para. 22.
139 The judgment was delivered on 18 February 1992 in the cases of Ali v. R. and Rassoolv. R. by the Judicial Committee of the Privy Council (JCPC) in England, which serves as the highest court of appeal for Mauritius.
completely. Tajikistan and Jordan have also removed drug offences from their lists of capital crimes. In April 2011, the government of the Republic of Gambia abolished the death penalty for drug trafficking, considering that “it had overlooked the constitutional prohibition against the death penalty for offences not resulting in death when adopting that piece of legislation”. The new law abolished capital punishment for drug related offences while making other penalties stiffer. By 2012, among the 32 states and territories that retained capital drug laws, five had formally abolished the death penalty or were considered de facto abolitionist.

While those countries have removed the death penalty for drug related offences, others introduced or reintroduced the death penalty for drug related crimes. The occurrence of introducing the death penalty for drug related crimes has been noticed by the United Nations since the early 1970s. Qatar and Saudi Arabia introduced the death penalty for drug offences in 1987, Bangladesh in 1988, Guyana and Sudan in 1989 and Vietnam in 1992. The Philippines abolished the death penalty for all crimes in 1987 but reintroduced it for drug related offences in 1994. In some jurisdictions, the reintroduction of the death penalty can be traced directly to states’ drug control legislation, as demonstrated in the United States. In 1972, based on the arbitrary manner the death penalty had been applied,

141 The new law has reduced the maximum penalty from capital punishment to life in prison, however, the fine for the same offences has been increased tenfold, from GMD1 million (about 38,388 dollars) to GMD 10 million (about 383,880 dollars). Cited from: Gambia: Death Penalty for Drug Offenses Abolished, Law Library of Congress website, available at: http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402619_text (last accessed 25 August, 2013).
144 Philippine abolished the death penalty subsequently and never practiced it. The reintroduction of the death penalty in 1994 for drug related offences, in some extent, was considered as: “signal the desperation of an elected government for a measure to symbolize a control and strength it does not really possess”. See Joan Fitzpatrick and Alice Miller, International Standards on the Death Penalty: Shifting Discourse, Brooklyn Journal of International Law 19, 1993, p. 356.
the United States Supreme Court in *Furman v. Georgia* declared the death penalty to be unconstitutional, leading to its abolition in both Federal and states’ criminal laws. However, only four years later in *Gregg v. Georgia*, the United States Supreme Court ruled that when administered in a manner designed to protect against arbitrariness and discrimination, capital punishment was not a violation of the Constitution. This ruling paved the way for the reintroduction of the death penalty, and drug control legislation provided the ideal vehicle for this reinstatement. On 18 November 1988, the death penalty was reintroduced with the Anti-Drug Abuse Act of 1988, which listed capital punishment as a possible penalty for certain drug offenses.

Nevertheless, any possible international trend in relation to the death penalty for drug related offences is by no means clear. Over the past few decades, there have been some steps forwards and some steps backwards. On the one hand, in certain countries that have had a long tradition of the death penalty for drug related offences, some steps have been taken towards abolition. For instance, Vietnam in 2009 and China in 2010 both considered removing drug related offences from the list of crimes that apply to the death penalty. In 2012, the Singaporean government re-examined the legislation that imposed a mandatory death sentence for drug trafficking. Changes to the mandatory death penalty regime for drug trafficking were made in the 2012 amendments to the Misuse of Drugs Act. On the other hand, some states went against the abolition trend even further.

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147 Agence France-Presse, Vietnam cuts list of death penalty crimes: official, 19 June 2009. It ultimately retained the death penalty for drug trafficking, but removed the death penalty as a punishment from Article 197, pertaining to “organizing the illegal use of narcotics”.
148 Southern Weekend Newspaper, interview with Tsinghua University professor Zhou Guangquan (August 26, 2010) – translation provided by the Dui Hua Foundation’s blog, Dui Hua Human Rights Journal (1 September 2010). Unfortunately, this recommendation did not make it into the National People’s Congress Standing Committee’s review on the revision to the country’s Criminal Law.
instance, in January 2010, Thailand’s Minister of the Interior announced a campaign to extend the death penalty to drug offences. In addition, some newly-established countries adopted laws that prescribe the death penalty for drug related offences. For instance, South Sudan, a newly independent state, introduced a sentence of death or life imprisonment for drug dealing in Article 383(2) of its Penal Code Act 2011. Regardless, reintroducing the death penalty or expanding the scope of the punishment to cover drug related offences is a departure from an international trend towards abolition. As Rick Lines has observed, “if the progress towards the abolition of capital punishment is indeed a dramatic example of the success of human rights law, then the expansion of capital punishment for narcotics illustrates an example of a dramatic failure”.

### 3.1.3 Human Rights Concerns

In spite of the fact that hundreds of people are executed for drug related offences every year, little concern for the human rights of those individuals has been raised by the international community. Notwithstanding the fact that the permissibility of the death penalty for drug offences remains under debate, it is noted that international community has failed to carry out sufficient monitoring of the implications of this practice for the right to life. This is a situation that has been well demonstrated in the international level by the Universal Periodic Review process. The Universal Periodic Review started in April 2008 as a unique mechanism of the United Nations to review the human rights practices of all states in the world. However, it has so far paid little attention on the issue of the death penalty for drug related offences. As a matter of fact, among the 193 United Nations Member States, only Turkey and the Czech Republic raised

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150 Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, Thailand, UN Doc. A/HRC/WG.6/12/THA/3, para. 22.
152 UN Doc. A/HRC/19/8, para. 89.27.
153 UN Doc.A/HRC/18/11, para. 97.3.
the particular issue of capital punishment for drug related offences.\footnote{Hungary raised recommendation towards to Thailand remove the death penalty for non-violent offenses. See UN Doc. A/HRC/19/8, para. 89.27; Amnesty International and Singapore Anti-Death Penalty Campaign have raised concern regard to the fact that Singapore continues to execute drug offenders. See UN Doc. A/HRC/WG.6/11/SGP/3, p. 4, paras. 18, 20.} If the concern from states was rare, then, the monitoring from the UN agents was almost imperceptible. For instance, in the compilation prepared by the Office of the High Commissioner for Human Rights, in a summary of the information in reports and documents from the United Nations agents, no observation was made about the death penalty for drug related offences.\footnote{UN Doc. A/HRC/WG.6/11/SGP/3.} In fact, during the first round of the Universal Periodic Reviews, of the 30 counties that retain capital drug laws, only Thailand and Singapore received recommendations to change their capital drug law and practice.

In the case of Thailand, Turkey recommended that the Thai government review its imposition of the death penalty for drug trafficking and that the government abolish the death penalty as promised in its National Human Rights Action Plan.\footnote{UN Doc. A/HRC/19/8, paras. 89.27.} No response has been made by Thai government since then even though the deadline was set as no later than March 2012.\footnote{UN Doc. A/HRC/19/8, para. 89.} To the contrary, in February 2012 the Deputy Prime Minister Chalerm Yubamrung was reported to be backing an amendment to the Narcotics Act that would shorten appeals processes and expedite the executions of those convicted of drug offences.\footnote{Chalerm: death to drug dealers, \textit{Bangkok Post}, 6 February 2012.} This position taken by Thai officials was in clear contradiction to its own commitment to abolish capital punishment, as established in the Second National Human Rights Action Plan 2009-2013.

Considering the fact that Singapore continues to sentence drug offenders to the death penalty, the Czech Republic urged Singapore to review the Penal Code and the Misuse of Drugs Act to repeal all provisions on mandatory capital sentencing, and to remove all presumption of guilt clauses.\footnote{UN Doc.A/HRC/18/11, para. 97.3.}
Campaign also recommended that the Singaporean government adopt a more reasonable approach to drug related problems, holding that the application of mandatory death sentencing for drug related offences was “inconsistent with the criteria of absolute necessity and proportionality”.160 In light of human rights, Amnesty International stated that the application of the death penalty violated the right to life.161 However, the government of Singapore holds different position with regard to the same issue. As it proclaimed in the national report during the review session:

Singapore considers capital punishment as a criminal justice issue, rather than a human rights issue, that remains legal under international law. Capital punishment is imposed only for the most serious crimes. It sends a strong signal to would-be offenders, deterring them from committing crimes such as murder and offences involving firearms. In the case of drug trafficking, the death penalty has deterred major drug syndicates from establishing themselves in Singapore.162

The claims submitted by the government of Singapore reflect some of the points that are usually used as rationales for applying the death penalty to drug related offences.

3.1.4 The Rationale for Imposing the Death Penalty for Drug Related Offences

The death penalty has been considered as an effective deterrent and retributive justice for drug related offences as well as reflective of the aspirations of the people and the interest of the society. For instance, one Philippine Ministry of Defense official, when defending a proposal for reintroducing the death penalty in The Philippines in 1989 argued: “there are compelling reasons for the restoration of the death penalty as an effective deterrent against the commission of heinous crimes and as matter of simple retributive justice”.163 More recently,

162 UN Doc. A/HRC/WG.6/11/SJP/1, paras. 119, 120.
the Malaysian government stated in its Universal Periodic Review report that officials “take into consideration the views of the majority of the electorates and that the death penalty was seen as the ultimate deterrence”.164

3.1.4.1 Deterrence

Despite the inconclusiveness of the deterrent effect of the death penalty, there is still belief in its value for drug related offences. In fact, the deterrent belief has been strongly held by some countries where capital drug laws are enforced. For instance, the Singaporean government has stated that:

The tough anti-drug laws have worked well in Singapore’s context to deter and punish drug traffickers. Singapore considers the MDA [Misuse of Drugs Act] to be a necessary legislation to help us keep our country drug-free.165

However, beliefs that the death penalty deters people from committing drug offences and will solve drug related problems may not be able to stand up to scrutiny for a number of reasons. First, studies on the deterrent effect of the death penalty itself have failed to conclude that it has any discernible impact on the commission of crimes. Professor H.L.A. Hart, for example, pointed out that such studies are inconclusive, regardless of who bears the burden of proof. That is to say, in those studies where proponents of the death penalty wished to prove that it is effective in deterring potential criminals they hardly succeed because it is impossible to find potential criminals who admit that they would have offended were it not for the strict punishment applied. In studies where the burden is on abolitionists to prove that the death penalty does have a deterrent effect in practice, they also fail to convince because they cannot show that certain people would not have offended, even if the penalties were harsher.166 Second, no particular study has identified the deterrent effect, or otherwise, of the death penalty for drug related offences.167 Even if there were studies which verified

that the death penalty did deter people from committing certain crimes, there is no logical reason that the study’s results could be extended and applied to drug related offences. This is because of the unique nature of drug related offences, which are usually borne out of poor socio-economic backgrounds and other social factors, as opposed to crimes such as murder, which tend to be driven by very different factors. In other words, even if the death penalty were to be considered as a deterrent to some crimes (although this is still under question since many of the studies that purport to prove this fall short of scientific standards and are “fraught with technical and conceptual errors”), it remains more difficult to find evidence to prove that the death penalty is a deterrent to drug related offences. Lastly, there is no hard evidence to support the belief that the death penalty is a deterrent to drug related offences in reality. That is to say, for countries that impose the death penalty for drug related offences and execute people for committing such crimes, no identifiable evidence shows the decline of drug related crimes or a move towards resolving drug related problems. In fact, the reality is that the conviction rates for drug crimes in countries such as Singapore where the death penalty is permitted for drug crimes are still high. Also, in countries such as Iran; the drug related situation remains problematic. For instance, a high prevalence of injection drug use is reported in Iran and the country is still used as the trade route for illicit drugs in the region.

In fact, the ineffectiveness of the death penalty as a deterrent to drug related offences has long been acknowledged. As early as 1985, at the meeting of the

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United Nations Expert Group on Countermeasures to Drug Smuggling by Air and Sea, it was noted that:

...in the experience of several experts, the fact that capital punishment appeared on the statute books as the maximum penalty did not necessarily deter trafficking; indeed in some cases it might make prosecution more difficult because courts of law were naturally inclined to require a much higher standard of proof when capital punishment was possible or even mandatory... The most effective deterrent was assuredly the certainty of detection and arrest.\(^\text{172}\)

In addition, one United Nations expert has concluded that:

Only after thorough observance of very elaborate rules of criminological enquiry one may arrive to substantiated conclusions on the deterrent effect of capital punishment on the rate of illegal drug trafficking. But even without such an enquiry and only accepting indisputable evidence that on balance the death penalty does not have a perceptible influence on homicide rate one may be sceptical whether such an influence will be visible in [the] case of illegal drug trafficking.\(^\text{173}\)

In short, there is no evidence to support the contention that capital punishment is an effective means of deterring drug crimes. It would seem more likely that those states that continue to justify the imposition of the death penalty for drug related crimes, purportedly driven by the alleged deterrent effect of that punishment, are instead influenced by strongly held moral and political ideals in their country.\(^\text{174}\)


\(^{174}\) For example drug related crimes has been describe as “grievous, odious and hateful offenses and which, by reason of their inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society.” UN Doc. CCPR/C/PHL/2002/2, para. 497.
3.1.4.2 Public Desire and Society Interests

It might be more convenient to adopt moral rationales rather than prove the deterrent effect of the death penalty for drug related offences. Those who argue the retributive value of the death penalty for drug related offence often assert that drugs are “weakening the very fabric of society” and “represent a heavy toll on many national economies”.\textsuperscript{175} Drug offenders are portrayed as “merchants of death”\textsuperscript{176} or “peddlers of death”;\textsuperscript{177} and drug related crimes are considered a “social evil”,\textsuperscript{178} “global menace”\textsuperscript{179} and bringing “serious harm to the nation”.\textsuperscript{180} Based upon such perspectives, drug offenders are seen as evidence of moral inadequacy that threaten the nations’ interests. It is therefore submitted that as harsh a punishment as the death penalty is, it is both desirable and necessary.\textsuperscript{181}

In this regard, social interests are used to justify the imposition of the death penalty for drug related offences. For example, the Chinese government has stated that:

\begin{quote}
\textit{[c]rimes involving drugs are recognized throughout the world as serious offences, entailing serious harm to society; both the international community and Chinese civil society demand that such crimes be punished severely. The}
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\textsuperscript{175} Statement of the UN Secretary-General to the Economic and Social Council, 24 May 1985.
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application of the death penalty in cases of crimes so harmful to society is appropriate, helps to deter and prevent them, and accords with the vital interests of the general public.  

Besides the argument of social interests, public desires are also sometimes used to justify the application of capital punishment on drug criminals. For instance, the Indian High Court of Judicature at Bombay has claimed that:

a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, … contemporary public opinion … rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty…

One can debate about the validity of either claim, but the belief may not be an unreasonable one. For instance, on the question of public opinion, there are many factors that influence the outcomes of such surveys; the outcome is also dependant on political ideology. Where the political climate does not favour abolition, this will lead the public to get the impression that the government that is in power must have valid reasons for adopting and implementing capital drug laws. Such assumptions from the public, in turn, strengthen the political claim that the public are in favour of applying the death penalty for crimes such as drug related offences.

In short, there is no simple way to judge if it is prudent to propose the death penalty for drug related offences on the grounds of deterrence, social interest or

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182 UN Doc. A/HRC/14/24/Add.1, para. 138.
183 Indian Harm Reduction Network v. Union of India, High Court of Judicature at Bombay in its criminal jurisdiction under Article 226 of the Constitution of India, criminal writ petition no. 1784 of 2010, judgment, 16 June 2011, para. 34.
public desire, considering that they are all bound up with other complex issues, not to mention the diverse national backgrounds and political ideology in those states that continue to impose the death penalty in this context.

3.2 The Death Penalty: Prescribed under International Drug Control Laws?

Besides the deterrent and moral rationales, some also argue that the death penalty is governed by penal provisions within the international drug control conventions.¹⁸⁶ Such reasoning is not unusual in countries where capital drug laws are implemented. One study shows that “the death penalty for drug offences became more prevalent” after many countries adopted the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁸⁷ However, the treaty obligation claim falls apart under close scrutiny of the international drug control law.

3.2.1 The Penalty Provisions of the International Drug Control Conventions

According to the three international drug control conventions, States parties are obligated to adopt certain penalties alongside their domestic drug legislation. However, the kinds of sanctions have not been prescribed in a specific manner. For example, article 36(1) of the 1961 Single Convention on Narcotic Drugs requires States parties to ensure that serious drug crimes “be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty”.¹⁸⁸ The other two conventions followed in a similar fashion. Article 22(1)(a) of the 1971 Convention states that serious breaches of drug laws or regulations adopted in pursuance of their obligations under the Convention “shall

be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty”.¹⁸⁹ Article 3 of the 1988 Convention requires States parties to establish trafficking activities as criminal offences under their domestic laws and to make the commission of these offences “liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation”.¹⁹⁰ Nevertheless, none of the penalty provisions in the three international drug control conventions prescribe the death penalty. Accordingly, the “adequate punishment” referred to in the three conventions is “imprisonment or other penalties of deprivation of liberty”. The death penalty is not indicated.

However, confusion is raised largely due to the provisions in the three conventions where penalties “more strict or severe than those provided by this Convention” are permitted. Accordingly, article 39 of the 1961 Single Convention stipulates:

> Notwithstanding anything contained in this Convention, 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 … as in its opinion is necessary or desirable for the protection of the public health or welfare.¹⁹¹

Similarly, article 23 of the 1971 Convention on Psychotropic Substances states:

> A Party may adopt more strict or severe measures of control than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the protection of the public health and welfare.¹⁹²

Almost identical wording appears in article 24 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.¹⁹³

The expression “more strict or severe measures than those provided by this Convention” in the three drug control conventions has been taken by States

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¹⁸⁹ Article 22(1)(a), 1971 Convention.
¹⁹⁰ Article 3, 1988 Convention.
¹⁹² Article 23, 1971 Convention.
¹⁹³ Article 24, 1988 Convention.
parties to each instrument as the authority for prescribing the death penalty for drug related offences on the basis that the death penalty is “more strict or severe” than “imprisonment or other penalties of deprivation of liberty”. For example, the Indian High Court of Judicature at Bombay justified the death penalty for drug related offences by arguing that:

all the Conventions have an article which expressly states that a party-State to the Convention may adopt more stricter or severe measures of control than those provided by the Convention, if such measures are desirable or necessary for the protection of public health and welfare.194

Besides the provision itself, the Commentary to article 39 of the 1961 Single Convention is further seen as a confirmation of the death penalty for drug related offence under international drug control law. The Commentary reads:

Parties which apply “more strict or severe” control measures may do this by imposing controls in addition to those required by the Single Convention or by replacing measures provided for in that treaty by “more strict or severe” ones. … Permissible substitute controls would be, for example, the prohibition of manufacture of and trade in certain drugs instead of subjecting them to a system of licensing, or the imposition of the death penalty in place of “imprisonment or other penalties of deprivation of liberty”.195

If only read literally, it may give the impression that the death penalty is permitted under the 1961 Single Convention, however, upon careful examination, it becomes clear that the death penalty is taken as an example to illustrate the expression of “more strict or severe” than “imprisonment or other penalties of deprivation of liberty” rather than prescribed as a type of penalty. This is especially true given the fact that the footnote of this paragraph clarified that the death penalty is not permissible “on moral or other legal grounds” under the


195Commentary to article 39 of the Single Convention on Narcotic Drugs 1961, United Nations Publication Sales No. E. 73. XI.1., pp. 449, 450. (My emphasis; footnotes omitted)
provisions of the 1961 Single Convention. Therefore, this section of the Commentary should not be taken as consent from the international drug control treaties for States parties to these instruments to impose capital punishment. Nevertheless, if the above understanding derived from the drug control convention itself still leaves room for debate, then the interpretive rules set out in the Vienna Convention on the Law of Treaties might provide greater clarity to disprove the assumption that the death penalty is prescribed under international drug control law.

3.2.2 Interpretation of the Penal Provisions

3.2.2.1 Application of Successive Treaties Relating to the Same Subject Matter

According to article 30 of the Vienna Convention on the Law of Treaties 1969, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the rule that:

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Pursuant to this rule and given the fact that most countries that are party to the 1961 Single Convention are also States parties to the 1971 and 1988 Convention, and the 1961 Single Convention was not terminated after the enactment of the latter two conventions, the interpretation of the penal provision of the international drug control law should follow the 1971 and 1988 Conventions rather than the 1961 Single Convention. In this regard, the issue of whether the death penalty has been prescribed as a sanction under the international drug

196 Footnote 3, Commentary to article 39 of the Single Convention on Narcotic Drugs 1961, p. 450. It states: “The reference to the “death penalty” is made in the light of the provisions of the Single Convention. It does not imply any position as to the admissibility of this penalty on moral or other legal grounds.”

control law shall be determined by later conventions, *inter alia*, the 1971 and 1988 Convention.

The penal provisions in the 1971 or 1988 drug conventions, as mentioned above, do not list the death penalty, nor does the Commentary of these two later conventions use the death penalty as an example to illustrate the expression of “more strict or severe control measures”, as the Commentary on the 1961 Single Convention did. In this respect, the death penalty cannot be understood to be prescribed by the 1971 or 1988 Drug Conventions.

### 3.2.2.2 Interpretation in Light of the Convention’s Object and Purpose

According to general rules established under article 31(1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in light of its object and purpose. One can say that the object of the 1988 Convention was to raise awareness of drug trafficking as a serious “international criminal activity”. Its purpose was to encourage States parties to establish sufficient criminal justice systems which could combat this problem and advance international cooperation against drug crimes. As the Commentary on article 3, the penal provision of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 stipulates:

> Article 3 is central to the promotion of the goals of the Convention as set out in the preamble and to the achievement of its primary purpose, stated in article 2, paragraph 1, “to promote cooperation 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”. Towards that end, it requires parties to legislate as necessary to establish a modern code of criminal offences relating to the various aspects of illicit trafficking and to ensure that such illicit activities are dealt with as serious offences by each State’s judiciary and prosecutorial authorities.

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199 Article 2, 1988 Convention.
200 Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc. E/CN.7/ 590, para. 3.1. (footnote omitted)
In this way, the primary purpose of the convention was to promote “international cooperation” in the field of against drug crimes and “improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition” to achieve such goal.\textsuperscript{201}

In this regard, prescribing the death penalty for drug trafficking would in fact have acted against the primary purpose of the 1988 Convention, given that the death penalty may serve as an obstacle to the requirement of international cooperation. As the International Narcotics Control Board, the international drug control treaties monitoring body, has long realised:

\begin{quote}
the provision of the death penalty can result in difficulties in international mutual legal assistance, extradition and transfer of proceeding case work if the requesting State’s legislation provides for the death penalty and the requested State’s legislation does not. The prospect of the death penalty often constitutes under national legislation a compulsory or discretionary ground for refusal of international mutual assistance.\textsuperscript{202}
\end{quote}

3.2.2.3 The Interpretation and Practice of States Parties

States parties’ implementation of the treaty may also be taken into consideration for the purposes of interpretation treaty provisions. As article 31(3)(b) of the Vienna Convention on the Law of Treaties stipulates, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall also be taken into account with regard to interpretation of treaty provisions.\textsuperscript{203} As mentioned above, of the 184 States parties to the 1961 Single convention\textsuperscript{204} only 30 countries\textsuperscript{205} and 2 territories\textsuperscript{206}

\textsuperscript{201} Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc. E/CN.7/ 590, para. 3.2.
\textsuperscript{202} UN Doc. E/INCB/2003/1, 2003, para. 214.
\textsuperscript{203} Article 31(3)(b), Vienna Convention on the Law of Treaties.
\textsuperscript{204} As of 1st February 2014, the number of States parties to the 1961 Single Convention are 184, 183 States parties to the 1971 Convention and 188States parties to the 1988 Convention.
\textsuperscript{205} These are Bahrain, Bangladesh, Brunei-Darussalam, China, Cuba, Egypt, India, Indonesia, Iran, Iraq, Kuwait, Lao PDR, Libya, Malaysia, Myanmar, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, South Korea, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, United States of America, Viet Nam and Yemen.
prescribed the death penalty for drug related offences by the end of 2012. In addition, the numbers of those jurisdictions actually executing drug offenders is relatively small. Moreover, there is also a noteworthy trend towards the abolition and restriction of the application of the death penalty. Considering these facts, the interpretation of the penal provisions in the drug control conventions becomes less appropriate to draw the conclusion that the death penalty is mandated under international drug control law. In short, it is advisable that when interpreting the international drug control conventions, one needs to refer to the object and purpose of these conventions, read alongside states’ implementing penal provisions. On this basis, it becomes clear that the death penalty for drug offences is neither prescribed nor permitted by the relevant international conventions.

3.2.2.4 Interpretation in Line with Human Rights Principles

Regarding the question of whether the death penalty for drug related offences is permitted under the international drug control conventions, where the issues are not considered clear-cut, for the purposes of interpretation, the importance of human rights norms may not be neglected. As a matter of fact, according to article 31(3)(c) of the Vienna Convention, “any relevant rules of international law applicable in the relations between the parties” shall also be taken into account together with the context when interpreted any given provisions. Pursuant to this rule, international human rights law, which enjoys adherence by many states that are party to the drug control conventions, shall also be considered when interpreting the drug conventions. In this respect, some scholars noted that particular ambiguously-worded provisions in the drug control

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206 Taiwan ROC and Gaza (Occupied Palestinian Territories).
conventions should be interpreted with the assistance of human rights law. As Damon Barrett and Manfred Nowak have stated:

Human rights law applies at all times in international drug policy. Specifically, where the drug conventions fail to legislate or are unclear, human rights law must fill the gaps, and it is within these gaps that human rights law serves as \textit{lex specialis} for determining what is “appropriate”. \textsuperscript{210}

In this connection, Professor Neil Boister believes that “given the general international protection in human rights instruments of the right to life, imposition of the death penalty cannot be regarded as being called for by the drugs conventions’ provisions for adequate punishment”. \textsuperscript{211}

In addition, following the principle of \textit{pacta sunt servanda}, every State party shall implement the binding treaty in good faith. \textsuperscript{212} This is a principle also underlined by article 2(2) of the Charter of the United Nations, which obliges Member States of the United Nations to “fulfill in good faith the obligations assumed by them in accordance with the present Charter”. \textsuperscript{213} In this respect, the obligation of protecting the right to life may be invoked to assist in the understanding and application of the penal provisions in the drug control conventions with regard to the death penalty issue.

Moreover, the international drug control conventions themselves also stipulate that the minimum standards for their implementation shall be consistent with human rights norms. As the Commentary on Article 3 of the 1988 Convention states:

While it is important to stress that the Convention seeks to establish a common minimum standard for implementation, there is nothing to prevent parties from


\textsuperscript{212} Article 26, Vienna Convention on the Law of Treaties.

\textsuperscript{213} Article 2(2), Charter of the United Nations.
adopting stricter measures than those mandated by the text should they think fit to do so, subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights.\textsuperscript{214}

In this regard, for those States parties that seek to derive the authority for imposing the death penalty for drug related crimes from the international drug control conventions, they are equally always subject to the requirement of consistency with international human rights law. In this regard, the study of relevant human rights norms may provide further understanding.

3.3 The Death Penalty for Drug Offences: in Line with Human Rights Norms?

3.3.1 International Human Rights Law

Even though the death penalty is not completely prohibited under international law, it is limited to those “most serious crimes”. Article 6(2) of the International Covenant on Civil and Political Rights states:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime... This penalty can only be carried out pursuant to a final judgement rendered by a competent court.\textsuperscript{215}

In this regard, under International Covenant on Civil and Political Rights, states that have not abolished the death penalty are obliged to confine its implementation to “the most serious crimes”. However, no exclusive list has been provided with regard to the “most serious crimes”. This has been criticised since at the time of drafting it was believed that a specific enumeration of serious crimes was needed.\textsuperscript{216}

\textsuperscript{214}Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc. E/CN.7/ 590, para. 3.3. (footnote omitted, my emphasis)

\textsuperscript{215}Article 6(2), International Covenant on Civil and Political Rights.

In relation to the principled content of the “most serious crimes”, in the General Comment No. 6: The right to life (art. 6), the Human Rights Committee stated that:

While it follows from article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable ... The Committee is of the opinion that the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.217

The notion that the death penalty should only be applied in exceptional circumstances was further developed in the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty adopted by the Economic and Social Council’s 1984 Resolution. Derived from article 6(2) of the International Covenant on Civil and Political Rights, the first safeguard reads:

Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.218

In this definition, while an indication of what does not constitute the “most serious crimes” was provided (that is, those crimes without lethal or extremely grave consequences), the threshold for particular crimes remains unclear. In reality, the “most serious crimes” continues to be understood in a relatively broad way by some states. For instance, the death penalty is available for economic, non-violent crimes, and crimes that do not result in lethal consequences.219 To

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217 General Comment No. 06: The right to life (art. 6), 30/04/1982, para. 7.
219 For relatively comprehensive list of the crimes that may attract the death penalty which have also confirmed by the UN, see William A. Schabas, The Abolition of the Death Penalty in International Law, 3rd Edition, Cambridge: Cambridge University Press, 2002, pp. 106, 107.
this extent, the “extremely grave consequences” formula of the Economic and Social Council 1984 Resolution takes us no further than the original “most serious crimes” language adopted in article 6(2) of the International Covenant on Civil and Political Rights; at least when it comes to determining whether the death penalty is permissible for drug related offences.

3.3.2 Drug Related Offences: a “most serious crime”?

Even though the crimes that may attract the death penalty have not been expressly stated under international law, it has been believed that crimes of an economic nature, deliberate intention to kill, or crimes without lethal consequence shall not been considered to be amongst the “most serious crimes” that may attract capital punishment. This is a notion that has been developed and confirmed by many UN bodies. For instance, the UN Human Rights Committee has on many occasions criticised states that impose capital punishment for various crimes that are economic crimes, non-violent and other offences with non-lethal consequences. The Committee has addressed the issue on states including, but not limited to: Iran, India, Sudan, Libya, Egypt, Syria, Vietnam and the Philippines. In its concluding observations on Iran, for example, the Committee pointed out that:

In the light of the provision of article 6 of the Covenant, requiring States parties that have not abolished the death penalty to limit it to the most serious crimes, the Committee considers the imposition of that penalty for crimes of an

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220 For example, Concluding observations of the Human Rights Committee: Thailand. UN Doc. CCPR/CO/84/THA, para.14; also see: Concluding observations of the Human Rights Committee: Sudan. UN Doc. CCPR/C/SDN/CO/3, para. 19.
221 UN Doc. CCPR/C/79/Add.25., para. 8.
222 UN Doc. CCPR/C/79/Add.81., para. 20.
223 UN Doc. CCPR/C/79/Add.85., para. 8.
224 UN Doc CCPR/C/79/Add.101., para. 8.
225 UN Doc. CCPR/CO/76/EGY., para. 12.
226 UN Doc. CCPR/CO/71/SYR,para. 8.
227 UN Doc. CCPR/CO/75/VNM., para. 7.
228 UN Doc.CCPR/CO/79/PHL., para. 10.
economic nature, … or for crimes that do not result in loss of life, as being contrary to the Covenant. 229

In addition, the Commission on Human Rights 230 also urged states that still maintain the death penalty “To ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes”. 231 This notion has been reaffirmed in its 2005 resolution. 232

In this connection, a scrutiny of drug related offences in accordance with these elements and also in comparing those with other serious crimes may provide further understanding of the question of whether the drug related offences fall within the ambit of the “most serious crimes”.

3.3.2.1 Identify and Comparing

3.3.2.1.1 “Intentional crimes with lethal consequences” vs. Murder

There are many interpretations about the expression of “intentional crimes with lethal consequences”. For instance, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye believed that the term “intentional” should be “equated to premeditation and should be understood as deliberate intention to kill”. 233 A decade later, in 2007, the same notion was confirmed by Mr. Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. In his report to the Human Rights Council, he determined that the death penalty shall be limited to cases where there was “an intention to kill which resulted in the loss of life”. 234 Pursuant this understanding, those offences that do not intend or result in the direct loss of life should not fall into the scope of the “most serious crimes”. This opinion has been further

229 UN Doc. CCPR/C/79/Add.25., para. 8.
230 The Commission on Human Rights has been replaced by the Human Rights Council in 2006, UN Doc.A/RES/60/251.
confirmed by the Human Rights Committee. The Committee has stated that “the imposition of death penalty … for crimes that do not result in loss of life” does not meet the norms in article 6(2) of the International Covenant on Civil and Political Rights.235

Whether drug related offences are intended to kill or have lethal consequence is a question that remains under debate. Professor William Schabas has stated that:

there is usually no choate lethal or grave offence with respect to drug trafficking. In most cases, the trafficker has been captured and the drugs have been confiscated without having reached the public. In other words, even if one were to stand by the argument that selling drugs leads to a loss of life (which, if taken seriously, is more so the case for alcohol and tobacco), the interdiction of the drugs before they hit the streets means that the person sentenced to death could not have sold the drugs, nor could anyone else – and no lives have been lost.236

Some also believe that illegal drug activities, such as drug dealing and trafficking, are hardly motivated by the intention to kill but by the intention to make profit. As Rick Lines analysed:

While the use of illegal drugs may potentially have harmful effects for the user, including death, most people who ingest a dose of illegal drugs suffer no significant ill-effects at all and certainly do not die from the experience. Whether from the perspective of a low-level drug dealer or a sophisticated international criminal enterprise, killing one’s customers is bad for business. It is difficult therefore to make a reasonable case that the use, sale or trafficking of narcotics is intended to have a lethal outcome.237

However, not all states hold the same understanding. For instance, the Government of Indonesia argues that:

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Whereas criminal acts related to narcotics and psychotropic drugs (narcotics and dangerous substances) are crimes against humanity which is aimed at killing and destroying human beings slowly but surely, so that such crimes can be categorized as serious crimes. Therefore, it is appropriate if the perpetrators shall be subject to severe punishments including capital punishment.238

While the interpretation of the expression of the “most serious crimes” in an exclusive manner still leaves room for some states to argue that the drug related offences cause grave consequences, to move the discussion a little bit further, one may come to the conclusion that all offences other than murder fall outside the scope of the “most serious crimes”. This is a view that has been confirmed by the Human Rights Committee for whom only murder has not raised concern in relation to the provision on the “most serious crimes”.239 The UN Secretary-General has also indicated that the application of the death penalty to offences that are not murder raises concern.240

Nonetheless some retentionist jurisdictions draw the opposite conclusion. While the definition of drug related offences as one of the “most serious crimes” is untenable, the retentionist states defend themselves by claiming that drug related crimes are to be equal to or even more heinous than murder. For instance, the Indian High Court of Judicature at Bombay stated that:

There is no reason to doubt that the offences relating to narcotic drug or psychotropic substances are more heinous than culpable homicide. For, the latter

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affects only an individual, while the former affects and leaves its deleterious
effect on the society, besides crippling the economy of the nation as well. 241

Similarly, Singapore’s Court of Appeal believed that drug traffickers, compared
to murderers, are more deserving of the mandatory death penalty. The court held
the view that even if the application of the mandatory death penalty to murder
amounts to inhuman punishment, it shall not be so seen in the case of drug
trafficking. 242 Given that it is at least debatable whether drug related offences are
intended to kill and have lethal consequences, to argue that drug crimes are on a
par with murder is somewhat strained. It creates a myth that drug offenders are
more deserving of execution than murderers.

3.3.2.1.2 “other extremely grave consequences” vs. genocide, crimes against
humanity or war crimes and the crime of aggression

On the question of whether drug related crimes fall into the ambit of “most
serious crimes”, it may be useful to compare drug crimes with other crimes that
are recognised as serious crimes internationally, such as genocide, crimes against
humanity or war crimes and the crime of aggression. Despite the fact that the
International Criminal Court has jurisdiction over these very serious crimes, the
Rome Statute is clear that the death penalty is not available as a punishment that
the Court is permitted to impose. 243 Also, the International Criminal Tribunal for
the Former Yugoslavia stipulates that the death penalty is not an option, even for
the most heinous crimes known to civilization, including genocide. 244 Even
though some convicted persons were executed for war crimes after the

241 Indian Harm Reduction Network v. Union of India, High Court of Judicature at Bombay in its
criminal jurisdiction under Article 226 of the Constitution of India, criminal writ e petition no.

242 Yong Vui Kong v. Public Prosecutor, submissions on behalf of the appellant, criminal appeal
no. 13 of 2008 and criminal motion no. 7 of 2010, para. 49.

243 For further understanding of the issue, comprehensive analysis of the drafting background of
the issue has been provided by Professor William A. Schabas. See William A. Schabas, The

244 Article 24, The Statute of the International Criminal Tribunal for the Former Yugoslavia,
adopted 25 May 1993 by Resolution 827.
Nuremberg and Tokyo trials, under the fourth Geneva Convention, the only crimes committed by civilians that may attract the death penalty are: espionage, serious crimes of sabotage of military installations, and intentional murder.

Drug related offences are not on a par with crimes such as genocide, crimes against humanity or war crimes and the crime of aggression. These crimes are regarded as serious crimes due to their heinous nature, raising concern among international community. In this regard, while the most serious crimes such as genocide and war crimes have been of concern “to the international community as a whole”, crimes like drug trafficking “compel some international dimension” but are not “international” crimes in the same sense. As Patrick Robinson has stated, “despite universal concern about drug trafficking and drug abuse… there can be little doubt that… [drug related offences] are not [international] crimes under customary international law”. Others believe “drug offences neither present a threat to world peace nor do they ‘shock the conscience’ of the world community”. Thus, regardless of their international impact, drug related offences do not measure up to the standard of the crimes prosecuted by international criminal courts and tribunals. In this regard, under the common understanding of society and the prevailing standards of international law, drug related offences do not evidence the same degree of atrocity as genocide or war crimes. Pursuant to this understanding, if the

245 The death penalty for war crimes was authorized by the Charter of the International Military Tribunal for Nuremberg court. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Article16, 4 BEVANS 20, as amended, Article16, 4 BEVANS 27.
246 Article 68 (2), Geneva Convention Relative to the Protection of Civilians, August 12, 1949.
249 Preamble, Rome Statue of the International Criminal Court.
international community reached an agreement that the death penalty shall not be imposed on crimes such as genocide, then how can one argue that drug offenders are deserving of capital punishment?

In short, despite the fact that drug related crimes such as drug trafficking have been considered as “international criminal activity” that “demands urgent attention and the highest priority” under international drug control law, it would be too superficial to take that as the grounds for harsh punishment such as the death penalty. First of all, as identified above, “international criminal activity” does not automatically mean international crimes such as those under the jurisdiction of the international criminal court. Secondly, as discussed in an earlier part of this chapter, the purpose of international drugs control is “to improve international co-operation in the suppression of illicit traffic” and “so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension”. In this respect, the seriousness of the drug related offences acknowledged among the international community is to raise international attention and strengthen cooperation rather than elevating it to the same degree as the “most serious crimes” to which the death penalty may be imposed. To conclude, it stands to reason that drug offences as one of the “most serious crimes” cannot withstand the scrutiny of rigorous examination. In other words, drug related offences are hardly falling into the ambit of the “most serious crimes” required under article 6(2) of the International Covenant on Civil and Political Rights.

3.3.2.2 UN Position

Strong positions have been taken by UN bodies that drug related offences shall not attract capital punishment. For example, the UN Human Rights Committee has expressed deep concern for countries that have capital drug law and practice. In its 2005 Concluding Observations on Thailand the Committee

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253 Preamble, 1988 Convention.
254 Preamble, 1988 Convention.
255 Article 2, 1988 Convention.
256 UN Doc. CCPR/CO/69/KWT, para. 13.
concerned that “the death penalty is not restricted to the ‘most serious crimes’ within the meaning of article 6, paragraph 2, and is applicable to drug trafficking”. The UN High Commissioner for Human Rights has also paid attention to the issue. In March 2009, the High Commissioner in conjunction with the Commission on Narcotic Drugs High-level Meeting noted that:

> the application of the death penalty to those convicted solely of drug-related offences raises serious human rights concerns, not the least of which is whether or not these offences can be said to fall within the category of “most serious crimes” for which the death penalty may be sought in conformity with the International Covenant on Civil and Political Rights.  

The UN Special Rapporteurs are also of the opinion that the death penalty shall be strictly applied to only the “most serious crimes”, among which drug related crimes are not included. For example, the former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye has said that “[T]he death penalty should be eliminated for crimes such as economic crimes and drug-related offences”. The view has been affirmed by Mr. Philip Alston, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in which drug related offences were believed to “fall outside the scope of the ‘most serious crimes’ for which the death penalty may be imposed”.

The United Nations drug control bodies, silent for a long time on the issue, most recently also expressed the support of the abolition and against the application of the death penalty for drug related offences. In a paper presented in 2008 to the Commission on Narcotic Drugs and the Commission on Crime Prevention and Criminal Justice, the Executive Director of the United Nations Office on Drugs and Crime condemned the use of capital punishment for drug criminals. Again,
in a 2010 report, the United Nations Office on Drugs and Crime (UNODC) acknowledged that:

[a]s an entity of the United Nations system, UNODC advocates the abolition of the death penalty and calls upon Member States to follow international standards concerning prohibition of the death penalty for offenses of a drug-related or purely economic nature.262

The International Narcotics Control Board, the treaty body established to oversee implementation of the drug control treaties was ambiguous with regard to the death penalty issue for a long time. For example, in its 2003 Annual Report, the Board states that:

Capital punishment is neither encouraged nor prohibited by the international drug control conventions, which do not refer to it under provisions relating to penalties. Under the United Nations standards and norms in criminal justice, States are encouraged to avoid using the death penalty.263

Most recently, however, the Board’s position became clearer on the issue as it openly announced its encouragement for the abolition of the death penalty for drug related offences. As reported on 5 March 2014, Raymond Yans, President of the International Narcotics Control Board stated that “Member states are encouraged to consider abolishing the death penalty for drug-related offences”.264

Still, no matter how the argument has been fashioned, the ambiguity of the expression “most serious crimes” remains unsettling and acts as a barrier to reaching a conclusive agreement on whether drug related offences are permissible grounds for imposing the death penalty under international human rights law. In other words, there may still be room left for argument that the death penalty is legitimately applicable to drug crimes. To this extent, the

264 UN Doc. UNIS/NAR/1199.
requirement to restrict the application of the death penalty with the view to abolishing it completely may lead the discussion a little bit further.

3.3.3  Restriction of the Application with a View to Abolition

While the restriction of the death penalty to the “most serious crimes” is permitted under international human rights law, a view to abolition is also required. In this respect, the Human Rights Committee in its General Comment 6 to article 6 of the International Covenant on Civil and Political Rights provides detailed interpretation. It reads:

…[S]tates parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable.265

In addition, the United Nations Commission on Human Rights approved Resolution 2005/59 on the question of the death penalty in 2005, which called for all states that still maintain the death penalty to abolish it completely and, in the meantime, to establish a moratorium on executions.266 In 2007, the United Nations General Assembly passed Resolution 62/149 which called for all states that still maintain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty.267 Furthermore, four treaties aimed at the abolition of the death penalty further confirm the tendency of the international community to move towards that end.268 All four require the States parties to abolish the death penalty in its territory. To this extent, the international understanding clearly suggests that the death penalty shall be applied in the

265 UN Doc. HRI/GEN/1/Rev.3, Part I, General comment 6, para. 6.
267 UN Doc. A/ RES/62/149.
268 The four treaties are the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Protocol No. 6 and Protocol No. 13 to the European Convention on Human Rights.
strictest way with the view to abolition. As Professor William A. Schabas believes: “abolition is more than just a fact that conditions the application of paragraph 2, it is also a goal of the Covenant”. 269

All in all, based upon the above assessment of the international instruments as well as the interpretation given by those UN bodies, human rights monitors and scholars, imposing the death penalty for drug related offences is questionable both under international drug control law and human rights norms. However, as Professor William A. Schabas notes, “the problem is not with the existence of a norm but rather with the varying definitions that States provide for it”. 270

3.4 States’ Interpretation and Application

Regardless of the international law discussed above and the position held by the international community, many retentionist countries continue to argue that drug related offences can attract the death penalty. The argument has been made that the death penalty for drug related offences is consistent with international law and compatible with states’ constitutions. 271 The belief has also been held that domestic law can override international law on the matter, or alternatively, that international drug control laws are considered to prevail over international human rights law. Such arguments are commonly presented in several jurisdictions where capital drug law is enacted and practiced.

With regard to the application of international law, for instance, the Indian High Court of Judicature at Bombay recognised international human rights law, namely article 6(2) of the International Covenant on Civil and Political Rights. However, the Court held the view that the Convention itself “cannot be the governing law”. 272 In this connection, the Court came to the conclusion that the

Indian national drugs legislation, namely the *Narcotic Drugs and Psychotropic Substances Act 1985* which imposes the death penalty on drug related offences is constitutional and cannot be circumscribed by international law. The Court held that:

> [f]or International Conventions and Treaties to be recognized as law, overriding any conflicting domestic law, Parliament has to legislate under Article 253 of the Constitution. The municipal law of India will always prevail over International Conventions in the case of any conflict, if there is no overriding law enacted by Parliament under Article 253. In other words, the enacted laws by Parliament can, in no way, be circumscribed by the International Conventions or Treaties.273

While states obtain freedom in regard to domestic legislation, where there is a conflict between national law and international human rights law, states may not simply free themselves from the obligation of respecting and protecting individuals’ rights by just claiming that domestic law prevails over international law. Particularly, India acceded to the International Covenant on Civil and Political Rights in 1979. Therefore, to simply claim that the domestic law of India will always prevail over international law in case of any conflict is irresponsible and problematic. In short, as Mr.Bacre Waly Ndiaye, former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated: “while Governments have the right to enact penal laws, these laws must conform to basic principles of international human rights law”.274

Unlike India, some jurisdictions do not deny the applicability of international law, but consider that the international drug control laws prevail over international human rights law. For instance, the Indonesian Supreme Court held the view that the death penalty for drug related offences was justified under the international drug control conventions and the drug control conventions was a superior source when it came to examine the domestic drug legislation. As the Court argued:

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[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 [drug control] Convention. ... The consequences of Indonesia’s participation in the Narcotic Drugs and Psychotropic Substances Convention 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…275

While the question of whether international drug control conventions are superior to international human rights law is questionable, the issue that is closely related to this study is where there is a conflict between drug control and human rights protection, will authorities automatically take the drug control mandate as their priority? In other words, is drug control considered more important than human rights protection? If this is the case, then, not only the right to life in the context of drug control is in jeopardy, but many other rights will also be jeopardised easily by reason of drug control law having “a higher degree of binding force”. For example, states might determine that the guarantees of a right to a fair trial have to be relaxed in pursuit of the drug control goals, and this is clearly problematic from a human rights perspective.

In countries where international human rights law has been considered, the manner of interpretation and the application of the law are problematic and controversial. For instance, regardless of the norms that shall be applied, the Singaporean government choose simply to equate the content of the country’s drug legislation to the notion of the “most serious crimes” as prescribed under article 6(2) of the International Covenant on Civil and Political Rights. 276 Controversially, however, while the Singaporean government referred to international law to justify the imposition of the death penalty, the country’s Court of Appeal rejected the applicability of the international norms enshrined in the International Covenant on Civil and Political Rights in a drug capital punishment case. 277 Careful to avoid proving that the death penalty for drug

277 Yong Vui Kong v. Public Prosecutor, submissions on behalf of the appellant, criminal appeal no. 13 of 2008 and criminal motion no. 7 of 2010.
related offence is incompatible with international human rights law, the Court also repudiated the argument that there is customary international law that prevents the imposition of the death penalty on drug crimes. As the Singaporean Court of Appeal in the case *Yong Vui Kong v. Public Prosecutor* held:

> a significant number of States which impose, both in law and in practice, the MDP [mandatory death penalty] for drug-related and other serious offences. As a result, although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL [customary international law]. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States ... The latter, together with *opinion juris*, is what is needed for the rule in question to become a rule of CIL.278

In this connection, even countries like Singapore, which is not a State party to the International Covenant on Civil and Political Rights, may seek to avoid considering international human rights obligations when imposing the death penalty for drug criminals denying the existence of any customary international law obligation circumscribing the practice.279

In short, the above illustrated interpretation and application of the international norms by domestic courts are controversial in many respects. Particularly, national governments and domestic courts have not been squarely faced with the key task of identifying whether drug related crimes are to be considered amongst the “most serious crimes” that may attract the death penalty as an exception to the right to life under international law. In light of the discussion above, it is posited that drug related offences hardly fall within this ambit. As a result, domestic courts may find it increasingly difficult to maintain their state’s drug laws which contravene international human rights norms. What is more, in cases

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278 *Yong Vui Kong v. Public Prosecutor*, submissions on behalf of the appellant, criminal appeal no. 13 of 2008 and criminal motion no. 7 of 2010, para. 96.

279 This study will not go down to this path, for a detailed discussion in this connection, see Yvonne McDermott, *Yong Vui Kong V. Public Prosecutor and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?*, *International Journal on Human Rights and Drug Policy*, vol. 1 (2010), pps. 35-52.
where the legislation itself causes a violation of rights, it will be challenged on that basis.\textsuperscript{280}

3.5 \textbf{Right to Life: the Challenge and Responses}

The death penalty is different from all other penalties in the fact that it concerns the most fundamental of all human rights, the right to life. The right to life is protected under international and regional human rights law as well as by states’ constitutions.\textsuperscript{281} State parties to international human rights treaties have an obligation to respect and protect the right to life, and it has undoubtedly been elevated to the status of a customary international law norm through state practice and \textit{opinion juris}. In this regard, challenges to capital drug laws as they interfere with the protection of the right to life have been brought in front of courts in some jurisdictions.

3.5.1 \textbf{The Indonesian Case}

Indonesia acceded to the International Covenant on Civil and Political Rights on 23 February 2006 and has not yet ratified the second optional protocol of the Covenant. With regard to its fulfilment of treaty obligation, the Indonesian Government stated in its 2012 report to the Human Rights Committee that the

\textsuperscript{280} Professor William A. Schabas hold the view that capital punishment is “a violation of the right to life, not merely the limitation or exception of the right to life”. See Constitutional Court of Indonesia, decision no. 2-3/PUU-V/2007, 30 October 2007, at: 3.12.4.

\textsuperscript{281} Article 3, Universal Declaration of Human Rights; Article 6, International Covenant on Civil and Political Rights; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (1989), This optional protocol urges states to take all necessary measures to abolish the death penalty and stipulates that no reservation is allowed except for the application of the death penalty for most serious crimes of a military nature committed during wartime; article 4, African Charter on Human and People’s Rights; article 2 and article 15, European Convention on Human Rights; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedom on the abolition of the death penalty concerning the abolition of the death penalty (1983) : States parties to the protocol shall abolish the death penalty. It allows them to retain this penalty for certain situations in war time; article 4, American Convention on Human Rights,
right to life is protected by various pieces of domestic legislation. However, the government did not address the issue with regard to the application of the death penalty for drug offences. In July 2013, the UN Human Rights Committee expressed its concern that Indonesia “suspended its de facto moratorium on the death penalty and has resumed executions”. The Committee reiterated that death sentences for drug crimes did not meet the threshold of the “most serious crimes” set out under article 6 of the International Covenant on Civil and Political Rights and recommended that Indonesia “review its legislation to ensure that crimes involving narcotics are not amenable to the death penalty”. Not only under international human rights law, is the right to life also protected by Indonesia’s Constitution. For instance, article 28A of the Indonesian Constitution states that: “every person shall have the right to live and to defend his/her life and existence” and article 28I stipulates that “the right to life...cannot be limited under any circumstances”. In addition, article 4 of Act No. 39 of 1999 on human rights also guarantees that right to life is a non-derogable right under any circumstances.

Nevertheless, Indonesian legislation still applies capital punishment for drug related offences. For example, under Indonesian Law No. 22/1997 on Drugs, capital punishment is prescribed for drug related criminal activities such as the production, import, export, provision, or distribution of narcotic drugs. One of the main justifications provided by the legislator is that Indonesia is obliged

282 Republic of Indonesia, Initial Report of Indonesia, 19 January 2012, UN Doc. CCPR/C/IDN/1, para. 76.
283 UN Doc. CCPR/C/IND/CO/1, para. 10.
284 UN Doc. CCPR/C/IND/CO/1, para. 10.
287 Article 4, Republic of Indonesia Legislation, Number 39 of 1999 concerning human rights.
288 Article 80 paragraph (1), paragraph (2), paragraph (3); Article 81 paragraph (3); Article 82 paragraph (1), paragraph (2), and paragraph (3), Article 83, Indonesian Law No. 22/1997 on Drugs.
under international drug control conventions to adopt proper drug control measures to combat illicit drugs, and those proper measures include the death penalty. It should be noted as a State party, Indonesia indeed has an obligation to adopt measures that can efficiently solve drug related problems. While these measures include adopting penal law to punish those who commit crimes such as drug trafficking, the death penalty is not prescribed as one of the drug control measures under the international drug control conventions, as discussed in detail earlier in this chapter.

The obligation of human rights protection and the capital drug legislation have created a tension in Indonesia. The tension between protection of the right to life and the capital punishment for drug crimes was sharply illustrated in an Indonesia Constitutional Court case where both constitutionality and international human rights law were examined. In 2007, a number of prisoners on death row for drug offences in Indonesia took a constitutional challenge to the legality of capital punishment in that context. Later on, the Constitutional Court of Indonesia issued a decision concerning a judicial review of whether Law No. 22 of 1997 on Narcotics which imposed the death penalty on drug related offences against the 1945 Constitution of Indonesia. With respect to the issue of whether Indonesia failed to fulfil its treaty obligations under article 6 of the International Covenant on Civil and Political Rights by imposing the death penalty under its Drugs law, the Indonesian Constitutional Court reached the conclusion that “there is no such international law obligations under the international covenant being violated by Indonesia by applying capital punishment to the crimes regulated” in drug control law. The main argument held by the Court was that the drug crimes that may attract the death penalty under Indonesian law fall within the ambit of the “most serious crimes” in article

290 Indonesia has become a State party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 through its ratification by Law Number 7 Year 1997.
6(2) of the International Covenant on Civil and Political Rights. Not to judge how the analysis has been presented, the fact is the court largely drew their conclusions by illustrating that drug crimes are considered under international drug control law as “serious crimes”; therefore, they met the category of crimes in which the death penalty is permitted in international human rights law, through article 6(2) of International Covenant on Civil and Political Rights. This is an argument that cannot stand up to robust scrutiny.

First of all, despite the fact that drug crimes are considered to “pose a serious threat to the health and welfare of human beings and adversarial affect the economic, cultural and political foundation of society” under international drug control law; it is something of a stretch to consider drug crimes as being one of the “most serious crimes” on that basis. Using the Court’s justification, one could easily determine that any crime that poses adverse societal consequences falls within that definition. Indeed, it would be difficult to point to any crime that does not bring adverse consequences to the welfare of fellow citizens and society as a whole – that is the nature of criminal jurisdiction. It is also true that different states are driven by differing theories on crime and punishment. However, the freedom of States parties to set the scope for the imposition of the death penalty is not unlimited. In other words, to interpret the concept of the “most serious crimes” in a subjective way is not viable; relying upon governments and individuals’ understanding of what is serious would “render the relevant international law standard meaningless”. Second, even if such an argument may be fashioned for convenience, whether “serious drug crimes” referred to in the international drug control convention are identical to the range of crimes that may attract the death penalty under Indonesian drug law is a question that remained unanswered in the judgment. Notwithstanding the fact that, as argued above, the international drug control conventions do not prescribe the death penalty for serious drug offences, the Court failed to prove that offences such as

294 Preamble, 1988 Convention.
the ‘provision’ of narcotic drugs fall squarely within the remit of the international drug control law.

3.5.2 Constitutionality Challenge

While the Indonesian Constitutional Court claimed that the imposition of capital punishment was not contrary to its international human rights obligations, it also came to the conclusion that the right to life upheld in its constitution did not apply to capital punishment.\textsuperscript{296} The court reached this point by reasoning that none of the human rights contained in the 1945 Constitution were absolute, including the provision on the protection of the right to life.\textsuperscript{297} Therefore, capital punishment is not against Indonesia’s constitution since it was applied in accordance with the law. This is a view that was also shared by legislators in Indonesia. A statement provided by The People’s Legislative Assembly (DPR) of the Republic of Indonesia argued that so long as the Indonesian Criminal Code retained the death penalty as one of the punishments available to the judiciary, then it was still legal to apply it.\textsuperscript{298} As regards drug crimes, the legislature posited that as long as they had been categorised as serious crimes in the Indonesian legal system, they were appropriate for the application of capital punishment.\textsuperscript{299}

The author would like to note at this point that it is not the main focus of this study to examine the justifications of any particular domestic legislation for the continual application of the death penalty to drug offences. Rather, in this context, it is the judicial approach to the interplay between the death penalty for drug offences and international human rights norms that remain under question. Also, in those countries that retain capital drug law, a crucial question arises before the courts where capital punishment for drug related crimes is alleged to be contrary to their own constitutions that protect the right to life. In this regard, it is

\textsuperscript{296} Constitutional Court of Indonesia, decision no. 2-3/PUU-V/2007, 30 October 2007.

\textsuperscript{297} Constitutional Court of Indonesia, decision no. 2-3/PUU-V/2007, 30 October 2007, p. 80.

\textsuperscript{298} Constitutional Court of Indonesia, decision no. 2-3/PUU-V/2007, 30 October 2007, at 3.13, p. 22.

\textsuperscript{299} Constitutional Court of Indonesia, decision no. 2-3/PUU-V/2007, 30 October 2007, at 3.13, p. 22.
noteworthy that the constitutionality of capital drug law has been challenged in respect of the right to life in other states, as well as Indonesia.

Similar constitutionality challenges have also been filed in India. In the case Indian Harm Reduction Network (IHRN) v. Union of India (UOI), for instance, the petitioners argued that applying the mandatory death penalty for drug related crimes was excessive, unscientific and inhumane and it violated the right to life which is protected under article 21 of the Indian Constitution. In its judgment, the Indian High Court of Judicature at Bombay held that the death penalty was not impermissible in given contexts, and that it was compatible with the Constitution. Later, in 16 June 2011, a division bench of Justices A.M Khanwilkar and A.P Bhangale declared Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), which imposes a mandatory death sentence for drug trafficking, to be unconstitutional. However, the declaration has not lead to the removal of the mandatory capital punishment for drug offences from Indian drug legislation, but only makes the Sentencing Court not obliged to impose the death penalty where a person convicted under Section 31A of the Narcotic Drugs and Psychotropic Substances Act, 1985 is a repeat offender.

In Singapore, the constitutionality of the mandatory death penalty for drug offences was challenged as well. In the Yong Vui Kong case, the appellant held

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300 Indian harm reduction network (IHRN) v. Union of India (UOI), 2012 Bom CR (CRI) 121. The Indian Harm Reduction Network petition, (petition no. 1784 of 2010) was heard and decided together with petition no. 1970 of 2010 filed by Gulam Mohammed Malik, a repeat offender who had been sentenced to death for possession of hashish. The petitioners also believe that neither of the offences prescribed in the under India drug legislation involves “intentionally taking of life of any person” nor “directly or indirectly result in killing or lethal consequences”. Therefore, it is not the “most serious offence” that may attract the death penalty. See Indian harm reduction network (IHRN) v. Union of India (UOI), 2012 Bom CR (CRI) 121, para. 16.


302 Article 9(1) of the Constitution of the Republic of Singapore states “No person shall be deprived of his life or personal liberty save in accordance with law”. Considering the expression “save in accordance with law”, this provision has been taken as the legal ground that precludes
the view that the mandatory death penalty was an inhuman punishment and therefore violated the right to life which was protected under article 9(1) of the Singaporean Constitution. In response, Singapore’s Court of Appeal found the mandatory death penalty to not be contrary to the right to life. In light of Singapore’s constitutional history, article 9(1) of the Singaporean Constitutions could not be understood as “impliedly including a prohibition against inhuman punishment”. In addition, given the fact that Singapore was not a party to the International Covenant on Civil and Political Rights or to the Second Optional Protocol thereto, the Court believed that the reference to “law” in article 9(1) did not include any customary international law that prohibits inhuman punishment. The Court further pointed out that even if customary international law had been incorporated into Singaporean legislation, prohibiting inhuman punishment did not specifically mean a prohibition of the mandatory death penalty. It is noted that Yong Vui Kong was not the first challenge against the mandatory nature of the death penalty for drug offences in Singapore. Earlier challenges were raised in 1980 before the Privy Council in Ong ah Chuan v. Public Prosecutor and in 2004 before the Court of Appeal in Nguyen Tuong Van v. Public Prosecutor. In both cases, contentions that the mandatory death penalty for drug offences was unconstitutional were dismissed.

3.6 Conclusion

Even in the context of drug control, the right to life shall not simply yield to the drug control mandate. The right to life is protected under many international and regional instruments as well as states’ constitutions. Capital punishment as an exception to the right to life must be interpreted restrictively and carried out in a most strict manner. The argument that the death penalty can be imposed for challenging the constitutionality of the death penalty per se; see observations of the Privy Council in Ong ah Chuan v. Public Prosecutor (1981) AC648.

304 Yong Vui Kong v. Public Prosecutor (2010) SGCA20, para. 120.
306 Nguyen Tuong Van v. Public Prosecutor (2005) 1 SLR (R) 103.
drug related offences suggests a wide interpretation of the nature of the offences and goes against the spirit of article 6(2) of the International Covenant on Civil and Political Rights. Article 6(2) of the Covenant is addressed to those countries that still obtain capital punishment, and rather than authorizing of the imposition of the death penalty in general, it states that it shall be limited to those “most serious crimes”. 308 Drug related offences are less likely to fall within this ambit. At least in some of the countries discussed above, there are not always sound reasons applied to justify derogating from this human rights norm. In addition, the conclusion drawn from the study of the international drug control conventions also shows that the death penalty is not prescribed for drug related offences under international drug control law. Therefore, the argument that the implementation of capital punishment to drug related offences fulfils states’ drug control treaty obligation is groundless.

It is noteworthy that the emphasis on the human rights perspective in the question of the death penalty has been to the advantage of the international movement towards abolition generally. 309 In this connection, while the restrictive application of the death penalty to the “most serious crimes” has not completely ruled out the possibility of capital drug law, a view to abolition may lead the way further. It will not be easy to predict, however, when exactly the retentionist countries will abolish the death penalty for drug related offences. What one can conclude is that there is a global trend of practice to reduce and restrict the application of the death penalty, and where it is retained, to apply to such cases higher standards of due process than is given to other trials. 310 To this extent, the right to life may have been protected, in a certain sense, within those jurisdictions where drug criminals may still face the death penalty.

310 For example, since 2007, all the death penalty cases have to be conducted by the Supreme People’s Court of the People’s Republic of China.
4 Chapter 4: Drug Treatment toward Drug Users

4.1 Background

The use of illicit drugs is problematic all over the world. According to the United Nations Office on Drugs and Crime, between 167 and 315 million people aged 15–64 were estimated to have used an illicit substance in 2011. This corresponds to between 3.6 and 6.9 per cent of the world adult population.\(^{311}\) It has been observed that “the scourge of drug abuse continues to spread and has reached epidemic proportions in many parts of the world”.\(^{312}\) There are a number of harms associated with drug use, for both the individual and society. For example, the injection of drugs has led to the spread of blood-borne viruses, such as HIV and Hepatitis C. Studies show that 30% of HIV infections outside of sub-Saharan Africa and up to 80% of cases in some countries in Eastern Europe and central Asia result from injecting drug use.\(^{313}\) In addition to being a public health threat, illicit drug consumption can also cause adverse economic consequences. These include the direct cost of health care services for drug users, and indirect costs such as counter-productivity owing to unemployment or the premature mortality of drug users.\(^{314}\) In light of these consequences, drug use problems have been described in the international drug control Convention as “pos[ing] a serious threat to the health and welfare of human beings and adversely affect[ing] the economic and political foundations of society”.\(^{315}\)

Some argue that because drug users choose to use drugs, they should take responsibility for the consequences of their choice and conduct. For example, the Prime Minister of the United Kingdom, David Cameron, once stated:

> We talk about people being at risk of poverty, or social exclusion: it’s as if these things—obesity, alcohol abuse, drug addiction—are purely external events like

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\(^{312}\) UN Doc. A/RES/36/168.


\(^{315}\) Preamble, 1988 Convention.
a plague or bad weather. Of course, circumstances—where you are born, your neighbourhood, your school and the choices your parents make—have a huge impact. *But social problems are often the consequence of the choices people make.*

This approach is not only evident in political circles; the laying of blame on drug users is also apparent in the responses of more objective sources. For instance, during the drafting of the 1961 Single Convention on Narcotic Drugs, the Indian delegation stated in debates over the provision of treatment for drug addicts that:

> In order to achieve its ultimate objective of preventing the social and economic incapacitation of individuals by the pernicious drug habit, the Convention should set out the measures that should be taken, first, *to isolate the addict so that he would not corrupt others and, secondly, to provide for the cure of his addiction so that he might again become a useful member of society.*

It is no easy task to argue that drug users should not be the ones held responsible for their own illicit drug use habit and the harms caused to society by such activity. However, the blame attitude, which is based solely on the responsibility of the drug user, views the issue as being far more simplified than it actually is. Downplaying the complexity of drug use or neglecting other diverse social factors that contribute to the problem of drug use runs the risk of marginalizing drug users. This outcome is inconsistent with the fundamental human rights principle of non-discrimination.

The other attitude toward drug users, in contrast to blame, is sympathy. Drug users are seen as the victims of drugs. Such claims are often raised within the human rights discourses where rights protection, rather than drug control, is the focus. Arguments have been made that special attention should be given to this

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316 Francis Elliott, Peter Riddell, Lorraine Davidson & Sam Coates, David Cameron Tells the Fat and the Poor: Take Responsibility, *Times* (UK), 8 July 2008. (my emphasis)


318 UN Doc. A/CONF.34/24, p.106. (my emphasis)
group of people with regard to rights protection. Some even go further by claiming that there is a right to use drugs. Pursuant to this understanding, approaches that interfere with people who use drugs have been viewed as a rights violation. While the sympathy attitude toward drug users has some support, it goes too far in that end. It is true that external factors, such as where an individual is born, the effects of living in a disadvantaged neighborhood, the lost chance of an education at an early stage of life, poverty or problematic parenting, may also contribute to one’s drug use. However, this approach is blind to the fact that drug users are the ones who use drugs; and that in some cases their drug use results in social harms that impact negatively on the rights of other social members. Therefore, certain control measures are required. Denying the necessity of any drug control is unrealistic and irresponsible.

Nevertheless, while societal attitudes toward drug users can be judgmental, any infringement of their rights shall not find its strength from such attitudes. Neither blame nor sympathetic attitudes toward drug users will play a constructive role with regard to human rights protection in the context of drug treatment. There are international drug control conventions and well established international human rights norms that should be applied. These will be studied in the following parts of this chapter with emphasis being placed on the examination of the compatibility of selected drug treatment policies with applicable human rights principles.


321 Douglas N. Husak, Drugs and Rights, New York, Cambridge University Press, 1992. Douglas N. Husak claims there is a moral right of adults who want to use drugs for pleasure. States’ legislation against such use is incompatible with the moral rights.
4.1.1 Classification

Before carrying out this exercise, it is necessary to distinguish different groups of people who may be subjected to drug treatment and to clarify the different means of drug treatments. It is evident that people who use drugs are referred to by different terms, including but not limited to, drug addict, drug dependent, drug abuser, drug user, etc. In addition, there are several types of drug treatments. These include, voluntary or compulsory, community based or institutional based, those ordered by the criminal justice system or administrative proceedings, sanction or punishment oriented treatments or medical based methods. In the context of the debate about drug treatment for drug users, the type of drug treatment and the different groups of people that are subject to the treatment are often confused. For instance, Saul Takahashi challenges those who claim that compulsory treatment for drug users is a violation of human rights by offering evidence of the drug court module.\(^{322}\) Others arguing that there is a human rights violation in drug treatment have referred to treatment mandated by an authority without a court order or otherwise arbitrarily applied.\(^{323}\) The examples as such are not only confusing, but also hamper the possibility to reach meaningful research conclusions in this area. Therefore, a classification is required.

While there are strict distinctions according to medical standards and varied classification and application in different jurisdictions, unless specified, anyone who uses drugs will be referred to as drug users in the following study. In this regard, the term “drug users” encompasses at least three different groups. One group consists of people who use drugs but are not classified as addicts according to medical criteria. The second group is comprised of those who are addicted to a certain type of drug as diagnosed. The majority of the second group would need a certain kind of treatment to recover from their addiction. While there are complex medical discussions in this regard, a simple clarification provided by Anand Grover, United Nations Special Rapporteur on the right of


everyone to the enjoyment of the highest attainable standard of physical and mental health reads: “drug dependence is a chronic, relapsing disorder, which should be medically treated using a bio-psychosocial approach. Drug use, on the other hand, is neither a medical condition, nor does it necessarily lead to drug dependence.” 324 These two groups of people consume drugs but do not commit crimes; either related to drugs or other types of offences. The third group of people consists of those who committed crimes and also have problems associated with their drug use. They may require a certain kind of drug treatment depending on their drug use problems according to a medical diagnosis. In such cases, the treatment may be ordered as alternative or in addition to given sanctions.

It has to be admitted that no matter how careful the distinctions are, there will still be overlaps. This is partly because the relevant international documents do not provide a clear classification and definition. For instance, in the three international drug control conventions, the terms used to describe people who use drugs include: drug abuser, drug user, drug addict, drug dependent people and other terms. 325 In addition, translations from different languages may hinder a unified definition or terminology. In order to avoid any confusion in the following discussion, explanation and clarification will be provided to the extent possible.

4.2 Drug Treatment under International Drug Control Law

Drug treatment is prescribed as an alternative or in addition to conviction or punishment for drug offenders under the penalty provisions in the international drug control conventions. As article 36(1)(b) of the 1961 Single Convention and article 22(1)(b) of the 1971 Convention stipulates: the treatment is “either as an alternative to conviction or punishment or in addition to given sanctions.

324 Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Submission to the Committee against Torture regarding drug control laws, 19 October 2012.
punishment”. The 1988 Convention distinguishes between two groups of offenders. Accordingly, for people who commit the offences prescribed under article 3(2), *inter alia*, “intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption”, treatment is an alternative or in addition to conviction or punishment. For those who commit more serious offences described under article 3(1), such as drug trafficking or manufacturing, the treatments are only prescribed as an addition to conviction or punishment.

It is noteworthy that under the 1961 Single Convention States parties *shall* ensure offenders who are “abusers of drugs” undergo “measures of treatment, education, after-care, rehabilitation and social reintegration”, while in the 1971 Convention, “Parties may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers undergo measures of treatment”. In this respect, the 1988 Convention adopts two different approaches. Accordingly, for people who committed crimes prescribed under article 3(2) of the 1988 Convention, States parties *may* provide measures for the treatment for those who have drug use problems. For offenders who committed serious drug crimes prescribed under article 3(1), such as drug trafficking, if he or she also has drug use problems, the treatment is mandatory. However, for this group of offenders, there is an exception permitted with regard to mandatory drug treatment. As article 3(4)(c) of the 1988 Convention states:

> Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties *may* provide, as alternatives to conviction or punishment,
measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.  

No matter whether international drug control law prescribes drug treatment or offers it alternatively for convicted drug users, it remained silent on the kind of treatment. The reason for this is summarised in the commentary to the 1961 Single convention:

the differing cause of addiction and the divergent conditions in different countries, as well as the possibility of scientific progress in understanding of the problem and in the methods of treatment of addiction, made it advisable not to lay down in the treaty a particular method of treatment as being valid under all conditions, in all countries and for the whole period of the operation of the Convention.

In addition, States parties are entitled to legislate freely in accordance with their “constitutional principles and the basic concepts of its legal system”. This leaves room for State parties to adopt methods that are believed to be the most suitable to the drug abuse situation in their individual countries. Due to this flexibility, the approaches toward drug users for drug treatment vary in practice. Some are questionable with regard to human rights standards.

Before unfolding the discussion, the issue of the criminalization of personal drug consumption must be addressed. It is noted that drug use alone is not a criminal activity under the international drug control laws. In other words, none of the three international drug control conventions consider drug users as automatic criminal offenders. Therefore, the penalty provisions that prescribe drug treatment for drug offenders, as illustrated above, are not applicable to drug users who are not offenders. However, drug users can be criminalised due to the possession of drugs. This is still a controversial matter both in international and

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334 Article 3(4)(c), 1988 Convention.
336 Article 3(2), 1988 Convention. Similar wording is also expressed in article 22 of the 1971 Convention and article 36 of the 1961 Single Convention.
337 Article 36 of the 1961 Single Conventions; article 22 of the 1971 Conventions and article 3 of the 1988 Conventions.
national legal frameworks. Internationally, according to the 1961 and 1971 Conventions, States parties are obliged to criminalise certain types of drug related activities which includes drug possession.338 However, whether such possession also refers to possession for personal use is unclear.339 Even article 3(2) of the 1988 Convention clearly states that the possession of drugs for personal consumption may be necessary to establish as a criminal offence under domestic law.340 But, the same provision also provides that such activities may be criminalised when “committed intentionally” and “contrary to the provision of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention” and subject to States parties’ “constitutional principles and the basic concepts of its legal system”.341 Therefore, the 1988 Convention does not lead the issue to a clearer end but instead, brings it back to the interpretation of the provisions in the 1961 Conventions.342 Nationally, the practices are not unified. That is to say, in some jurisdictions possession for personal use is criminalised and in others it is not.343 It is also evident that there is a trend towards decriminalisation of personal drug possession.344 Nevertheless, these discussions are more related to

339 See Commentary on the 1961 Single Convention on Narcotic Drugs, comments on article 36; paragraphs 17-21 of the comments on article 4 (1); Commentary of the 1971 Convention, comments on article 22. Also see: Annual Report of International Narcotic Control Board, 1992, para. 15.
340 Article 3(2), 1988 Convention.
341 Article 3(2), 1988 Convention.
342 For further discussion see Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, comments on article 3, paragraph 2, pps. 78-83.
343 No worldwide legislation data is available in this regard. The European Monitoring Centre for Drugs and Drug Addiction provides comprehensive up to date data on European countries’ drug legislation. For detailed information see the Centre’s annual report.
344 For instance, there is a recent well debated case about the decriminalization of drug use in Portugal. See Caitlin Hughes and Alex Stevens, The effects of decriminalization of drug use in Portugal, the Beckley Foundation Drug Policy Programme, December 2007; Artur Domoslawski(Translated from Polish to English by Hanna Siemaszko), Open Society Foundations, Drug Policy in Portugal: The benefits of decriminalizing drug use, June 2011.
criminology and legitimacy; issues that are not the main focus of this study. Therefore, the following discussion will concentrate on identifying and analysing the human rights issues involved in the context of drug treatment toward drug users.

4.3 Drug Treatment Policies and Practices: Human Rights Concerns

No matter what kinds of drug treatment programmes are adopted by states, people who are subjected to them should not be stripped of their guaranteed rights. In practice, however, drug users’ rights are often breached in the name of, or in the course of, drug treatment in one way or another. For instance, compulsory drug treatments are carried out that challenge the right to privacy; people are detained for drug treatment in circumstances questionable with regard to the right to liberty; human rights abuses such as forced labour, rape, corporal punishment, sub-standard living environments and many other forms of ill-treatment and punishment are reported, and in many instances the right to health is not well protected or fulfilled for drug users. In short, as the United Nations Office on Drugs and Crime and the World Health Organization has noted: “large numbers of people suffering from drug dependence have no access to humane,

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345 It should be noted that there are human rights discussions with regard to criminalization of drug users. For instance, see Ban Ki-moon, Remarks on the handover of the report of the Commission on AIDS in Asia, 26 March 2008; Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, UN Doc No A/65/255, 6 August 2010, Summary, para.76; also see: Is the decriminalisation of possession of controlled substances for personal use consistent with international law?, Harm Reduction International amicus brief submitted to the Colombian Constitutional Court, 12 February 2011.

ethical and effective treatment [...], and violation of human rights and ethical principles of treatment are common’. 347

These realities demand a human rights assessment. In this regard, the following study will analyse the human rights issues involved in the context of drug treatment; the main topics addressed are: firstly, whether compulsory drug treatments are carried out in line with the principle of informed consent and other relevant rights, such as right to privacy; Secondly, in cases where drug users have been detained in the name or in the course of drug treatment, whether their detention is compatible with international human rights standards with regard to the right to liberty; thirdly, how drug users have been treated in the course of drug treatment and whether those practices violate their rights and finally, how the right to health has been respected and protected within the realm of drug control.

4.3.1 Compulsory Drug Treatment

With regard to the medical response, drug addiction is viewed as a treatable illness, in which voluntary oriented and evidence-based treatment should be provided. 348 In other words, compulsory drug treatment should be an exception. However, compulsory drug treatment of drug users is authorised in many countries. For instance, a survey undertaken by the World Health Organization shows that among 42.5% of the 147 countries that responded, 30% reported having special legislation for the compulsory treatment of drug users. 349 It is noted that, with regard to compulsory drug treatment, a distinction should be made. One type of compulsory drug treatment is ordered for people who do not have the opportunity to give informed consent. Another approach is prescribed to drug users who have to choose between treatment and penalty because he or she

347 Joint UNODC-WHO Action Programme on Drug Dependence Treatment, Scaling Up Evidence-Based Services for Drug Dependence Treatment and Care, 2009-2013 (draft), 18 November 2008, on file, p. 3.
commits a crime. The term “quasi-compulsory treatment” (QCT) has been used in some studies to describe the latter approach.\(^\text{350}\)

### 4.3.1.1 Compulsory Drug Treatment for Offenders

Compulsory drug treatment for offenders who have drug problems is a type of drug treatment usually carried out as an alternative or in addition to sanctions or punishment in many jurisdictions.\(^\text{351}\) This type of drug treatment is ordered by a court which is usually referred to as a drug court. A World Health Organization survey shows that among 147 countries, 20.5% had established drug courts regardless of the countries’ income level and legal justice systems. The highest proportion of countries with drug courts was in the Eastern Mediterranean Region (38.5%). The African (14.0%) and American (14.3%) regions had the lowest proportions of countries with drug courts.\(^\text{352}\) Besides, 52.5% of the surveyed countries have programmes that focused on diverting probable drug users from the criminal justice system to a medical treatment system.\(^\text{353}\) In the UK, for example, Drug Treatment and Testing Orders were introduced by the _Crime and Disorder Act 1998_.\(^\text{354}\) Accordingly, offenders found to have drug

\(^{350}\) For instance, Alex Stevens and others, Quasi-Compulsory Treatment of Drug Dependent Offenders: An International Literature Review, 40 *Substance Use and Misuse*, 2005. The definition of quasi-compulsory treatment in this article is: “drug users are given a choice of going to treatment or facing a penal sanction that is justified on the basis of crimes for which they have been (or may be) convicted.”

\(^{351}\) For example, in Cambodia, according to article 92 of the Cambodia Law on Control of Drugs: “A person who is charged with an offense … if upon examination it is found out that such person is addicted of poisonous substance, the court may decide to compel him/her to undertake an appropriate treatment measure in accordance with his/her health condition, during the implementation of the procedure.”


\(^{353}\) World Health Organization, *Atlas on substance use (2010)*, Resources for the prevention and treatment of substance use disorders, p.101. As noted in the report: “The reported data on presence of drug courts in countries should be interpreted with caution as the understanding of the term by nominated focal points could vary, and reported data could also reflect the presence of special procedures for offenders with drug use disorders.”

\(^{354}\) Some provisions under this subject have been modified. Ss. 61-64 repealed (25.8.2000) by 2000 c. 6, ss. 165, 168(1), Sch. 12 Pt. I (with Sch. 11 paras. 1, 2).
abuse problems may be given drug treatment orders for a specified period. The primary goal of this approach is usually claimed to be the reduction of drug addiction and prevention of drug related crimes. For instance, the Scottish government states that drug treatments prescribed under the Order are specifically aimed to: “reduce or eliminate an offender’s dependency or propensity to misuse drugs” and “achieve positive changes in the scale and frequency of drug related offending”.

It is noteworthy that under approaches such as these, offenders usually obtain the freedom to choose whether to undergo drug treatment. For instance, in the UK, according to the Powers of Criminal Courts (Sentencing) Act 2000, “[a] court shall not make a drug treatment and testing order unless the offender expresses his willingness to comply with its requirements”. Still, there are debates with regard to this point. It is argued that the choice of treatment under this approach is not voluntary and that it violates individual’s rights. For instance, the HIV/AIDS Law in Canada stated:

Drug treatment courts employ the weight of the criminal justice system to order people who use drugs to undergo treatment. The fact that participants enter treatment under the threat of incarceration, or abstain from drugs to avoid sanctions, has serious implications for the right to bodily integrity, the right to privacy and the right to equality.

Some hold different opinions, however, arguing that it is necessary to apply compulsory drug treatment. They contend that on the one hand, such an approach addresses the society’s interest that drug addicts undergo treatment and overcome their addictions; while on the other hand drug addicts usually lack the free will to

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357 Article 52 (7), Powers of Criminal Courts (Sentencing) Act 2000, 2000 c. 6 Part IV, Chapter III.
make the decision. With the realization that the drug courts do provide limited options for drug addicts some believe that “it is essential that confidentiality is guaranteed and that effective and ethical treatment is provided when individuals may have little choice but to cooperate.”

Regardless of the debates, treatment as an alternative or in addition to penal measures is permitted under international drug control law. Besides, such an approach is also recognised by the United Nations. For instance, the United Nations Office on Drugs and Crime and the World Health Organization noted in a joint paper that even though the drug court approach has been carried out as a form of coercion, the individuals subjected are believed to have the right to reject treatment and choose to undergo sanction instead. Particularly, the World Health Organization has stated that:

In situations where opioid-dependent individuals are convicted of crimes related to their opioid use, they may be offered treatment for their opioid dependence as an alternative to a penal sanction. Such treatment would not be considered compulsory unless the punishment for refusing or failing treatment were more severe than the penal sanction it replaced.

While drug treatment as an alternative to or in addition to punishment for offenders is still questionable with regard to the principle of informed consent and the right to privacy, it will not be the emphasis of the following study considering that: a) many of such treatments are undertaken within criminal justice systems where certain safeguards, whether efficient or not, are nonetheless applied; b) it is in itself a complex issue which requires access to and

361 See discussion in section 2 of this chapter. Related provisions in international drug control conventions are: Article 36, 1961 Single Convention; article 22, 1971 Convention and article 3(4), 1988 Convention.
analysis of broad legislation, which to a certain extent, especially considering the capacity of this study, cannot be well covered; c) there are already many comprehensive studies that have been undertaken on this topic. Therefore the following sections will focus on human rights issues in relation to drug treatment for drug users who are not offenders.

4.3.1.2 Informed Consent: Medical Ethic and Human Rights Requirements

Informed consent is one of the central concepts of medical ethics. The right of patients to make free decisions about their medical treatment has been codified in many key medical ethic documents. For instance, the International Code of Medical Ethics stipulates that medical professionals shall “respect a competent patient’s rights to accept or refuse treatment” and “act in the patient’s best interest when providing medical care”. The World Health Organization Amsterdam Declaration on the Promotion of Patients’ Rights in Europe (1994) requires informed consent as a prerequisite for any medical intervention. The


366 Article 3, Amsterdam Declaration on patients’ rights (1994), ICP/HLE 121.
World Medical Association Declaration on the Rights of the Patient clearly states that;

The patient has the right to self-determination, to make free decisions. [...] A mentally competent adult patient has the right to give or withhold consent to any diagnostic procedure or therapy. The patient has the right to the information necessary to make his/her decisions. The patient should understand clearly what is the purpose of any test or treatment, what the results would imply, and what would be the implications of withholding consent. 367

The principle of informed consent also invokes several human rights in the context of drug treatment. First of all, informed consent is closely tied to the protection of the right to health. 368 There are clear interpretations in this regard. For instance, the United Nations Committee on Economic, Social and Cultural Rights notes:

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms … including … the right to be free from interference, such as the right to be free from … non-consensual medical treatment and experimentation. 369

As a matter of fact, informed consent has been considered as a cornerstone of the right to health. 370 As Anand Grover, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health states: “Guaranteeing informed consent is fundamental to achieving the enjoyment of the right to health through practices, policies and research that are respectful of autonomy, self-determination and human

370 UN Doc. A/65/255, para. 38; also see UN Doc. A/64/272.
dignity.” 371 In this regard, as the Committee on Economic, Social and Cultural Rights notes, states have an obligation to refrain from “applying coercive medical treatments, unless on an exceptional basis”. 372 In other words, compulsory treatments upon individuals, except in the narrowest exceptional circumstances, run counter to a state’s obligation to respect, protect and fulfil the enjoyment of the right to health. 373

In addition, the absence of consent for medical intervention may amount to cruel, inhuman or degrading treatment and even torture. 374 For instance, according to article 7 of the International Covenant on Civil and Political Rights, “no one shall be subjected without his free consent to medical or scientific experimentation”. 375 Similar wording can be found in article 15 of the Convention on the Rights of Persons with Disabilities and within its Optional Protocol. In relation to article 3 of the European Convention on Human Rights which prohibits torture or inhuman or degrading treatment or punishment, the European Court of Human Rights has opined that: “[m]edical intervention to which a person is subjected against his or her will, including for the purposes of psychiatric assistance, may be regarded as treatment prohibited by Article 3 of the Convention”. 376 It is noteworthy that compulsory treatment will not amount to a violation of the right to be free from torture, cruel, inhuman or degrading treatment unless it is over a “minimum intensity of interference” and qualifies as “experimentation” under article 7 of the International Covenant on Civil and Political Rights. 377 Nevertheless, as noted by Juan E. Méndez, the Special

371 UN Doc. A/64/272.
373 UN Doc. A/65/255, para. 32.
375 Article 7, International Covenant on Civil and Political Rights.
376 Akopyan v. Ukraine, (Application no.12317/06), ECHR, 5 June 2014, para.102. Also see, for example, Gorobet v. Moldova, (Application no. 30951/10), ECHR, 11 October 2011,para.47-53; and V.C. v. Slovakia, (Application no.18968/07),ECHR 2011 (extracts), para. 100-120.
Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in the course of drug treatment, the prohibition of torture or ill treatment calls for the respect of an individual’s free consent and dignity as well as the need to balance it with public health concerns.  

As the above illustrates, informed consent is an important principle of medical ethics and human rights. The guarantee of informed consent shall apply for all medical interventions, including drug treatment. With regard to drug treatment, in particular, the importance of safeguarding informed consent is noted by many human rights bodies. For instance, the World Health Organization recommends, as a minimum standard, drug users as patients must give informed consent for drug treatment.  

Pursuing this understanding, informed consent must be obtained in administering drug treatment; this also includes the right of drug users to refuse compulsory drug treatment.  

This is a notion that has also been addressed by the United Nations Office on Drugs and Crime and the World Health Organization. In this regard, the drug policies that authorise state power to coerce individuals to have treatment can only be applied in a strict manner and in line with medical ethic principles and human rights standards. As stipulated by the Executive Director of the UN Office on Narcotic Drugs and Crime in 2010:

> With respect to drug treatment, in line with the right to informed consent to medical treatment (and its “logical corollary,” the right to refuse treatment), drug dependence treatment should not be forced on patients. Only in exceptional crisis situations of high risk to self or others can compulsory treatment be mandated for specific conditions and for short periods that are no longer than strictly clinically necessary. Such treatment must be specified by law and subject to judicial review.

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378 Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/22/53, para. 83.
380 UN Doc. A/64/272, paras.28, 88 and 91.
382 UN Doc. A/64/272, pp. 5, 6.
[...] Treatment for drug dependence (whether voluntary or compulsory) must be evidence-based, according to established principles of medicine.\(^{383}\)

### 4.3.1.3 Conditions for and Limits to Permissible Interference Measures

Besides the right to health and the right to be free from cruel, inhuman or degrading treatment or torture as afore mentioned, the right to privacy is also directly related to compulsory treatment. Compulsory treatment is considered to be an interference with an individual’s privacy under the scope of the protection of an individual’s integrity.\(^{384}\) The European Court of Human Rights’ case law provides clear interpretation in this regard. As the Court reiterates in one of its most recent cases, *Akopyan v. Ukraine* (2014); “medical intervention carried out in defiance of the applicant’s will constitutes an interference with his or her private life, and in particular his or her right to physical integrity”.\(^ {385}\)

State interference with individual rights is only permissible when it is conducted in line with human rights principles. In relation to the right to privacy, for example, the European Convention on Human Rights, article 8(2) provides that the right to privacy may face interference only “in accordance with the law and [as] is necessary in a democratic society”.\(^ {386}\) This term has been further interpreted by the European Court of Human Rights in the case *Silver and others v. the United Kingdom*. As the Court states, such interference must “correspond to a ‘pressing social need’ and be ‘proportionate to the legitimate aim pursued’.”\(^ {387}\) In contrast to article 8(2) of the European Convention on Human Rights, the European Court of Human Rights decided that it is necessary to strike a balance between the interests of public health and the individual’s privacy rights, especially when the latter are in conflict with the former. Therefore, the Court will consider the necessity of the interference, the less intrusive alternative measures, and the proportionality of the interference to determine whether the compulsory treatment is justifiable.

\(^{383}\) UN Doc. E/CN.7/2010/CRP.6 – E/CN.15/2010/CRP.1, para. 45. (citation omitted)


\(^{385}\) *Akopyan v. Ukraine* (2014), Application no.12317/06, para.107. Also see: *X v. Finland* (2012), no. 34806/04, para.212; *Glass v. the United Kingdom* (2004), no.61827/00, para.70; *Pretty v. the United Kingdom* (2002), Application no.2346/02, paras. 61 and 63; and *Y.F. v. Turkey*, no.24209/94, para. 33, 22 July 2003; mutatis mutandis, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, para. 22.\(^ {385}\) It is noted that even though these cases are not directly addressing the issue of compulsory drug treatment, they provide useful guidelines through which the compulsory drug treatment can be examined in respect of right to privacy.

\(^{386}\) Article 8(2), European Convention on Human Rights.

\(^{387}\) *Silver and others v. The United Kingdom*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 1983, para. 97.
Rights, article 17 of the International Covenant on Civil and Political Rights does not provide conditions for the limitation of the right to privacy. Merely, article 17(1) provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy”. Still, interference may be “lawful” but deemed as a violation of article 17 if it is based on unreasonable legislation. In addition, the conjunction of “arbitrary or unlawful” indicates that not only unlawful, but also arbitrary interference with an individual’s privacy is inconsistent with article 17 of the Covenant. In this connection, the concept of prohibition of arbitrariness requires that interference with the right to privacy is reasonable in the particular circumstances, and its “compatibility with the purposes, aims and objectives of the Covenant” is guaranteed. Pursuant to these interpretations, when determining whether a state’s interference with a drug user’s privacy in the context of drug treatment is compatible with human rights law, the existence of legitimate goals and the necessity of achieving such goals require examination.

Firstly, interference with the right to privacy may be undertaken when legitimate goals exist. The legitimate objectives could include pursuing national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. For instance, in cases where an individual’s refusal for treatment will impose a danger to the society, restrictive measures may be carried out for the purpose of protecting the wider public and the

388 Also contrast with article 12 (3), 18(3), 19(3), 21 and 22 of the International Covenant on Civil and Political Rights which provide the limitation conditions.
389 Article 17 (1), International Covenant on Civil and Political Rights.
391 UN Human Rights Committee, General Comment No. 16, HRI/GEN/1/Rev.4 of 7 February 2000, para. 4.
394 Article 8(2), European Convention on Human Rights; also see Article 12 (3), 18 (3), 19 (3), 21 and article 22(2), International Covenant on Civil and Political Rights.
individual’s own interests. To this extent, compulsory treatment in the aim of preventing the epidemic of a communicable disease may be considered legitimate as a way to protect the public interest. However, in cases of compulsory drug treatments, the reasons provided are not always valid.

One of the legitimate goals used to justify compulsory drug treatment is based on the presumption of a link between drug use and crime. However, such an assumption is ideological rather than empirical. In other words, the results drawn from empirical studies do not support the assumption that drug users threaten public safety by committing criminal activities. For instance, Toby Seddon’s research demonstrates that the money used for the purchase of heroin comes largely from the drug users’ family or friends rather than from property crimes. He further challenges the assumption that drug use causes crime by submitting that no study results suggest that providing drugs to drug users leads to a decrease in crime, which logically should be the result if drug users support their drug habits by committing crimes. Though it is not the purview of this study to determine the relationship between drug use and crime, the assumption that “drug use causes crime” is not a straightforward issue and there is no strong evidence to support its validity. Even in cases where drug users do commit crimes, this cannot simply be taken to justify the state’s interference with drug users’ rights in the way of compulsory drug treatment. Instead, he or she shall be dealt with under the criminal justice systems where the laws proscribed for the offences charged are to be applied accordingly.

The public health notion has also been raised to justify compulsory drug treatment. While such a notion has a legitimate goal, compulsory drug treatment

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395 In A v. New Zealand (754/97), Messrs Pocar and Scheinin in a separate opinion held that: “In an individual case there might well be a legitimate ground for such detention, and domestic law should prescribe both the criteria and procedures for assigning a person to compulsory psychiatric treatment. As a consequence, such treatment can be seen as a legitimate deprivation of liberty under the terms of article 9, paragraph1.”


397 Ibid, p. 98.

398 Ibid, pp. 97-98.
may nevertheless fail to reach that end. In reality, compulsory measures which are sometimes punitively oriented, drive people away from evidence-based prevention and care programmes, which have been proved as an effective means to control drug abuse problems and reduce its related harms. For example, in Thailand, due to the compulsory drug treatment policy, drug users avoid seeking health care because of the fear of arrest and detention. In this respect, compulsory treatment may in fact limit the effectiveness of public health outreach, which runs count to the public health notion. In addition, it is noteworthy that the limitation of an individual’s rights cannot always be justified simply on the grounds of public interests; the legitimate purpose must also consider the interests of the individual. As Manfred Nowak interprets:

> Even though some types of interference may be justified for one reason or another, it must be kept in mind that overly far-reaching permissibility of State interference in the interest of public order, the common good or social costs undermines the sphere of individual privacy in highly socialised societies. The right to privacy, therefore, dictates that State interference be restrained and the principle of reasonableness be respected even with conduct that has certain effects upon the common good (e.g., vagrancy, begging, prostitution, etc.)

Besides legitimate objectives, the restrictive measures adopted must also be strictly necessary in a democratic society. In this regard, the main argument that has been made to justify the necessity of imposing compulsory drug treatment is that people who use drugs often lack the ability to make proper decisions. As Takahashi claims:

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399 For instance, the European Court of Human Rights has regarded the state’s imposition of compulsory measures as impinging on the private life of individual subjects and required further justification in terms of limitation clauses. See Pretty v. the United Kingdom (2002), ECHR, Application no. 2346/02, para. 62.


The reality of drug addiction is that it destroys - or at least suspends - the free will of the addict. While taking into account the varying individual degrees of addiction, the general situation of the addict is one who is, to some extent, consistently under the influence of drugs. … Decisions made under the influence of drugs are not decisions of free will… 403

Such a claim evokes the question of the individual’s legal capacity. Legal capacity is generally determined by the ability to comprehend, retain, believe and weigh information provided in arriving at a decision. 404 It is presumed in adults and renders them with the right to consent, to refuse, or to choose a medical intervention. 405 Such ability in a person who uses substances will be affected. 406 However, the conclusion that all drug users will lose their legal capacity to make decisions of drug treatment is questionable. Even if it is the case that drugs have a strong influence on an individual’s nervous system, which requires medical diagnose on a case-by-case basis, it is still difficult to come directly to the conclusion that people who use drugs lack the capacity to give or withhold legal consent. As the World Health Organization stipulates, “in most case, those who have lost control over opioid use are not necessarily considered to have lost the ability to care for themselves in other ways”. 407 In other words, the fact that a person uses drugs should not automatically lead to a determination that he or she has lost the capacity to give informed consent for medical interventions. In this regard, presuming every drug user to lack legal capacity in relation to decision-making is open for discussion. 408 It is noteworthy that there are situations when

404 See for example: Re C [1994] 1 All ER 819 (UK). Also applied in Re C [1997] 2 FLR 180 (UK).
405 UN Doc. A/64/272, para. 10.
406 This is the basis for legislation forbidding driving under the influence of alcohol.
408 As Harm Reduction International argues, “the presumption that people who use drugs lack capacity to consent to treatment is dangerous because it ignores relevant legal safeguards regarding competence to make treatment decisions, and widens the scope of potential abuse”. 

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drug users may not be in adequate states to provide informed consent. In such circumstances, as the World Health Organization believes that treatment may be conducted where consent from an individual shall be provided as soon as the drug users are neither intoxicated nor in withdrawal and the consent may lead to the changing of treatment direction.\textsuperscript{409} That is to say, as long as a drug user has the capacity to make the decision, informed consent must be secured.

In addition, to ensure drug users receive treatment does not necessarily mean that enforcement, coercion or compulsory measures from states have to be adopted. Coercion from states is not the only mean to ensure drug users undergo drug treatment and it is not always the necessary and approvable one. In respect to the treatment for drug users, the pressure to ensure they undergo drug treatment can be derived from many sources. The pressure from community, family members and friends also play an important part. It may also be hard to deny that drug users may need assistance to overcome their problems; still, this factor does not contribute to the argument that states can make a decision for an individual with regard to medical intervention.\textsuperscript{410} Even in a case where the refusal of drug treatment may lead to adverse consequences for the individual, any medical intervention without the consent from that individual is questionable. As the European Court of Human Rights acknowledged in \textit{Pretty v. the United Kingdom}: 

\begin{quote}
In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention.\textsuperscript{411}
\end{quote}

What is more, in cases where interference with rights is deemed necessary, the measure taken must also satisfy the principle of proportionality. Accordingly, the

\textsuperscript{411} \textit{Pretty v. the United Kingdom}, Application no. 2346/02, ECHR, 29 April 2002, para. 63.
degree and scope of the interference must be reasonable in relation to what is necessary to prevent or control the danger involved and must be subject to review.\footnote{Manfred Nowak, \textit{U.N. Covenant on Civil and Political Rights: CCPR Commentary}, 2\textsuperscript{nd} Edition, N.P. Engel, 2005, p. 97.} Pursuing this interpretation, only minimum interference with the rights of drug users that are aimed at the protection of the public and the individual’s interest are justified.\footnote{Robin C.A. White and Clare Ovey, \textit{Jacobs, White, & Ovey: The European Convention on Human Rights}, Fifth Edition, New York: Oxford University Press, 2010, p. 311.} In other words, compulsory measures toward drug users should be regarded as the action of last resort; where a less restrictive approach is not available to achieve the same legitimate goal. In cases of drug treatment, for example, if a community based voluntary treatment programme has proved beneficial to the society and the individual, then, the compulsory treatment will not be considered as necessary. As a matter of fact, studies show that compulsory drug treatments have been generally ineffective;\footnote{Health Services Assessment Collaboration, The Effectiveness of Compulsory, Residential Treatment of Chronic Alcohol or Drug Addiction in Non-Offender, \textit{INAHTA Briefs}, issue 38, 2008.} and that drug users who undergo such treatment are largely susceptible to relapse.\footnote{M.-L. Brecht et al., Coerced treatment for methamphetamine abuse: differential patient characteristics and outcomes, \textit{The American Journal of Drug and Alcohol Abuse}, vol. 3, 2005, pps. 337-356.}

All in all, the above arguments, do not suggest that drug treatment is not necessary, nor neglect the fact that drug use can lead to severe consequences to the users and society. The point to be made is that: while the blanket assumption that it is necessary to impose treatment upon people who use drugs is questionable, it is particularly problematic to ground the justification for any compulsory measures toward drug users on presumption rather than evidence. As Simon Flack submitted, “[t]he point is simply to contest the widespread belief that drug use is always harmful, and that such harm uniformly provides sufficient justification for interfering with the human rights of people who use drugs”.\footnote{Simon Flacks, Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A reply to Saul Takahashi, \textit{Human Rights Quarterly} 33, 2011, p. 866.} It is not the intention of this study to assess and illustrate the situations, in which on
a case-by-case basis, compulsory measures can be carried out. While certain requirements exist, it is the obligation of the authority who initiates the measures to provide the justification for the restriction and interference with an individual’s rights. In doing so, governments will need to strike a fair balance between the protection of public interests and individuals’ rights. This exercise should be conducted in line with human rights principles.

4.3.2 Detention for Treatment

Drug users are not only forced to undergo drug treatment in various ways, in some jurisdictions they are detained in isolated institutions in the name of, or in the course of, drug treatment. A study shows that 350,000 drug users were detained in the name of drug “treatment” or “rehabilitation” in countries such as Lao PDR, China, Cambodia and Vietnam until 2010. In Thailand alone, 39,287 people were detained in compulsory drug detention centres from October 2008 to June 2009. Commonly referred to as drug treatment centres, drug rehabilitation centres or camps, these institutions are run in some countries by the

military, police or security forces or private companies. The United Nations Office on Drugs and Crime determined that some of these drug treatment or rehabilitation centres functioned as “a type of low security imprisonment”.

Many human rights criticisms have been raised with regard to detention for drug treatment. In March 2012, for instance, 12 United Nations entities issued a joint statement entitled, Compulsory drug detention and rehabilitation centres. The statement claims that compulsory drug detention centres “raise human rights issues and threaten the health of detainees” and “no evidence [demonstrates] that these centres represent a favorable or effective environment for the treatment of drug dependence”. In this regard, calls for the closure of these compulsory drug detention centers have been made. However, one of the main human rights issues involved, namely the right to liberty, has not yet been well studied

423 Gilberto Gerra and Nicolas Clark (eds), From coercion to cohesion: treating drug dependence through health care, not punishment, Discussion paper, United Nations Office on Drugs and Crime, 2009, p. 9.
in this context. The detention of drug users for treatment is a form of deprivation of liberty, to which well-established international principles apply.

The right to liberty is protected under many international and regional human rights instruments. For instance, article 3 of the Universal Declaration of Human Rights protects the right to liberty and article 9 protects against the arbitrary arrest and detention of a person. Similar guarantees can be found in regional human rights instruments such as article 5 of the European Convention on Human Rights, article 14 of the Arab Charter on Human Rights, article 7 of the American Convention on Human Rights and article 6 of the African Charter on Human and People’s Rights. Among these human rights instruments, article 5 of the European Convention on Human Rights contains provisions which directly prescribe the lawful detention of drug users.

4.3.2.1 Article 5 of the European Convention on Human Rights

Article 5 of the European Convention on Human Rights provides that everyone has the right to liberty and security. However, the right protected under article 5(1) can be limited in certain circumstances. Accordingly, provision 5(1)(e) allows for the lawful detention of persons for medical or social reasons, including drug addicts, along with other groups people of unsound mind, alcoholics and vagrants, and those spreading infectious diseases. So far there is no precedent from the European Court of Human Rights in relation to the interpretation of the term “drug addict” under article 5(1)(e). Case law involving alcoholics may be instructive in this regard. One of the noteworthy cases is Witold Litwa v. Poland, in which the European Court of Human Rights held that a person does not need to be clinically diagnosed with ‘alcoholism’ to fall within the scope of article 5(1)(e). Article 5(1)(e) is therefore applicable to:

persons who are not medically diagnosed as “alcoholics”, but whose conduct and behavior under the influence of alcohol poses a threat to public order or

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428 Article 3, Universal Declaration of Human Rights.
429 Article 9, Universal Declaration of Human Rights.
themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.  

The position demonstrated in *Witold Litwa v. Poland* may suggest that the European Court of Human Rights is ready to give a broader understanding to the expression “drug addict” as well. To this extent, article 5(1)(e) may not merely apply to those having the medical condition of drug addiction but also to those under the influence of drugs. That is to say, the restriction on liberty can apply to those who may not be diagnosed as being addicted to drugs, but who nevertheless may pose a threat to the public and themselves due to drug consumption. However, this broad interpretation should not be used to justify the deprivation of the liberty of those merely using drugs. As the European Court of Human Rights has stated: “[t]hat does not mean that Article 5 § 1 (e) of the Convention can be interpreted as permitting the detention of an individual merely because of his alcohol intake”. Therefore, the broad interpretation of “drug addicts” requires a strict application of the test of the lawfulness of the detention of drug users in a given circumstance.

There is a common factor that legitimises the detention of those groups under article 5(1)(e); a deprivation of liberty is permissible in order to give necessary medical treatment to the individual for his or her own interests and/or due to considerations of societal interests dictated by social policy. As addressed by the European Court of Human Rights:

> …a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention…

From this point of view, the key consideration in determining whether the detention of drug users is lawful under article 5(1)(e) of the European Convention on Human Rights is whether drug users pose a threat to the public or

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to himself or herself. With regard to the threat, people who use drugs for the first time can pose a grave danger to themselves. For instance, an overdose of drugs can lead to fatal consequences. In other cases, a drug addict may function well without posing any threat to themselves or to others. Also, in cases where a person is addicted to drugs, he or she will not be under the influence of drugs at every given time. Therefore, if no threat exists for the public and/or the individual, regardless of whether the person is addicted to drugs or not, the deprivation is groundless. In this regard, drug policies allowing for the detention for treatment of drug users merely on the basis of their addiction are incompatible with the object of article 5(1)(e) of the European Convention on Human Rights.

The author would like to note at this stage that this study does not intend to establish practical standards for determining whether the threat caused by drug users warrants strict measures that limit an individual’s rights. While the examination of the threat is crucial to deciding whether certain restrictive measures can be justified, the information in regard to the threat posed by drug users needs to be evidence based rather than grounded in ideology, and any exaggerated or biased information should not be used. In this respect, while the argument that the individual’s rights can be infringed in order to protect social and other individual interests may sound well-founded in certain cases, safeguards may be applied as a counterbalance to initiatives that are based upon ideology, prejudice and discrimination. A brief study of the relevant safeguards will be carried out in part 4.3.2.3.

In addition to the requirement of an existing threat, the deprivation of liberty can only be justified under article 5(1)(e) of the European Convention on Human Rights when it is a last resort to protect the public interest and/or the individual’s interest. For instance, if taking the person to his or her residence would be

436 Robin C.A. White and Clare Ovey, Jacobs, White, & Ovey: The European Convention on Human Rights, Fifth Edition, New York: Oxford University Press, 2010, p. 311. This is a principle also well recognized in domestic jurisdictions. For instance, in the case Shelton v. Tucker (Shelton v. Tucker, 364 U.S. 479 (1960)), the American Supreme Court established the least restrictive doctrine, aimed at preventing states from “broadly stif[ing] fundamental personal liberties when the end can be more narrowly pursued.” The doctrine has later been applied to
sufficient to defuse the threat, detaining the person will not be permissible. As the European Court of Human Rights decided:

The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances. 437

The Court further noted that:

an intoxicated person does not necessarily have to be deprived of his liberty since he may just as well be taken by the police to a public health-care establishment or to his place of residence. 438

Pursuant to this understanding, the detention of drug users may only be carried out when other less restrictive measures have been considered and found to be insufficient to prevent the threat. In fact, drug treatment may not always need to take the form of detention; remaining at home and reporting to a clinic for medication while maintaining social and family roles may constitute a practical and effective form of drug treatment. 439 Therefore, drug policies that authorise the detention of drug users for treatment are open to discussion with regard to the “last resort” requirement.

4.3.2.2 Article 9 of the International Covenant on Civil and Political Rights

Unlike article 5 of the European Convention on Human Rights, article 9 of the International Covenant on Civil and Political Rights and other regional human rights instruments do not list the circumstances in which a person may

mental health treatment cases by asking states to explore community based treatment instead of institutionalized treatment (Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966)).

437 Witold Litwa v. Poland (Appl. Nos 26629/95), judgment of 4 April 2000, para. 78.


legitimately be deprived of their liberty. In other words, the application of article 9 of the Covenant to the detention of drug users for treatment requires clarification. In this respect, General Comment 8 on Article 9 of the International Covenant on Civil and Political Rights stipulates:

paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.

Accordingly, article 9 paragraphs 1, 4 and 5 of the International Covenant on Civil and Political Rights are applicable to drug detention cases. Therefore, where a drug user is deprived of his or her liberty, an examination will be required to determine the lawfulness of the detention and whether it constitutes arbitrariness.

For the deprivation of liberty to be permissible, a legal ground is first required. As stipulated in article 9(1) of the International Covenant on Civil and Political Rights: “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”. The law shall be understood to include a status or norm of common law and international law. In this respect, the detention of drug users for treatment not only requires clear

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440 The 1947 draft of a working group contained a list of permissible cases of deprivation of liberty, in which drug addiction was not included. UN Doc. E/CN.4/21, Annex B, Article 10 (4).
441 UN Human Rights Committee (HRC), CCPR General Comment No. 08: Right to liberty and security of persons (Article. 9) (my emphasis)
442 Article 9(1), International Covenant on Civil and Political Rights.
443 Badanetal.v. Australia, Communication No. 1014/2001, 6 August 2003, UN Doc. CCPR/C/78/D/1014/2001 para. 7.2; A similar interpretation has also been adopted by the European Court of Human rights with regard to article 5 of the European Convention on Human Rights, see Iglesias Gil and AUI v. Spain, (Application no.56673/00), ECHR, Judgment 29 April 2003, para.51.
prescription under domestic legislation, it should also be compatible with international law. In relation to international human rights law, following the *travaux préparatoires*, one may come to the conclusion that the categories listed, including drug addicts, in article 5 of the European Convention on Human Rights will not go against article 9 of the International Covenant on Civil and Political Rights.  

Besides human rights law, the three international drug control conventions are important legal documents to refer to when examining the legality of the deprivation of liberty of drug users. As previously discussed, drug treatments referred to in the international drug control conventions are for offenders who are also addicted to drugs. For this group of people, the treatment is provided as an alternative to or in addition to conviction or punishment. It is a type of sanction that is ordered by a court and it is “not necessarily more lenient than imprisonment or much different in concept from punishment”. Therefore, for this type of drug treatment, detention is legitimate where it is prescribed by a court following a criminal proceeding. But for non-criminalised drug users, no provision can be found in international drug control conventions that prescribe drug treatment in isolated institutions. That is to say, there is no legitimate basis, derived from international drug control law, existing for the states to deprive drug users’ of their liberty for the purpose of drug treatment. In this regard, the drafting history of the 1961 Single Convention provides a useful insight. According to the third draft of the 1961 Single Convention, States parties that have serious drug use problems will be required to “use their best endeavours to establish facilities for the compulsory treatment of drug addicts in

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445 As of 1st February 2014, the number of States parties to the 1961 Single Convention was 184, 183 States parties to the 1971 Convention and 188 State parties to the 1988 Convention.


447 Commentary to article 3(2) of the 1988 Convention, para. 3.109.

448 Article 38, 1961 Single Convention.
closed institutions”. However, such an approach has not been adopted as the final version of the treatment provision in the 1961 Single Convention. In light of this straightforward textual rejection, drug treatment for drug users but not offenders in closed institutions is not provided under international drug control law.

With regard to domestic law, some try to use the drug court approach to imply that detaining drug users for drug treatment is justified. As previously clarified, however, the drug court approach deals with offenders who also have drug use problems; the human rights issue raised in this study relates to the deprivation of liberty of drug users who have not committed an offence and in respect of whom detention has not been ordered by a court. Despite the fact that the drug court approach itself may provide a legal foundation to deprive the liberty of offenders for drug treatments, such an approach can by no means be used to justify all of the cases in which drug users are detained in the name of drug treatment. In other words, for drug users who are not offenders, it will be an arbitrary detention for drug treatment if arrest and detention are carried out without a clear legal ground.

In order for a deprivation of liberty to be lawful, it must also protect against arbitrariness. The word arbitrary does not merely mean unlawful, it is also understood as meaning disproportionate, unjust, discriminatory, unreasonable, or against due process. Applying this understanding, drug legislation that permits the deprivation of liberty of drug users may be considered arbitrary when the law itself is shown to be disproportionate, unreasonable or discriminatory. In this respect, some claim that any legislation that provides for constraining measures

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451 Article 9 (1), International Covenant on Civil and Political Rights.
for illicit drug users is arbitrarily drafted.\footnote{Simon Flacks, Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: A reply to Saul Takahashi, \textit{Human Rights Quarterly} 33 (2011), p. 872.} While such a claim may be too general, it is nevertheless questionable that legislation allow for the deprivation of liberty of drug users while similar restrictions do not apply to people who drink alcohol. Especially considering that alcohol users may cause more harm than illicit drug users.\footnote{David Nutt et al., Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse, \textit{Lancet}, Vol. 369, 2007, p.1047.} For instance, as the following chart illustrates, harm relating to alcohol and tobacco is greater than harm relating to some type of drugs, such as cannabis and Ecstasy.\footnote{It must be noted that under the UN drug control system, however, cannabis and Ecstasy are classified as the most dangerous substances, while alcohol and tobacco are not classified as such.} Also, there is research from the United Kingdom proving that alcohol consumption constitutes a greater threat to the public in terms of violence and accidents.\footnote{Charlotte Walsh, Drugs and Human Rights: Private Palliatives, Sacramental Freedoms and Cognitive Liberty, \textit{The International Journal of Human Rights}, Vol.14, No.3, 2010, p. 435.} In this respect, legislation that allows the detention of people who use illicit drugs such as Ecstasy and cannabis but not those who drink alcohol or smoke tobacco may be unreasonable.
4.3.2.3 Safeguards

In every case of deprivation of liberty, even assuming that legitimate grounds exist, the measures must be carried out with appropriate procedural safeguards. Such safeguards include that the restriction of liberty be for a limited period, subject to review and appeal and with clear remedial mechanisms available. All people who have been deprived of their liberty are entitled to these rights; drug users should by no means be an exception. In reality, however, safeguards are often insufficient in the proceedings surrounding the detention of drug users for treatment. For instance, drug users can be consigned to drug detention centres in the name of drug treatment without any trial or other due process safeguards. 458

As Human Rights Watch documented in Cambodia: “police rarely tell people the reasons for arrest, or misrepresent why they are arresting someone. There is no access to legal counsel in police detention or in subsequent detention in the [drug detention] centres”. 459 In some other cases, drug users are detained where no domestic legislation exists and the term of the detention can range from months to years. 460

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458 For instance, see Human Rights Watch report, “Skin on the Cable”: The illegal arrest, arbitrary detention and torture of people who use drugs in Cambodia, January 2010.


Individuals detained for drug treatment, like all persons deprived of their liberty, have the right to have their detention reviewed in front of a court. This safeguard, known as the right to habeas corpus, is guaranteed under many human rights instruments, such as article 9 (4) of the International Covenant on Civil and Political Rights, which stipulates:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The right to have the lawfulness of one’s detention reviewed in court without delay is also enshrined in many regional human rights instruments, including, article 5 (4) of the European Convention on Human Rights which provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Similar wording can be found in article 7(6) of the American Convention on Human Rights and article 14(6) of the Arab Charter on Human Rights. So far there have been no cases in front of the UN Human Rights Committee or regional human rights courts in relation to the issue of detention for drug treatment. In a relevant case Winterwerp v. the Netherlands, the European Court of Human Rights held that individuals with a mental disorder who are detained in psychiatric hospitals have a right to periodic review of the lawfulness of their detention in accordance with article 5(4) of the European Convention on Human Rights.

462 Article 9(4), International Covenant on Civil and Political Rights.
463 Article 9 (4), European Convention on Human Rights.
464 Article 7 (6), American Convention on Human Rights.
465 Article 14(6), Arab Charter on Human Rights.
Rights. The same understanding may also apply to drug treatment detention cases, given the fact that the categories “unsound mind” and “drug addict” are both contained within the same provision, namely article 5(1)(e) of the European Convention on Human Rights. Pursuant to this understanding, an individual who has been deprived of their liberty for the reason of drug treatment should have access to a periodic hearing to examine the lawfulness of their detention, and should be released as soon as the criteria for the original admission are no longer met. That is to say, after a certain period of time, the detention of drug users for treatment without a proper justification may be considered arbitrary even if it was not arbitrary in the first place. In this respect, as Lawrence O. Gostin submits: “a person admitted for compulsory drug treatment should not be confined longer than necessary to reduce his dependence on drugs”.

The right to habeas corpus relates exclusively to the lawfulness of the deprivation of liberty. In the case of drug treatment, given the special nature of medical interventions, the deprivation of liberty for the purpose of treatment is only legitimate when the need for medical treatment still exists. For that reason, it is noteworthy that the right to habeas corpus is especially important in cases of detention for drug treatment. Unlike pre-trial detention or imprisonment, where the deprivation of liberty is based on a court order, the detention of drug users for treatment can take place by an administrative procedure. For instance, in China, a police or administrative officer can order that drug users be placed under detention for compulsory drug treatment programmes. In Vietnam, the Ministry of Health is authorised to “lay down and carry out” drug treatment

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programmes that involve detention.\textsuperscript{471} In those situations detention could be misused by authorities to arbitrarily or discriminatorily detain drug users who are designated as social deviants.\textsuperscript{472} Also, in some circumstances, individuals may be detained for drug treatment for a fixed term without the guarantee of periodic review or appeal. For instance, in Malaysia, compulsory drug treatment is ordered for a fixed term not less than two and not more than three years.\textsuperscript{473} In light of these realities, the right to \textit{habeas corpus} offers important safeguards for those detained for drug treatment, most notably the right to challenge the lawfulness of their detention and to be released without delay if the detention is unlawful.

Besides the right to \textit{habeas corpus}, the right to compensation in cases of unlawful deprivation of liberty is guaranteed under article 9(5) of the International Covenant on Civil and Political Rights, as well as under regional human rights instruments, such as article 14(7) of the Arab Charter on Human Rights and article 5(5) of the European Convention on Human Rights. While article 14(7) of the Arab Charter on Human Rights is identical to article 9(5) of the International Covenant on Civil and Political Rights, which guarantees the right to compensation for “anyone who has been the victim of unlawful arrest or detention”,\textsuperscript{474} article 5(5) of the European Convention on Human Rights provides that “[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to

\textsuperscript{471} Article 9, The Narcotics Drugs and Psychotropic Substance Law, Vietnam State Law and Order Restoration Council Law No. 1/93.


\textsuperscript{473} Article 6(1)(b), Law of Malaysia: Drug Dependents (Treatment and Rehabilitation) Act 283, Incorporation all amendments up to 1 January 2006.

\textsuperscript{474} Article 9 (5), International Covenant on Civil and Political Rights; Article 14 (7), Arab Charter on Human Rights.
compensation”. Regardless of the different wording, in the case of detention for drug treatment, the right to compensation entitles drug users detained for drug treatment to seek this remedy.

In addition to procedural safeguards, any rights restrictions, even for the purpose of medical treatment must be fully respectful of dignity, human rights and fundamental freedoms. This principle shall make no exceptions in the context of drug treatment. In this regard, the following section will examine the abuse of drug users rights in the context of drug treatment.

4.3.3 Treatments toward Drug Users: Fully Respectful of Dignity, Human Rights and Fundamental Freedoms?

People who use drugs do not yield their rights for the purpose of drug treatment. That is to say, in cases of drug treatment, no matter what kind of programme is adopted, the human rights of the individual needs to be respected and protected. Inhuman and degrading practices or punishment should not be part of any type of drug treatment. However, there are a number of human rights concerns being raised in the context of drug treatment. In the course of, or in the name of, drug treatment, human rights abuses such as forced labour, lack of medical care, physical and sexual abuse and other cruel treatments and punishments have been reported.

4.3.3.1 Forced Labour

Forced labour has been reported in some drug treatment institutions. In countries such as China, Lao PDR and Cambodia, drug users detained in some drug treatment institutions are required to spend long periods of time making shoes and hand crafts, sewing clothing and working in agriculture and construction. In some cases, the work is carried out as a form of so-called treatment, which is believed to help drug users detoxify. In others, forced labour has been claimed to constitute vocational training. Drug users are often working involuntarily and with the fear of punishment. As Human Rights Watch reported, those who refuse to undertake the work, fail to finish the daily quota or work too slowly, may receive punishment in the form of beatings, isolation and other ill-treatment.

Forcing drug users to work in the course of drug treatment is neither in line with international labour regulations nor human rights standards. The International Labour Organization’s Forced Labour Convention, article 4, stipulates that “the competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations”. Forced labour is also prohibited under many international human rights instruments. For instance, article 4 of the Universal Declaration of

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Human Rights,\(^{483}\) article 8(3)(a) of the International Covenant on Civil and Political Rights,\(^{484}\) article 10(1) of the Arab Charter on Human Rights,\(^{485}\) article 6(2) of the American Convention on Human Rights\(^{486}\) and article 4(2) of the European Convention on Human Rights.\(^{487}\) Even though international law allows detainees to work as part of their punishment in furtherance of a lawful order;\(^{488}\) drug users in drug treatment institutions by no means fall into this category. This is in light of the fact that they are in those institutions for treatment, justifiable or not, rather than being detained as a prisoner. In this connection, forcing drug users to work in the course of drug treatment is incompatible with international norms and violates the drug user’s right to be free from forced labour.

### 4.3.3.2 Torture or Cruel, Inhuman or Degrading Treatment or Punishment

Drug users are reportedly facing various physical and sexual abuses in the course of drug treatment. In some cases these abuses can amount to cruel, inhuman or degrading treatment and even torture.\(^{489}\) For instance, drug users in some drug treatment centres are shocked with electric batons, whipped by cords, forced to roll on the ground over a certain distance, made to stand on one leg in the sun or are subjected to other painful physical punishments.\(^{490}\) In some drug detention

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\(^{483}\) Article 4, Universal Declaration of Human Rights: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”

\(^{484}\) Article 8 (3)(a), International Covenant on Civil and Political Rights, “No one shall be required to perform forced or compulsory labour.”

\(^{485}\) Article 10(1), Arab Charter on Human Rights: “.... No one shall be held in slavery and servitude under any circumstances.”

\(^{486}\) Article 6(2), American Convention on Human Rights, “No one shall be required to perform forced or compulsory labor”.

\(^{487}\) Article 4(2), European Convention on Human Rights: “No one shall be required to perform forced or compulsory labour.”

\(^{488}\) For instance, International Covenant on Civil and Political Rights, Article. 8(3)(c)(i); article 6 (3) (a) of the American Convention on Human Rights; see also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl: NP Engel, 2005, pp. 204-205.


centres in Vietnam, Lao PDR and Cambodia, drug users are punished by being “tied up in the sun for hours without food or water”.  As one former detainee, named Trach testified,

They chained [the detainees] at the ankle and attached it to the flagpole in the sunlight in the middle of the day. I saw it two or three times... I saw someone chained in their underwear: this is punishment for running away.

Besides physical violence, drug users sometimes experience sexual abuse. For instance, forced oral sex has been reported by former male detainees in Cambodian drug detention centres. An 18 year old former detainee, named Kronhong, told Human Rights Watch researchers that he was forced to perform oral sex in a centre in which he was detained,

Sometimes I had to give massages to the military police and sometimes the commander... Some massages I had to give were sexual... If I did not do this, he would beat me. The commander asked me to ‘eat ice cream’ [perform oral sex]. I refused and he slapped me... Performing oral sex happened many times... how could I refuse?

All of these punishments and ill treatments toward drug users can be considered as a form of cruel and inhuman punishment; some may even amount to torture. The prohibition of torture and cruel, inhuman or degrading treatment or punishment has been codified in medical ethics documents. For instance, the


495 UN Doc. A/HRC/22/53; also see Open Society Foundation, Treatment or Torture? Applying International Human Rights Standards to Drug Detention Centres, June 2011.
Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibit health personnel from performing any act that may amount to torture and other cruel and inhuman or degrading treatment toward people who are in prison or under detention.496

Furthermore, the ill treatment and punishment of drug users contravenes a state’s human rights obligations with regard to the prohibition of torture or cruel, inhuman or degrading treatment or punishment as established under international and regional human rights instruments. For instance, according to article 7 of the International Covenant on Civil and Political Rights, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.497 Article 2 of the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment requires States parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and provides that “no exceptional circumstances whatsoever may be invoked as a justification of torture”.498 Article 3 of the European Convention on Human Rights stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”.499

Similar language can be found in article 8(1) of the Arab Charter on Human Rights.500 The right to be free from torture or cruel, inhuman, or degrading punishment or treatment is also stipulated in article 5 of the American Convention on Human Rights501 and article 5 of the African Charter on Human and Peoples Rights.502

496 UN Doc. A/RES/37/194.
497 Article 7, International Covenant on Civil and Political Rights.
498 Article 2, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, (entry into force 26 June 1987).
500 Article 8 (1), Arab Charter on Human Rights.
501 Article 5, American Convention on Human Rights.
4.3.3.2.1 Right of detainees to be treated with humanity and dignity

The prohibition of inhuman and degrading treatment also applies to those who have been deprived of their liberty. In other words, people who have been detained shall be treated with humanity and dignity as well. This is a notion underpinned by international and regional human rights law. For instance, the Inter-American Commission on Human Rights has ruled that

the State, by depriving a person of his liberty, places itself in the unique position of guarantor of his right to life and to humane treatment. …that the act of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights. 503

The requirement that detainees be treated with humanity and dignity is mainly derived from provisions that prohibit cruel, inhuman or degrading treatment. For instance, the European Court of Human Rights has determined that:

In accordance with Article 3 of the Convention, the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure does not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention.504

While other human rights instruments contain an overall prohibition of cruel, inhuman and degrading treatment which applies to people who have been deprived of their liberty, the International Covenant on Civil and Political Rights and the Arab Charter on Human Rights take a step further by specifying the right of detainees to be treated with humanity and dignity.505 According to article 10 of the International Covenant on Civil and Political Rights, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the

505 Article 10, International Covenant on Civil and Political Rights.
inherent dignity of the human person”. 506 Similar wording is included in article 20(1) of the Arab Charter on Human Rights. 507

Whereas article 10(2) of the International Covenant on Civil and Political Rights only applies to pre-trial detainees and article 10(3) only applies to prisoners, article 10(1) of the Covenant guarantees the right to be treated with humanity and dignity for all those who have been deprived of their liberty. 508 Therefore, in conformity with the right to liberty contained in article 9(1) of the Covenant, which applies to the detention of drug users as discussed in an early part of this chapter, article 10(1) shall also apply in cases of detention of drug users for treatment. This is a notion upheld by the UN Human Rights Committee. It notes that States parties should ensure the implementation of article 10(1) “in all institutions and establishments within their jurisdiction where persons are being held”. 509 Pursuant to this interpretation, regardless of whether the deprivation of liberty takes place in prisons, hospitals, or closed institutions such as drug treatment centres, the right to be treated with humanity and dignity shall be guaranteed to all individuals. 510 This interpretation should also apply to drug users who have been deprived of liberty due to drug treatment; no matter where she or he has been detained. In other words, drug users should never be subjected to inhumane or degrading treatment and punishment in the course of drug treatment. 511

It must be noted that the right to humanity and dignity of those deprived of their liberty encompasses the satisfaction of basic needs such as food, clothes, sanitary

506 Article 10 (1), International Covenant on Civil and Political Rights.
507 Article 20 (1), Arab Charter on Human Rights.
509 UN Human Rights Committee, CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992, para. 2.
510 UN Human Rights Committee, CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992, para. 2.
living conditions and health care. However, in some drug treatment institutions, these basic living needs are not provided for drug users. One of the former detainees in Lao PDR has described the harsh conditions he experience in a drug treatment centre:

> There are lots of people and not enough food. It was hard to sleep there because in my room there were 60 people. There was not enough water for the showers, only a few minutes to shower every day.

Also, in Cambodia, for instance, drug users in drug treatment centres reported receiving insufficient amounts of food and food that was generally deficient in nutritional and caloric content and sometimes even rotten or insect-ridden.

These conditions are not in compliance with human rights standards. As the European Court of Human Rights notes: “the overcrowding was severe enough to justify, in its own right, a finding of a violation of Article 3 of the Convention”. Deprivation of food or receipt of inadequate food may be considered inhuman treatment in violation of article 10 of the International Covenant on Civil and Political Rights. This notion has been further supported by the UN Human Rights Committee. For instance, in the case of Lantsova v Russian Federation, the Committee found that holding someone without


514 Human rights Watch, “Skin on the Cable”: The illegal arrest, arbitrary detention and torture of people who use drugs in Cambodia, January 2010, p. 66.

515 Kim v. Russia, (Application no. 44260/13), ECHR, Judgement 17 July 2014, p. 32; also see Ananyev and Others v. Russia, (Application nos. 42525/07 and 60800/08), ECHR, para. 145, 10 January 2012.

adequate food violated his rights under article 10(1) of the Covenant. 517 The same opinion was reached in the case of Pennant v. Jamaica, where the Committee found that confining someone with unsatisfactory quality food violated article 10(1) of the Covenant. 518

Besides a lack of basic living needs, there have also been reports as to the absence of general medical care for detainees in some drug treatment institutions. One report alleged that people who sustained injuries whilst trying to escape a drug treatment centre received no medical care but instead a punishment which resulted in a long-term disability. 519 International standards guarantee that people under any type of detention, without discrimination based on their status, are entitled to enjoy the same standard of health care as free people. 520 The denial of necessary medical treatment may not only amount to a violation of article 10(1) of the International Covenant on Civil and Political Rights as afore discussed, but also contravenes the right to health. 521

4.3.4 Right to Health

Drug treatment is a complex issue, but ultimately it is about health. 522 The right to health is provided for in many human rights instruments. For instance, article 25(1) of the Universal Declaration of Human Rights affirms: “Everyone has the right … for the health of himself and of his family, including … medical care and

520 UN Human Rights Committee, CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992, para. 3.
522 Statement by Mr. Raymond Yans, president, International Narcotics Control Board special event of the fifty-sixth session of the Commission on Narcotic Drugs; Launch of the United Nations Office on Drugs and Crime World Drug Report, on the occasion of the International Day against Drug Abuse and Illicit Drug Trafficking, Vienna, 26 June 2013.
necessary social services”. 523 Article 12 of the International Covenant on Economic, Social and Cultural Rights illustrates in a comprehensive way the responsibilities of States parties with regard to health. It firstly clarifies that States parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, following the enumeration of the steps to be taken by States parties to “achieve the full realization of this right”. 524 In regional human rights instruments the right to health has also been protected. For example, article 11 of the European Social Charter of 1961 as revised, article 16 of the African Charter on Human and Peoples’ Rights 525 and article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. 526 The right to health is recognised, additionally, in many other human rights instruments for special groups, for instance, articles 12 of the Convention on the Elimination of All Forms of Discrimination against Women, 527 article 24 of the Convention on the Rights of the Child 528 and article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination. 529 Accordingly, there are responsibilities of States parties with regard to the protection and promotion of individuals’ health.

Apart from human rights law, states also have obligations with regard to the protection and promotion of the right to health under drug control law. In point of fact, protecting and promoting health is articulated as one of the primary goals of drug control. As outlined in the international drug control conventions, the objective of drug control is to promote the “health and welfare of mankind”. 530

523 Article 25(1), Universal Declaration of Human Rights.
527 Articles 12, Convention on the Elimination of All Forms of Discrimination against Women.
528 Article 24, Convention on the Rights of the Child.
529 Article 5(e)(iv), International Convention on the Elimination of All Forms of Racial Discrimination.
This notion is also reflected in domestic drug legislation. In this connection, states have the obligation to respond to health issues related to drug use by giving “special attention to” them and taking “all practicable measures”.

In addition, the requirement for states to protect the right to health in the context of drug treatment has been emphasised by the relevant UN bodies. For example, in a 2008 joint publication, the United Nations Office on Drugs and Crime and the World Health Organization determined that, “drug treatment services should comply with human rights obligations and recognise the inherent dignity of all individuals. This includes responding to the right to enjoy the highest attainable standard of health and well-being”. Therefore, the right to health of drug users, as with every member of the society, shall be respected, protected and fulfilled. In other words, the principles enshrined in those human rights instruments with regard to the right to health should also apply to drug users. However, far from protecting and promoting the enjoyment of the right to health, current drug policy and practices has impeded its realisation.

4.3.4.1 Right to Health in the Context of Drug Treatment

Drug dependence is a health condition which requires medical treatment, but one that is not often recognised and so the responses have been flawed. In other words, the right to health of drug users is endangered and threatened by drug policies and practices. As the United Nations Office on Drugs and Crime and the World Health Organization observed:

Drug dependence is considered a multi-factorial health disorder that often follows the course of a relapsing and remitting chronic disease. Unfortunately in many societies drug dependence is still not recognized as a health problem and

531 For example, article 1, Anti-Drug Law of the People’s Republic of China.
532 Article 38, Single Convention of Narcotic Drugs as amended by the 1972 Protocol.
534 UN Doc. A/65/255, 6 August 2010.
many people suffering from it are stigmatized and have no access to treatment and rehabilitation.\textsuperscript{535}

Generally speaking, conditions during drug treatment often present health risks due to a lack of medical treatment including, but not limited to, absence of evidence based drug treatment services, shortage of medicines and lack of qualified medical staff.

First of all, proper drug treatment services are unavailable in some countries. As a result, drug users are denied access to drug treatment and many suffer painful withdrawal symptoms without treatment.\textsuperscript{536} For instance, in Cambodia, none of the drug treatment centres provide medical detoxification services and no medication is used to stabilised drug users’ withdrawal symptoms.\textsuperscript{537} Article 12 of the International Covenant on Economic, Social and Cultural Rights requires States parties to create “conditions which would assure to all medical service and medical attention in the event of sickness”.\textsuperscript{538} Drug dependence has been recognised as a chronic disease, which requires proper medical interventions.\textsuperscript{539} Therefore, proper treatment should be provided for drug users in light of their drug addiction problems.

In addition to a lack of medical services, the medicines needed for drug treatment are unavailable in some countries. Research has proved that methadone is the most effective and least costly medicine for heroin dependence treatment.\textsuperscript{540}


\textsuperscript{536} UN Doc. A/65/255, para. 36.


\textsuperscript{538} Article 12(2)(d), International Covenant on Economic, Social and Cultural Rights.


\textsuperscript{540} World Health Organization, \textit{Guidelines for the psychosocially assisted pharmacological treatment of opioid dependence}, 2009; Amato L, Davoli M, Perucci C, Ferri M, Faggiano F,
the purpose of drug dependence treatment, the World Health Organization has added methadone to the Model List of Essential Medicines since 2005. As a minimum standard for drug treatment, the World Health Organization recommends:

Essential pharmacological treatment options should consist of opioid agonist maintenance treatment and services for the management of opioid withdrawal. At a minimum, this would include either methadone or buprenorphine for opioid agonist maintenance and outpatient withdrawal management.

However, even after methadone’s listing as an essential medicine, there is still a very insufficient supply of methadone for drug treatment. Besides economic issues, in some jurisdictions, this problem arises mainly as a result of drug control legislation. For instance, in Russia, methadone is classified as an illegal drug. Such drug legislation directly affects the accessibility to methadone as one of the medicines needed for effective drug treatment. The provision of essential drugs as defined under the WHO Action Programme on Essential Drugs is one of the core obligations of states to ensure the exercise and enjoyment of the right to health, at minimum essential levels, enunciated in the International Covenant on Economic, Social and Cultural Rights. In other words, if states fail to provide the medicine needed for drug treatment, the obligation in relation to the right to health will hardly be fulfilled.

Besides lack of treatment services and medicines, there is also inadequate access to drug treatment for drug users owing to the absence of professional


personnel. In practice, some drug treatment institutions are run by the military, police or security forces or private companies, which lack a medical treatment background or any specialised drug treatment skills whatsoever. The health care personnel in drug treatment institutions not only need to obtain medical skills, they should also be trained to recognise and respond to the specific needs of drug users. As noted in the UN Committee on Economic, Social and Cultural Rights General Comment No. 14, the provision of appropriate and good quality health facilities, goods and services requires skilled medical personnel. This is also a requirement under international drug control law in relation to drug treatment. Accordingly, where states fail to provide qualified personnel for drug treatment services, the extent to which they are effectively discharging their obligations under these international treaties is questionable.

What is more, even where drug treatments are available, in some cases they fail to meet the quality requirements relating to the right to health. For treatment to be of appropriate quality, scientifically approved medicines, services and equipment must be used. Where states fail to meet these requirements, the quality of the drug treatment is open to doubt. One example is where forced labour and disciplinary interventions are undertaken as “treatment” while evidence-based treatment programmes are absent. For instance, in Vietnam and Cambodia, forced labour, physical exercise and military drills are undertaken in the belief that drug users can be “cured” of the addiction by “sweating out” the drugs. In fact, neither forced labour nor disciplinary interventions have been

recognised by medical science as treatments for drug addiction.\textsuperscript{551} Instead, harm reduction programmes such as needle and syringe exchange programmes and opioid substitution therapy with methadone are recognised and recommended by the World Health Organization and the Human Rights Committee for states to undertake as part of a comprehensive approach to combating drug abuse problems.\textsuperscript{552} Drug treatment that disregards evidence-based methods and fails to treat drug use problems effectively can hardly be said to meet the quality requirement with regard to the right to health.

Current drug policy not only impede s the enjoyment of the right to health, it can also imperil drug users’ health. As demonstrated previously in this chapter (section 4.3.3), instead of medical care, drug users in some so called drug treatment institutions are subjected to ill treatment.\textsuperscript{553} For instance, detainees in some drug detention centres are shocked with electric batons, whipped by cords, forced to roll on the ground over a certain distance, made to stand on one leg in the sun and subjected to other painful physical punishments.\textsuperscript{554} Also, symptoms such as numbness and swelling have been reported by detainees, which may result from nutritional deficiencies.\textsuperscript{555} All of these ill treatments toward drug users are directly damaging drug users’ health, both physically and psychologically.

In short, the requirements of respecting, protecting and fulfilling the right to health, should encompass health services, goods and personnel that are available,


\textsuperscript{552} UN Doc. E/C.12/MUS/CO/4, para. 27.


\textsuperscript{555} Human Rights Watch, “Skin on the Cable”: The illegal arrest, arbitrary detention and torture of people who use drugs in Cambodia, January 2010, p. 66.
accessible, acceptable and of good quality.\textsuperscript{556} This is one of the “core obligations” of States parties in fulfilling, at the minimum essential level, the right to health as enunciated in international human rights instruments.\textsuperscript{557} Particularly with regard to drug treatment, “[n]othing less must be provided for the treatment of drug dependence than a qualified, systematic, science-based approach such as that developed to treat other chronic diseases considered untreatable some decades ago”.\textsuperscript{558} However, as illustrated above, drug treatment for drug users is often insufficient and many fail to meet the given standards with regard to the protection and promotion of the right to health.

\textbf{4.3.4.2 Right to Health in the Broad Context of Drug Control}

With regard to the right to health, besides the aforementioned problems in relation to drug treatment, there are also other issues in the broad context of drug control that must be mentioned, including treatment for other diseases such as HIV of drug users; drug treatment for prisoners as a particular group and insufficient drug supply for medical care.

Firstly, it is not only treatment for drug addiction that has been denied to drug users, treatment for other diseases has also been withheld. This situation is well demonstrated in the context of HIV control.\textsuperscript{559} For example, in Vietnam between 15 to 60 per cent of detainees in drug detention centres are HIV positive. However, appropriate medical care for HIV and other infectious diseases is


\textsuperscript{557} Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN.Doc. E/C.12/2000/4, para. 43.


absent in most of these centres.\textsuperscript{560} With regard to the right to health, states have the obligation to control and treat epidemic diseases.\textsuperscript{561} Therefore, states must respond to diseases such as HIV including among drug users.

Secondly, while drug treatment toward drug users in general is problematic, those problems are also demonstrated in prisons. Despite the high rates of drug abuse problems in prison that have been documented in many countries, adequate drug treatment services are often unavailable to prisoners.\textsuperscript{562} For instance, prisoners are often denied access to evidence-based drug treatment programmes, such as methadone therapy and needle exchange.\textsuperscript{563} From a human rights perspective, international standards demand that people under any type of custody, without discrimination based on their status, are entitled to enjoy standards of health care equivalent to those enjoyed by the general community.\textsuperscript{564} In this regard, regardless their status under custody, prisoners who have drug abuse problems should receive proper drug treatment. This notion has been upheld by UN bodies. For instance, the World Health Organization and the United Nations Office on Drugs and Crime have stressed that “[d]rug dependent people in prison have the right to receive the health care and treatment that are guaranteed in treatment centers in the community”.\textsuperscript{565} Particularly, in 2010, Anand Grover, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stated that failure to implement effective drug treatment in prison violates the

\textsuperscript{560} Human Rights Watch, \textit{The Rehab Archipelago: Forced Labor and other abuse in drug detention centre in southern Vietnam}, September 2011, p. 5.

\textsuperscript{561} Article 12(2)(c), International Covenant on Economic, Social and Cultural Rights.


enjoyment of the right to health of prisoners who have drug abuse problems. 566
In 2013, the UN Special Rapporteur on torture and other cruel, inhuman or
degrading treatment of punishment Juan E. Méndez opined that all evidence-
based drug treatment should be available to prisoners who use drugs at all stages
of their detention. 567 Also, as stipulated in the Principles of Medical Ethics
relevant to the Role of Health Personnel, particularly Physicians, in the
Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman
or Degrading Treatment or Punishment, health personnel have a duty to provide
detainees with “protection of their physical and mental health and treatment of
disease of the same quality and standard as is afforded to those who are not
imprisoned or detained”. 568 Therefore, failure to provide proper drug treatment to
those in prison is against the right to health of those under custody.

Finally, the right to health for members of society is also impeded by drug
control policies that cause an insufficient supply of drugs for medical care. In
other words, the current drug control regime at both international and national
levels, create a situation where drugs for medical care, especially for pain control,
is inadequate. 569 For instance, in 2012, the World Health Organization estimated
that 5.5 billion people live with low or no access to controlled drugs for pain
treatment. 570 The obligation to respect the right to health requires States parties to
refrain “from denying or limiting equal access for all persons […] to preventive,
curative and palliative health services”. 571 In this connection, the lack of drugs
for medical care caused by drug control policy is questionable with regard to a
state’s obligation to respect, protect and fulfill individuals’ right to health.

Besides human rights obligations, one of the main goals of international drug

566 UN Doc. A/65/255, 6 August 2010, para. 29.
568 UN Doc. A/RES/37/194.
569 Human Rights Watch, Please Do Not Make Us Suffer Any More: Access to Pain Treatment as
a Human Right, 2009; Open Society Foundations, Palliative care as a human right, Public Health
Fact Sheet, 2012.
570 World Health Organization, Access to Controlled Medicines Programme, briefing note, 2012,
p.1.
571 Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN.Doc.
E/C.12/2000/4, para. 34.
control, as stipulated in the international drug control conventions, is to ensure the medical and scientific use of narcotic drugs and psychotropic substances.\textsuperscript{572} As such, the insufficient supply of drugs for medical care is also a departure from the objective of the international drug control regime. This is an issue that has already been acknowledged by the international community.\textsuperscript{573}

In short, there are obligations for States parties to respect, protect and fulfil the right to health even in the realm of drug control. The Committee on Economic, Social and Cultural Rights interprets the obligation attendant to the right to health as requiring States parties to “refrain from interfering directly or indirectly with the enjoyment of the right to health” and “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health”.\textsuperscript{574} In this connection, drug policy that denies or fails to ensure that drug users and every other member of the society has access to health care for drug dependence or other diseases can amount to a violation of the right to health.\textsuperscript{575}

4.4 Conclusion

Drug treatment approach as demonstrated in this chapter “has not achieved its stated public health goals, and has resulted in countless human rights violations”.\textsuperscript{576} Neglecting to ensure the proper enjoyment of rights to drug users means that drug treatment measures may not operate to help individuals to overcome drug addiction and in turn will fail to benefit the interests of society as


\textsuperscript{574} Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN. Doc. E/C.12/2000/4, para. 33.

\textsuperscript{575} Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN.Doc. E/C.12/2000/4, para. 52.

\textsuperscript{576} UN Doc. A/65/255, Summary.
a whole, which is supposedly the major purpose of the drug control regime.\textsuperscript{577} In addition, as demonstrated in this chapter, under international human rights law states have obligation to respond to issues toward drug users in line with medical, ethical and human rights principles with regard to human rights such as: the right to privacy, the right to liberty, the right to be free from torture or cruel, inhuman or degrading treatment or punishment and the right to health. In this connection, a human rights based approach is needed. As stated by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health:

A human rights-based approach to drug control must be adopted as a matter of priority to prevent the continuing violations of rights stemming from the current approaches […] and to move towards the creation of a humane system that meets its own health-related objectives.\textsuperscript{578}

In this regard, some states have made progress. For instance, the Portuguese Drug Strategy provides the following:

The guarantee of access to treatment for all drug addicts who seek treatment is an absolute priority of this national drug strategy. The humanistic principle on which the national strategy is based, the awareness that drug addiction is an illness and respect for the State’s responsibility to satisfy all citizen’s constitutional right to health, justify this fundamental strategic option and the consequent mobilisation of resources to comply with this right.\textsuperscript{579}

Still, as demonstrated in the early part of this study, the social attitudes, political claims and legal responses toward drug users can sometimes be problematic. To some extent, all these may stand as obstacles to the development and implementation of rational drug treatment policies that are fully consistent with human rights principles. Hence, the question still remains as to how human rights standards will adjudicate among drug control strategies, especially concerning

\textsuperscript{577} Preamble, 1961 Single Convention; also see national legislation, for instance, article 1, Anti-Drug Law of the People’s Republic of China.
\textsuperscript{578} UN Doc. A/65/255, para. 48.
that the amount of justification needed for the restriction of individuals’ rights by the state itself is often unclear. With question as such, some other issues in relation to the restriction of rights in the realm of drug control regarding particular groups in society will be discussed in the following chapter.
5 Chapter 5: Drug Control and Human Rights: for Certain Groups of People in Society

5.1 Introduction

The previous two chapters discussed human rights issues arising from drug policies in relation to drug offenders and drug users. It should be noted that drug policies may also affect other societal groups in various contexts of drug control. Examples include: drug tests carried out under the premise of state welfare, drug searches in schools, aerial fumigation of illicit crops; the prohibition of the personal consumption of certain type of drugs. These policies and practices are located within the broader context of drug control where human rights of certain groups of peoples have been restricted, infringed and violated. Every individual, regardless of social status, is entitled to protection against unjustifiable intrusive governmental action. Accordingly, human rights concerns may arise where drug control policies have resulted in the denial of social welfare benefits, the infringement of schoolchildren’s privacy and dignity, the destruction of standard living conditions, and the impairment of the enjoyment of religious and cultural life.

These issues highlighted above are examined further in this chapter. The study focuses on drug related legislation and practice which encroaches upon the rights of certain groups of people, including the right to privacy, the right to an adequate standard of living, children’s rights, the right to freedom of religion and the right to cultural life. The main discussion surrounds whether restrictions on individual’s rights can be justified merely on the basis of the need for drug control. In other words, can a state’s intrusive drug control policy toward certain groups of people be justified in accordance with human rights principles? In doing so, national drug control law and practice will be analysed along with states’ obligations under relevant human rights instruments. Case law and key statements in judgements will be explored in order to strengthen the understanding of given issues.
5.2 Drug Testing and Searching

5.2.1 Background

Drug tests and searches may be applied in different circumstances. For example, employees and schoolchildren may be subjected to drug tests and/or searches as may those applying for public funds. Irrespective of the policy basis for drug tests and searches, individuals’ rights are often affected as a result thereof. Some believe that “involuntary drug testing violates the privacy and security of the person without justification in almost all circumstances”.\(^{580}\) While such claims may be too generalised, it is not easy to deny the fact that drug testing and searching policy may infringe individuals’ rights, including the rights to privacy and security, which are generally protected under national constitutions as well as under regional and international human rights law.

Maintaining this understanding, the following study is undertaken to identify the human rights issues involved in cases where individuals are subjected to drug testing or searching. Attention has been given to the United States jurisprudence on the grounds that: firstly, there are rich precedents in the United States, among which a number of significant cases are highly relevant to the research questions of this study, that is to identify the conflict between drug control and human rights protection and to explore how the conflict has been addressed in practice; secondly, there is insufficient discussion in other countries with regard to the issues. However, this can due to language barriers, relevant materials in other languages such as French, Spanish, Russian and Dutch may not be accessible to the author.

In the United States, no comprehensive federal law regulates drug testing. The federal law only provides for certain agencies to apply drug testing to employees. For instance, The Federal Omnibus Transportation Employee Testing Act requires tests for all operators of aircraft, railroad equipment, mass transportation vehicles and commercial motor vehicles. The Drug-Free Workplace Act imposes certain requirements relating to employee education on drug abuse but does not require testing nor does it restrict it. Since there is no comprehensive federal drug

testing legislation, the states of America enact legislation imposing drug testing of various kinds. Regardless of the existence of a legitimate aim, state drug testing or searching programs may be susceptible to human rights challenges, particularly under the Fourth Amendment of the United States Constitution. The Fourth Amendment protects the right of individuals “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”.581 As a matter of fact, drug testing and searching legislation has long been questioned in respect of the Fourth Amendment.582 There are several key points in relation to drug testing or searching discussed under the Fourth Amendment.

First of all, it is well-established by the United States Supreme Court that government-mandated drug testing is a “search” within the meaning of the Fourth Amendment.583 For instance, in *Skinner v. Railway Labor Executives’ Association* the Supreme Court held that the “collection and testing of urine intrudes upon expectations of privacy” and that “these intrusions must be deemed searches under the Fourth Amendment”.584 The Fourth Amendment does not prohibit all searches, only unreasonable searches are unconstitutional.585 As stipulated in *Skinner v. Railway Labor Executives’ Association*:

> To hold that the Fourth Amendment is applicable to . . . drug and alcohol testing . . . is only to begin the inquiry into the standards governing such intrusions… For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.586

Therefore, the question is whether drug testing in a certain context is a reasonable search. To be reasonable under the Fourth Amendment, ordinarily a search may be carried out where there is individualised suspicion of

581 United States Constitution, the Fourth Amendment.
wrongdoing. In other words, the government cannot undertake a search when individualised suspicion is absent. However, in certain well-defined, limited and exceptional circumstances, a search has been considered reasonable without showing individualised suspicion.  

In cases where searching is about to take place without the existence of individualised suspicion, a recognised “substantial special needs” must exist. As the Court stated:

In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.  

This argument illustrates that the notion of “substantial special needs” is usually grounded on “governmental interests”, which, in a given case may override the interests of the individual. As the United States Supreme Court in a later case further determined:

Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.  

Not every alleged public interest, however, will fit within the “substantial special need” exception; an “exceptional circumstances” is also required. So far, the Supreme Court of the United States has recognised two categories of “exceptional circumstances” that meet the “substantial special needs” requirement, namely: “the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to the public

school system’s care and tutelage”. It has also been clarified by the Court that it is the government that bears the burden of establishing a “special need” for drug testing in the absence of individualised suspicion.

Based upon this understanding, case law concerning drug testing and searching programmes toward two different groups in the United States, namely, drug testing for receipt of governmental benefits and drug searching of schoolchildren, are now discussed in order to identify the tension between drug control policy and human rights protection. Questions are raised both in regard to the United States’ Constitution and international human rights law.

5.2.2 Drug Testing Required for the Receipt of Governmental Benefits

At least nine American states have passed legislation that requires drug testing for public assistance applicants. As at 6 March 2014, at least 24 American states had proposed legislation requiring drug testing for those applying for government welfare support. The legitimate basis relied upon by the state level governments is the Federal Temporary Assistance for Needy Families program (TANF). This programme was created by the United States Congress on 22 August 1996, as part of the Personal Responsibility and Work Opportunity Act. The Act was intended to support states in operating programmes designed to achieve the following goals:

(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
(2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

594 These states are: Arizona, Florida, Georgia, Kansas, Missouri, North Carolina, Oklahoma, Tennessee and Utah.
(3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
(4) encourage the formation and maintenance of two-parent families.\textsuperscript{597}

Accordingly, American states may generally use federal funds “in any manner that is reasonably calculated to accomplish” the goals of the \textit{Temporary Assistance for Needy Families Programme}.\textsuperscript{598} As a complement to this provision, other legislation provides that: “Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances”.\textsuperscript{599} Such provisions demonstrate that the United States Congress is authorizing states to impose drug testing on individuals who apply for public assistance and sanction those whose drug test results are positive. However, the Federal legislation does not prescribe rules regarding the circumstances in and means by which the drug tests can be conducted. To this extent, state drug testing programmes that are implemented pursuant to this authority may be vulnerable to constitutional challenge with regard to the individual’s privacy rights as protected under the Fourth Amendment to the United States Constitution. The case of \textit{Lebron v. Florida} has brought this issue under the spotlight.

\textbf{5.2.2.1 Case law}

Under Florida Statutes Section 414.0652, drug testing is conducted as a condition for receiving \textit{Temporary Assistance for Needy Families} benefits. An individual’s consent is obtained by way of a signed, written acknowledgement that “he or she has received and understood” the situation.\textsuperscript{600} The testing can be avoided only if the individual does not apply for the benefits.\textsuperscript{601} In other words, drug testing is mandatory for those who apply for the Florida \textit{Temporary Assistance for Needy

\begin{footnotesize}
\textsuperscript{597} 42 U.S.C. § 601(a).
\textsuperscript{598} 42 U.S.C. § 604(a)(1).
\textsuperscript{599} 21 U.S.C. § 862b.
\textsuperscript{600} FLA. STAT. § 414.0652(2)(e).
\textsuperscript{601} FLA. STAT. § 414.0652(2)(a).
\end{footnotesize}
Families benefits. If the test result is positive, the individual will be ineligible to receive the benefit for one year, starting from the date of the positive test. In cases where a parent has been deemed ineligible for receipt of benefits, an appropriate protective payee shall be designated to receive the Temporary Assistance for Needy Families benefit on behalf of the child. However, only when the protective payee also undergoes drug testing and obtains a negative result.602

Lebron was an honourably discharged veteran of the United States Navy, a college student, and a single parent who took care of his young child. Lebron resided with and also cares for his disabled mother. In July 2011, Lebron applied for financial assistance benefits for himself and his son through Florida’s Temporary Assistance for Needy Families programme. He met all the eligibility requirements except a refusal to submit to mandatory drug testing. Later, Lebron filed a lawsuit seeking to enjoin the enforcement of Florida’s mandatory suspicionless drug testing as a violation of his and all other Temporary Assistance for Needy Families applicants’ Fourth Amendment right to be free from unreasonable searches and seizures. In November 2011, it was found that the state of Florida showed no “substantial special need” to apply drug testing to all Temporary Assistance for Needy Families applicants and the district court halted enforcement of Section 414.0652 against any others applicants until such time as the problem was fully resolved.603 In February 2013, the United States 11th Circuit Court of Appeals upheld the district court decision.604

Pursuant to the mandate of the Fourth Amendment of the Constitution of the United States as previously discussed, in order to justify mandatory drug testing under Temporary Assistance for Needy Families the government would first need to establish the “substantial special needs” exception to the Fourth Amendment. In this regard, the government of Florida maintains that the following interests

602 FLA. STAT. § 414.0652 (3)(c).
603 Lebron v. Wilkins, Court Order, Case No.: 6:11-cv-01473-Orl-35DAB, United States District Court Middle District of Florida Orlando Division.
604 Lebron v. Secretary, Florida Department of Children and Families, Case No. 11-15258, Appeal from the U.S. Dist. Ct. M.D. Fla. (11th Cir. 2013).
can be taken as “substantial special needs” to establish an exception to the Fourth Amendment.

(1) ensuring that TANF funds are used for their dedicated purpose, and not diverted to drug use;
(2) protecting children by “ensuring that its funds are not used to visit an ‘evil’ upon the children’s homes and families;”
(3) ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment;
(4) ensuring that the government does not fund the “public health risk” posed by the crime associated with the “drug epidemic.”

These are all sound goals; however, such argument does not of itself constitute special needs sufficient to justify the drug testing. As the United States District Court Middle District of Florida Orlando Division found:

[the] State invokes the government’s general interest in fighting the “war on drugs” and the associated ills of drug abuse generally to contend that TANF funds should not be used to fund the drug trade. The Court agrees. But, if invoking an interest in preventing public funds from potentially being used to fund drug use were the only requirement to establish a special need, the State could impose drug testing as an eligibility requirement for every beneficiary of every government program. Such blanket intrusions cannot be countenanced under the Fourth Amendment.

Similarly, Judge Jordan of the 11th Circuit Court determined:

Every expenditure of state dollars, taxpayers hope, is for the purpose of achieving a desirable social goal. But that does not mean that a state is entitled to require warrantless and suspicionless drug testing of all recipients of state funds (e.g., college students receiving Bright Futures scholarships, see Fla. Stat. § 1009.53) to ensure that those funds are not being misused and that policy goals

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605 Lebron v. Wilkins, Court Order, Case No.: 6:11-cv-01473-Orl-35DAB, United States District Court Middle District of Florida Orlando Division, p. 23.
606 Lebron v. Wilkins, Court Order, Case No.: 6:11-cv-01473-Orl-35DAB, United States District Court Middle District of Florida Orlando Division, p. 33.
(e.g., the graduation of such students) are being achieved. Constitutionally speaking, the state’s position is simply a bridge too far. 607

In relation to this point, the 11th Circuit Court of the United States expounded:

There is nothing so special or immediate about the government’s interest in ensuring that TANF recipients are drug free so as to warrant suspension of the Fourth Amendment. The only known and shared characteristic of the individuals who would be subjected to Florida’s mandatory drug testing program is that they are financially needy families with children. Yet, there is nothing inherent in the condition of being impoverished that supports the conclusion that there is a concrete danger that impoverished individuals are prone to drug use or that should drug use occur, that the lives of TANF recipients are fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. 608

The above judicial analyses illustrate that the constitutional rights of those who apply for public assistance are not automatically suspended because of their financial circumstances and their action of application for public funds. In other words, this group of people who are financially needy do not have any of the identifiable characteristics that might warrant mandatory searches without suspicion “upon expectations of privacy that society has long recognised as reasonable”. 609 In addition, drug testing cannot simply claim it will mitigate a threat upon a public interest when competent evidence is absent. 610 In other words, initiation based upon a “substantial special need” means that it will address a problem or move a barrier for achieving the special need. In the Lebron case, there was no evidence to show that the public interest would be better protected as a result of drug testing under the TANF programmes; neither did the evidence show that the absence of such testing would place the public or others

608 Lebron v. Secretary, Florida Department of Children and Families, Case No. 11-15258, Appeal from the U.S. Dist. Ct. M.D. Fla. (11th Cir. 2013)710 F.3d, at 1213 (internal quotations and citations omitted).
Still, it is worth mentioning that, this balancing act will only be necessary if the government is able to satisfy the threshold in the first place: demonstrate that there is a “substantial special need” for the drug testing. That is to say, if no special need has been demonstrated then there is no need to balance the public interest in conducting drug control policies against the individual’s rights.

Besides the public interest argument, the government has claimed that drug use within certain populations is of itself sufficient to establish a “substantial special need”. This is a groundless notion. No empirical evidence to support such a claim. In fact, in contrast to the government’s claim, a study known as the *Demonstration Project* shows:

…(1) because it is difficult to determine the extent of drug use among welfare beneficiaries, such estimates should not be used for sanctioning purposes and (2) drug testing may be of little benefit given the finding of inconsequential differences between drug users and non-users on employability and reliance on government benefits.  

Also, as the 11th Circuit Court of United States succinctly explains:

In pointing out that there is no evidence of a demonstrated problem of drug use within Florida’s TANF population to support the State’s special needs argument, we in no way are suggesting that evidence of drug use within the TANF population would, in and of itself, suffice to establish a substantial special need for mandatory drug testing.  

The government also argued that regardless of the absence of a substantial special need the legislation was nonetheless legitimate because applicants for

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613 *Lebron v. Secretary, Florida Department of Children and Families*, Case No. 11-15258, Appeal from the U.S. Dist. Ct. M.D. Fla. (11th Cir. 2013), 710 F.3d at 1212 n.7.
TANF benefits had consented to drug testing. However, as previously mentioned this consent was given in the knowledge that refusal to undertake drug testing would result in a determination of ineligibility. In other words, if an applicant refused to be subjected to mandatory drug testing, he or she would not be eligible to apply for the government’s financial assistance, assistance which his or her family needed. Therefore, this limited freedom of choice challenges the claim that informed consent was received from applicants.

In short, the government’s desire to use drug testing to decrease the likelihood of a public resource being used to fund drug abuse is reasonable. However, while legislation that only requires drug testing where individualised suspicion exists is less likely to run afoul of human rights standards, legislation that requires all applicants for public assistance to undergo drug testing is challengeable. In addition, in spite of the fact that there is a mandate for drug control, the government cannot simply condition an individual’s receipt of government benefits on the surrender of his or her constitutional rights; and by no means can states jeopardise an individual’s enjoyment of their human rights, including the right to privacy, the right to an adequate standard of living, and the right to freedom from discrimination, all of which are protected under international law.

5.2.2.2 International Human Rights Law

The right to privacy is protected under many human rights instruments. Following relevant safeguards, the right to privacy in the context of drug testing encompasses obligations to respect the physical privacy of individuals, including the obligation to seek informed consent from those subjected to drug testing; and

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616 Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004).
617 For instance, article 12, Universal Declaration of Human Rights; article 17, International Covenant on Civil and Political Rights; article 8 of the European Convention on Human Rights, article 21 of the Arab Charter on Human Rights, article 11 of the American Convention on Human Rights.
privacy of information, including the need to respect the confidentiality of all information relating to a person’s drug use status. Following the Lebron case, even where an explicit declaration of consent is received from those who apply for public benefits such as a signed release acknowledging consent, a violation of the right to privacy may nonetheless arise. As previously mentioned, it not easy for applicants to refuse to participate in drug testing where the consequence of such refusal will be a declaration of ineligibility. In practice, legislation such as the Temporary Assistance for Needy Families renders consent mandatory in circumstances where the applicant is already in a disadvantaged social position. It creates a dilemma whereby applicants have to choose between giving up their rights and obtaining government help. In other words, the enjoyment of the right to privacy for that group of people is limited. In this respect, this group of people, namely those who as a result of their social status are in need of government support, become a group of people who cannot freely and fully enjoy their rights due to drug control policy.

It is noted that limitations of certain rights are allowed under international human rights law.618 The limitation, however, can only be identified and carried out in a strict manner. The government, as in the Lebron case, usually base drug testing on the notion of public interest; or more specifically, preventing taxpayers’ money from being used to support drug use. As previously discussed claims such as these may sound reasonable; however, they cannot always stand up to close scrutiny. Put simply, if preventing public funds from potentially being used to fund drug addict were excuse for justify mandatory drug testing, then governments could impose intrusive measures as such as an eligibility requirement for every beneficiary of every government programme. Such blanket intrusions cannot be countenanced under international human rights standards, which prohibit arbitrary intrusive measures. The prohibition of arbitrary rights restriction has been discussed in chapter four in relation to the issue of detain for drug treatments, hence, the author will not go into detailed discussion again in this part. The point is where there is a conflict between a drug control mandate and human right obligations, the justification for the restriction of the enjoyment

618 For instance, article 12(3), 18(3), 19(3), 21 and 22 of the International Covenant on Civil and Political Rights which provide the limitation conditions.
of the right must be well established and the burden is on the government who initiated the intrusive measures. In relation to the drug testing of applicants for government benefits as in the aforementioned *Lebron* case, such justification is poorly grounded.

Besides infringing the right to privacy, mandatory drug testing of applicants for government benefits may also raise human rights challenges in other respects. For instance, it may restrict an individual’s enjoyment of the right to a minimum standard of living.\(^{619}\) Relevant provisions include article 9 of the International Covenant on Economic, Social and Cultural Rights which stipulates: “The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance”.\(^{620}\) Also, article 10 states that: “The widest possible protection and assistance should be accorded to the family, …, particularly for its establishment and while it is responsible for the care and education of dependent children”.\(^{621}\) Therefore, states have an obligation to guarantee that families in need, especially those with children, receive public support to ensure certain minimum living standards. However, programmes, which require mandatory drug testing as a precondition for the receipt of government benefits, undermine the enjoyment of this right by those who refuse such testing or who test positive. In addition, any restriction of an individual’s rights cannot simply be based on his or her social status. In other words, a simple presumption that anyone who applies for government benefit is also prone to drug use is groundless and discriminatory. In this respect, a policy that requires mandatory drug testing of applicants for government benefits also raises the question of discrimination against certain groups of people in society.

**5.2.3 Drug Testing and Searching of School Children**

Drug control is a pressing social concern which also arises within school yards.\(^{622}\) It is expected that schools institute all necessary measures to prevent

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\(^{619}\) Article 25, Universal Declaration of Human Rights.

\(^{620}\) Article 9, International Covenant on Economic, Social and Cultural Rights.

\(^{621}\) Article 10, International Covenant on Economic, Social and Cultural Rights.

drug use and proliferation. Therefore, school authorities have employed a variety of measures to foster a drug free environment. These measures include: mandatory drug testing, closed circuit cameras, sniffer dogs and even strip-searches. While the protection of children from the harm of illicit drugs is necessary, the measures taken to fulfill this good intention may cause more harm than good. For instance, strip-searching may have profound harmful consequences upon children’s mental health. In this respect, drug control measures, such as drug testing and searching in school must strike a balance between providing a drug free environment for children and protecting children’s rights. This is by no means an easy task. If school drug control measures are considered reasonable where school officials initiate actions based on minimal suspicion, an invasion of student privacy may arise. If control measures are found to be unreasonable due to the high threshold of suspicion required, it may hamper the school’s ability to detect illicit drugs. In either case, there will be space for debate on how to achieve a balance between drug control and rights protection in school. In doing so, there are several pertinent Fourth Amendment cases in the United States that address this issue.

5.2.3.1 Case Law

In *New Jersey v. T.L.O*, the Supreme Court of the United States acknowledged the legitimate expectations of schoolchildren with regard to privacy and determined that the entry of schoolchildren into school does not necessarily mean that the right to privacy has been waived. The Supreme Court emphasised that the school also has a legitimate goal in seeking to maintain a safe and healthy learning environment, which may require searches. When striking the balance between the schoolchildren’s right to privacy and the school’s drug control goals, the Court came to the conclusion that the search of students for drugs was not unreasonable and that the right of schoolchildren to privacy had not been violated. It believed that for school searches, “the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause”. The majority held the position that school officials do not need to obtain a warrant before searching and searching does not need to be based on

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probable cause either. However, one can argue that this decision does not fit within the traditional legislative framework of the Fourth Amendment where exceptions are detailed. This has been noted by Justice Brennan, who pointed out in his dissent that it is “unclear, unprecedented, and [an] unnecessary departure from generally applicable Fourth Amendment standards”. Nevertheless, this decision has extended the school official’s authority to search students.

In *Petitioners v. Lindsay Earls et al*, the Supreme Court of the United States ruled that school drug testing for students participating in extracurricular activities is a reasonable means of furthering the important social interest in preventing and deterring drug use among students; and, therefore, does not violate the Fourth Amendment. The Court reached this conclusion mainly based on the belief that students who participate in competitive activities have “a limited expectation of privacy”; the invasion of the right to privacy due to drug testing is “not significant” and drug testing is an effective means to achieve the school’s legitimate goals of preventing drug use by schoolchildren. It is worth mentioning that a different position has been held by some state level Supreme Courts in the United States. For instance, in *Kuehn v. Renton School District*, the Washington Supreme Court held that a blanket search of large groups of students without individualised suspicion violates the Washington Constitution. Again, in a more recent case (*York v. Wahkiakum*), the Washington Supreme Court unanimously found that a school district policy of urine testing of students who participate in extracurricular athletics without suspicion violates the Washington Constitution.

Clarifying the scope of students’ Fourth Amendment rights against school drug testing and searching remains an on-going development. A recent case that involves school drug searching, *Safford Unified School District v. Redding*, further demonstrated the tense relationship between drug control and rights

protection of children in school. Safford middle school officials strip-searched
thirteen-year-old student Savana Redding for drugs based on uncorroborated tips
from another student. After a District Court and a Ninth Circuit panel found the
search to be lawful, the Ninth Circuit reheard the case en banc and the previous
judgment was reversed. The Supreme Court of the United States in Safford
Unified School District v. Redding held that searching a schoolchild’s underwear
for drugs violated the Fourth Amendment which prohibits the unreasonable
invasion of an individual’s privacy; however, the Court also posited that the
school officials should be granted qualified immunity authorizing them to
conduct drug searching. Justice Stevens and Justice Ginsburg dissented from
the majority opinion in this part and opined that strip-searching constituted a
“clearly outrageous conduct” and believed that “it does not require a
constitutional scholar to conclude that a nude search of a 13-year-old child is an
invasion of constitutional rights of some magnitude”.

In short, in the above mentioned cases the courts were invited to help authorities
to clarify the scope of children’s rights when it comes to drug control in schools.
However, the judges ignored the issue or left it without clarification. Still, the
main task facing school authorities is how to balance the legitimate goal of
maintaining a secure, healthy and drug free environment for schoolchildren
against the need to concurrently protect the rights of individual students. In this
regard, the human rights principles enshrined in international instruments,
especially the Convention on the Rights of the Child, may provide some insights.

5.2.3.2 Convention on the Rights of the Child

The Convention on the Rights of the Child provides specified rules for schools to
follow with regard to the protection of children’s rights. For instance, article

para. 2638. It is worth noticed that the qualified immunity is not only granted for school authority
in the context of drug searching, but in other circumstance. For instance, in Thomas v. Roberts
(C.A.11 2003), a teacher and police officer who conducted a group strip search when looking for
a missing $26 have also been granted qualified immunity. (Thomas v. Roberts, 323 F.3d 950
(C.A.11 2003) )

at. 2644.
28(2) of the Convention on the Rights of the Child requires States parties to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention”. Pursuant to this provision, the drug control measures adopted and administered by a school shall respect every child’s human dignity. Specifically, the right to privacy of child is protected under article 16 of the Convention on the Rights of the Child. Besides the right to privacy, in some cases, drug searching may also have a mental effect on children that are subjected to such measures. In this regard, according to article 19(2) of the Convention, States parties are obliged to take all appropriate measures to protect the child from all forms of physical and mental injury or abuse. In this connection, drug testing and searching of school children that constitutes arbitrary interference with a child’s right to privacy and results in physical or mental harm is incompatible with human rights law and goes against states’ human rights obligations. What is more, article 3 of the Convention provides that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The principle of “the best interests of the child” embedded in the Convention shall be followed in all situations. Drug control within school yards is by no means an exception.

It is worth mentioning that under the Convention on the Rights of the Child, States parties also have the obligation to “take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances”. It is outside of the scope of this study to determine what “appropriate measures” are and this in any case may vary in different situations. The point is, certain

634 Article 33, Convention on the Rights of the Child.
principles should be followed when initiating and applying drug control measures that involving children. In other words, while the importance of deterring drug abuse and preventing illicit drugs from entering into school yards is a legitimate goal, the measures that are carried out to achieve this goal need to be appropriate. For instance, if less intrusive measures are available to achieve the same legitimate goals, then the more invasive measures shall be abandoned. Certain safeguards are also necessary to prevent any arbitrary intrusion from school officials in the context of drug control. For instance, parents may be informed before searches and be present when searches are conducted. In addition, the drug control provision shall be interpreted within the framework of the Convention on the Rights of the Child. That is to say, it has to be in line with the objective of the Convention and not conflict with other provisions in the same Convention. In this regard, “the best interests” principle and the rights protection provisions discussed above also need to be followed by school authorities when fulfilling their drug control mandate under the Convention on the Rights of the Child.

The school authorities’ decision to conduct drug testing or searching in pursuit of the legitimate aim of guarding against the threat of drug abuse in schools is not an issue under question; rather where children’s rights may be restricted for the purpose of drug control, the scope of the said restriction may need clarification to prevent any arbitrary invasion and violation of rights. That is to say, on the one hand, it is necessary for schools to take measures to foster a drug-free environment in the interests of students. On the other hand, schools also have the obligation to protect children’s rights from arbitrary interference. Therefore, school authorities have to address the issue of how to create a drug free environment for school safety while the measures that are taken to achieve the goal shall not harm schoolchildren. This is by no means an easy task for school authorities. At least, however, the principle of the “best interests of the child” embedded in the Convention on the Rights of the Child can be used to guide officials and judges when it comes to drug control policies that concern children.

All in all, everyone shall be protected against unreasonable drug testing and searching that restricts or violates rights to which they are entitled. This is also true in cases where there is no immediate or direct threat to public safety from
public assistance applicants\textsuperscript{635} or in school settings where the government has a responsibility for the tutelage of students.\textsuperscript{636} However, the protection of the rights of those groups of peoples, as above illustrated, is often neglected, and not only by policy makers and the authorities. The judiciary also shows weaknesses in addressing the protection of rights when it comes to drug control. Those are not the only cases in that kind in the context of drug control and it is by no means only happening within the United States. The tension between drug control and human rights as well as the often questionable political and judicial responses to human rights protection in the context of drug control are also demonstrated in many other countries in relation to other aspects of drug control measures including the eradication of illicit drugs and the ban on personal consumption of drugs. These are issues discussed in the following parts of this chapter.

5.3 Eradicating Illicit Drugs

5.3.1 Background

The international drug control conventions require the eradication of illicit cultivated plants that contain narcotic or psychotropic substances.\textsuperscript{637} Therefore, these states have the obligation under international drug control law to eradicate illicit drug plants. Meanwhile, international drug control law also requires that the measures undertaken to fulfill this mandate be compatible with human rights norms.\textsuperscript{638} Accordingly, under both international drug control law and human rights law, States parties have an obligation to respect and protect human rights when conduct eradication measures. In practice, however, drug crop eradication campaigns can overlook human rights protection and cause human rights crises. This particular issue has been significantly demonstrated by Colombia’s drug eradication policy.

\textsuperscript{635} Lebron v. Secretary, Florida Department of Children and Families, Case No. 11-15258, Appeal from the U.S. Dist. Ct. M.D. Fla. (11th Cir. 2013).


\textsuperscript{637} Article 14(2), 1988 Convention.

\textsuperscript{638} Article 14(2), 1988 Convention.
The following parts of the study, therefore, mainly use Colombia as a case study for examining the eradication of illicit drug crop measures that raise human rights concerns. The study firstly looks at the impact of aerial fumigations on the health and living conditions of the affected population and on the environment. It then considers the legal framework in which international drug control law and human rights law applies in Colombia, as well as the conflict between drug control and human rights protection in the context of drug crop eradication.

### 5.3.2 Colombian Drug Eradication Policy and Consequences

Colombia has used various strategies to eradicate illicit narcotic drug plants. One of these strategies is the aerial spraying of drug crops with chemical herbicides. In 2000, the Colombian government launched the “Plan Colombia” to combat illicit drugs in its territory. This plan mainly carried out by aerial eradication of coca and poppy crops. Since then, the chemical eradication of illicit coca and poppy plantations by aerial spraying has been widely and heavily used. This was a national plan that was largely funded by another country, namely the United States, in the aim of supporting:

the Colombian Government’s efforts to strengthen its democratic institutions, promote respect for human rights and the rule of law, intensify counter-narcotics efforts, foster socio-economic development, address immediate humanitarian needs, and end the threats to democracy posed by narcotics trafficking and terrorism.

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641 United States Department of State, A report to congress on united states policy towards Colombia and other related issues, 3 February 2003.
However, a plan initiated with good faith did not bring benefit but harms to the society. The Colombian government has been “digging itself into a paradoxical hole”.  

First of all, the objective of gaining control of illicit cultivation of drugs has not been achieved by undertaking aerial spraying. The following chart shows a general decreasing trend of coca fields in Colombia since 2001; however, the impact of aerial spraying on this decrease is limited. Recent studies show that in Colombia “the coca leaf yield per hectare has decreased, probably because farmers are cutting back on fertilisers and agro-chemicals… and it is evident that aerial spraying is not the only factor involved in crop reduction”.  

There were years where coca cultivation even increased after the Colombian government launched the “Plan Colombia” programme. According to the United Nations Office on Drugs and Crime, the area under coca crop cultivation in Colombia rose 3 per cent in 2011 when it reached 64,000 hectares. In short, as the Latin American Commission on Drugs and Democracy concluded: “prohibitionist policies based on the eradication of production and on the disruption of drug flows…have not yielded the expected results”.


645 Latin American Commission on Drugs and Democracy, Drugs and Democracy: Toward a Paradigm Shift 7, Available at: http://www.drogasedemocracia.org/Arquivos/livro_ingles_02.pdf (last accessed 31 January 2014)
The drug eradication programme not only failed to achieve the expected goals, the aerial herbicide spraying also resulted in harmful consequences. The most direct effect is the impact on the health of the residents. These health consequences include fevers, diarrhoea, intestinal bleeding, nausea and a variety of skin and eye problems. The use of aerial spraying to eradicate illicit drug crops not only damaged physical health, it also caused mental health problems. For instance, local testimony indicates that military helicopters sometimes accompanied the aircrafts performing the aerial spraying which terrifying residents in the subjected regions, especially vulnerable groups such as children.647 In addition to the adverse health effects, internal displacement also occurred due to the deterioration of living conditions.648 Notably, the herbicides used did not only affect coca plants, many other crops cultivated nearby were also killed. Some herbicides even had long-term effects on the land making it impossible to grow many other crops for a long time.649 Fish, domestic animals and food crops have all been destroyed as a result of the aerial spraying. This damage to material living conditions has forced local people to move away from their original places of residence.

647 Paul Hunt, the UN special rapporteur on the right to the highest attainable standard of health, oral remarks to the press, 21 September 2007, Bogota, Colombia.
648 UN Doc. A/HRC/7/39, para. 52. See also UN Doc. E/C.12/1/Add.74, para.11.
Apart from people, the environment at large has also damaged. For example, as a result of the fumigation, soil, air and water were all contaminated. One administrative court in Colombia found that aerial fumigations have a detrimental effect on the environment and on the ability of Colombians to enjoy their natural environment, a right that is protected under the Colombia constitution. However, the United States government supported the fumigation by arguing that such measures deter the cultivation of coca crops, which in turn also protects the environment by reducing deforestation and erosion. Counterarguments have been offered that aerial spraying has not deterred illicit coca cultivation but has merely moved it to other fields. Due to the exploration of new fields, in fact, the deforestation increased.

Colombia itself is not the only country suffering from the adverse outcomes of this drug control strategy. Ecuador, which shares a border with Colombia, has also been a victim. As the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, comprehensively reported:

…International studies indicate that this practice has negative effects on environmental resources and the health of people and animals. Skin and other diseases, pollution of rivers and aquifers, and other damage have been reported. Furthermore, spraying has been seen as having serious effects on banana plantations and varieties of tuber crops, the local staple. In addition, the

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652 Plan Colombia: Major Successes and New Challenges, Jonathan D. Farrar, Deputy Assistant Secretary for International Narcotics and Law Enforcement Affairs Statement before the House International Relations Committee Washington, DC, 11 May 2005.
653 Chemical reactions, Fumigation: spreading coca and threatening Colombia’s ecological and cultural diversity, February 2008, p. 22.
population often uses untreated water from the river forming the border between the two countries.

… spraying has also had a negative effect on the health and food security of border populations by polluting their water sources and the aquatic life. Some indigenous communities in the area, … complain that their rights are being violated and that they are being subject to other abuses. … Apparently, after spraying, the entire Sumac Pamba community was displaced and did not return to their place of origin. As a consequence, it appears that the local wildlife, which provided a source of daily consumption, both for households and for recreational purposes, has died and various activities have been affected, as polluted water cannot be used. Spraying appears to be destroying subsistence crops, diminishing soil quality and reducing yields, affecting both the economic activities of communities and the population’s access to adequate food.  

The UN Special Rapporteur on the Right to Health, Paul Hunt, also reported on the impact of the spraying on the Colombian-Ecuadorean Border. After his mission to Ecuador and Colombia, he held the view that:

There was credible and reliable evidence that the aerial spraying of glyphosate along the border damages the physical and mental health of people living in Ecuador. … evidence provided … was sufficient to call for the application of the precautionary principle and that, accordingly, Colombia should not recommence aerial spraying …, thus ensuring conformity with its international human rights responsibilities.

Colombia has a human rights responsibility of international cooperation to ensure that its action shall not deconstruct other countries’ human rights environment. In this case, Colombia’s aerial spraying along the border of Colombia and Ecuador jeopardises the enjoyment of the right to health and standard of living of those living in Ecuador. After several failed attempts to reach diplomatic settlement to the dispute, the government of Ecuador brought a case to the International Court of Justice requesting a judgment of the Court ordering Colombia to terminate the practice of aerial dispersion and indemnify Ecuador’s damages caused by

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656 UN Doc. A/HRC/7/11/Add.3, p. 17.
Colombia’s internationally unlawful acts.\textsuperscript{657} An Agreement was reached between Ecuador and Colombia, dated 9 September 2013. According to the Agreement, an exclusion zone has been established in which Colombia will not carry out aerial spraying. Furthermore, Colombia must ensure that any spraying conducted outside the zone does not drift into Ecuador.\textsuperscript{658} It has been stated that this Agreement “fully and finally resolves all of Ecuador’s claims against Colombia”.\textsuperscript{659} Consequently, on 13 September 2013, the case was removed from the International Court of Justice at the request of Ecuador.\textsuperscript{660} Also, it is worth mentioning that an argument was advanced that the fumigation performed by Colombia also has violated international humanitarian law.\textsuperscript{661} However, this is a topic that is beyond the scope of this study.

5.3.3 The Conflict: Drug Control and Human Rights Protection

On 20 December 1988, Colombia was one of the first countries to sign the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. According to article 14(2) of the 1988 Convention: “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.”\textsuperscript{662} At the national level, the Colombian Penal Code also prohibits the cultivation of

\textsuperscript{657} International Court of Justice, Application Instituting Proceedings, Aerial Herbicide Spraying (\textit{Ecuador v. Colombia}), Pleadings, 31 March, 2008, para.2.
\textsuperscript{658} International Court of Justice, Press Release, 17 September 2013, No. 2013/20. Aerial Herbicide Spraying (\textit{Ecuador v. Colombia}). Case removed from the Court’s List at the request of the Republic of Ecuador.
\textsuperscript{659} International Court of Justice, Press Release, 17 September 2013, No. 2013/20. Aerial Herbicide Spraying (\textit{Ecuador v. Colombia}). Case removed from the Court’s List at the request of the Republic of Ecuador.
\textsuperscript{660} International Court of Justice, Court Order, 13 September 2013, General list No.138. Aerial Herbicide Spraying (\textit{Ecuador v. Colombia})
\textsuperscript{662} Article 14(2), 1988 Convention.
coca plants. Therefore, the government of Colombia has the responsibility to take action against illicit drug cultivation, such as eradicating illicit drug crops. Even though no specified methods have been prescribed under international drug control law for implementing eradication measures; the manner in which eradication measures are carried out cannot contravene human rights norms. As article 14(2) of the 1988 Convention stipulates: “The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses…as well as the protection of the environment.” Pursuant to this provision, human rights considerations need to be taken into account when determining whether certain eradication measures are appropriate. In addition, the ultimate goal of international drug control is to prevent human suffering as a result of illicit drugs. Strategies of drug control such as the chemical fumigation of narcotic plants which bring harm to society depart from that goal.

Colombia not only has obligations under international drug control law; relevant human rights obligations under international human rights conventions to which Colombia is a State party have to be observed as well. As early as 29 October 1969, Colombia ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as a result of which, the Colombian government has certain human rights obligations. For instance, article11 of the International Covenant on Economic, Social and Cultural Rights stipulates “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions”. Also, article 12 of the Covenant recognises the right to the highest attainable standard of health and particularly addresses the obligation of states with regard to improvement of all aspects of the environment. In these respects, the government of Colombia has an obligation under international human rights law to protect the right to health

663 CÓDIGO PENAL [PENAL CODE] article 375.
and the right to adequate living conditions. In the context of drug control, this means that a state’s policy and action, such as aerial spraying, shall avoid adverse human rights consequences upon individual’s health and living conditions. However, as demonstrated above, the health of local people, their living conditions and the environment at large have all been damaged due to Colombia’s drug eradication strategies. In this regard, Colombian drug control policy of eradicating illicit drugs is questionable.

Colombia is the only country where aerial fumigation to eradicate illicit coca crops currently takes place. The position of the domestic judicial system in Colombia is ambiguous as regards the human rights ramifications of aerial spraying. For instance, in 2003 the Cundinamarca Administrative Court ordered the Colombian government to stop aerial spraying until the risk to human health had been analysed conclusively. The appellate court overturned this decision without addressing the issue of the right to health. The court held the opinion that states should be able to continue aerial fumigations because the illicit coca cultivation was a threat to state security.

Internationally, human rights concerns relating to aerial spraying for the purpose of eradicating illicit drug plants have been raised by several human rights bodies. For instance, with regard to the protection of the rights of indigenous people, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, in his report to the Economic and Social Council, argued that “no aerial spraying of illicit crops should take place near indigenous settlements or sources of provisions”. In 2006, the Committee on the Rights of the Child expressly

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stated its concern about the health and environmental problems resulting from the fumigation of coca plantations as part of the “Plan Colombia” regime. 671 While acknowledging the legitimate aim of combatting drugs, the Committee recommended States parties to: “carry out independent, rights-based environmental and social-impact assessments of the sprayings … and ensure that, when affected, prior consultation is carried out with indigenous communities and that all precautions be taken to avoid harmful impact of the health of children”. 672 In 2007, Paul Hunt, then United Nations Special Rapporteur on the right to the highest attainable standard of health expressed a similar opinion on the spraying issue. He acknowledged that illicit drug cultivation causes serious problems in Colombia but also pointed out Colombia has a human rights obligation with regard to the right to health. Following the precautionary principle, he believed that in order to ensure conformity with its human rights obligations, Colombia should not recommence spraying until it was shown that spraying does not damage human health. 673 However, the international drug control related bodies, such as the United Nations Office on Drugs and Crime holds the position that it “neither participates nor supervises aerial spraying activities”. 674

In short, the fact that governments have the responsibility to take action against illicit drug cultivation is undeniable. Yet, governments are not authorised to respond to illicit acts by damaging human health and destroying living environments, which they have an obligation to protect. The importance of controlling illicit drugs is not called into question; however, human rights obligations are not exempted because of the need to pursue a drug control mandate. In other words, people’s rights shall not be sacrificed in the name of drug control. Such conflict between a state’s drug control mandate and human rights obligations has also been significantly demonstrated in the fields of religious and cultural use of drugs. In these contexts, the individual’s right to

671 UN Doc. CRC/C/COL/CO/3, p. 72.
672 UN Doc. CRC/C/COL/CO/3, pp. 72, 73.
673 UN Doc. A/HRC/7/11/Add.3, p. 17.
674 United Nations Office on Drugs and Crime, Colombia Coca Cultivation Survey 2012, June 2013, p. 82.
freely enjoy religious, cultural and traditional rights have been restricted, justifiable or not, in the name of drug control.

5.4 Cultural and Religious Use of Drugs

5.4.1 Introduction

It has long been acknowledged and accepted in some communities that many cultural and religious practices involve the use of certain types of drugs such as coca and cannabis based plants. In the human rights realm, cultural and religious rights are recognised and protected under many of the international and regional human rights instruments to which many states adhere. These include, but are not limited to, article 18 of the Universal Declaration of Human Rights, which stipulates that everyone has the right to freedom of religion, and article 27 which provides that “[e]veryone has the right freely to participate in the cultural life of the community”. Also, article 18 of the International Covenant on Civil and Political Rights provides that “[e]veryone shall have the right to freedom of thought, conscience and religion”. Regionally, article 12 of the American

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675 The right to enjoy cultural and religion life is also recognised in many other human rights instruments, such as: International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (e) (vi); Convention on the Elimination of All Forms of Discrimination against Women, article 13 (c); Convention on the Rights of the Child, article 31, para. 2. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 43, para. 1 (g); Convention on the Rights of Persons with Disabilities, article 30, para. 1; In particular the International Covenant on Civil and Political Rights, articles 17, 18, 19, 21, 22, and 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 2, paras. 1-2. See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), article 15; United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff; Declaration on the Right to Development (General Assembly resolution41/128), article 1. In its general comment No. 4, paragraph 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments.


677 Article 18, International Covenant on Civil and Political Rights.
Convention on Human Rights states that “everyone has the right to freedom of conscience and of religion”. Similar wording can be found in article 9 of the European Convention on Human Rights. The African Charter on Human and People’s Rights protects the right of religion by stipulating in article 8 that “freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”

Under international drug control law, however, any personal use and possession of drugs is prohibited except for “medical and scientific” purposes. Accordingly, drug uses for cultural or religious purposes are not permitted under the international drug control regime. It is therefore that on the one hand, states have the obligation to protect an individual’s religious and cultural rights, while on the other hand states are also required to ban personal drug use, including for religious or cultural purposes. In other words, there is an unavoidable conflict between drug control and human rights protection in countries where religious and cultural use of drugs are taking place. For states that have obligations under both international drug control law and human rights law, governments are required to carefully examine and balance the interests at stake to ease any conflict that may occur. In practice, cultural and religious rights are often restricted on the basis of drug control requirements. In other words, states’ obligations to protect religious and cultural rights have yielded to states’ drug control mandates.

While certain rights may be subject to limitations, it is questionable whether the requirements of drug control will always justify restrictions on those rights. Litigation has been initiated in order to settle the issue both in national and international contexts. Challenges to the international drug control conventions have been lodged by countries seeking to address the conflict between their international drug control and human rights treaty obligations. Two recent cases are prominent in this regard. One relates to cannabis drug use for manifest

678 Article 12, American Convention on Human Rights.
679 Article 9, European Convention on Human Rights.
religious in South Africa, and the other relates to the traditional use of coca in Bolivia.

5.4.2 South Africa: Religious Use of Cannabis

The conflict between drug control and human rights protection is both present with respect to states’ treaty obligations, as well as within domestic legal system where national drug control law and human rights safeguards are not coordinated with each other. These conflicts are well demonstrated in South Africa, where the ban on religious use of Cannabis has been challenged in relation to the right to manifest and practice religion both in relation to the states’ constitutional duties and human rights treaty obligations.

5.4.2.1 Drug Control Mandate and Human Rights Obligations

Cannabis and cannabis resin are, along with other narcotic drugs such as heroin, morphine and cocaine, listed under Schedule 1 of the 1961 Single Convention, thereby requiring the strictest control. States parties have the obligation, under article 28 of the 1961 Single Convention, to “adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis”. Any legal possession for personal use of cannabis is limited to “medical and scientific research” purposes. Thus, States parties to the 1961 Single Convention have the obligation to “take such legislative and administrative measures as may be necessary” to “limit exclusively to medical and scientific purposes the…use and possession of drugs”. What is more, possession of drugs for personal use other than for “medical and scientific research” purposes can be criminalised within some jurisdictions, a criminalisation which often finds its basis in international drug control law.

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682 List of drugs included in Schedule 1, 1961 Single Convention, Revised Schedules including all amendments made by the Commission on Narcotic Drugs in Force as of 5 March 1990.
686 Article 3(2), 1988 Convention. The interpretation hold by the author is that the possession for personal use is not a criminal offence under international drug control law. This is an opinion also
South Africa is a State party to the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Therefore, pursuant to the above illustrated provisions, South Africa has enacted drug legislation that prohibits personal drug use and possession except for medical or scientific purposes. In addition, according to the Drugs and Drugs Trafficking Act of South Africa, people who in “possession of drugs can be guilty of an offence”. The Act allows personal possession and use of drugs as exemptions under specified conditions for patients, medical practitioners, dentists, pharmacists, other professionals, or anyone that has “otherwise come into possession” of a prohibited substance in a lawful manner. Accordingly, drug use for religious purposes is illegal in South Africa.

In addition to its mandate under the drug control regime, South Africa also has human rights obligations. With regard to protection of freedom of religion, South Africa has obligations under various human rights treaties as well as under its own constitution. South Africa ratified the International Covenant on Civil and Political Rights on 10 December 1998. According to article 18 of the Covenant everyone has the right to freedom of religion and to manifest his religion in various ways. Regionally, the right to freedom of religion is guaranteed under article 8 of the African Charter on Human and Peoples Rights.

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690 Section 4(b) (i), (ii), (iii), (iv) and (v) of the Drugs and Drugs Trafficking Act.

691 International Covenant on Civil and Political Rights, treaty status as at 6 April 2014.

692 Article 18(1), International Covenant on Civil and Political Rights.
to which South Africa is also a State party.\footnote{South African ratified the African Charter on Human and Peoples in 1996, see African Commission on Human and People’s Rights Website: http://www.achpr.org/states/ (last accessed 06 April 2014)} At the national level, the right to freedom of religion is protected under the South African Constitution. Accordingly, section 15 of the Bill of Rights in the South African Constitution stipulates that “everyone has the right to freedom of religion”.\footnote{Section 15, Constitution of the Republic of South African, Act No. 108 of 1996.} In addition, the prohibition of discrimination on the ground of religion is closely connected to the protection of the right to freedom of religion. Internationally, article 26 of the International Covenant on Civil and Political Rights stipulates that any discrimination on the basis of religion which results in unequal protection under the law is prohibited.\footnote{Article 26, International Covenant on Civil and Political Rights.} Article 27 of the Covenant provides equal protection to religious minorities to enjoy their own cultural and religious life.\footnote{Article 27, International Covenant on Civil and Political Rights.} Domestically, Section 31 of the South African Constitution address comprehensively in this regard. As it reads:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
(a) to enjoy their culture, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.\footnote{Section 31, Constitution of the Republic of South African, Act No. 108 of 1996.}

5.4.2.2 The Conflict and the Response: Prince Case

As mentioned above, under South African drug control legislation people who use and possess drugs for religious purposes do so unlawfully. Given the fact that using cannabis is part of customary practice among some religious groups, such legislation will result in the restriction of their enjoyment of the right to freely practice their religion. Meanwhile, as illustrated, South Africa also has the obligation to protect the right of freedom to manifest one’s religion. Such conflict between drug control mandate and human rights obligations has been well demonstrated in the \textit{Prince} case.
The case relates to a law graduate and a follower of the Rastafari religion, Mr Prince, who was denied the right to practice law in South Africa due to his use of cannabis as a religious practice. The use of cannabis is central to the Rastafari religion. It is used at religious gatherings and in the privacy of one’s home. Mr Prince fulfilled all the academic requirements to be an attorney. However, his previous conviction for possessing cannabis and his intention to continue this practice as part of his religion resulted in his rejection from the Law Society of the Cape of Good Hope, to which his registration was required to qualify as an attorney. This situation, therefore, placed him in a position where he was forced to choose between his religion and his career. Mr Prince filed an application in the South African courts claiming that “the failure of the relevant legislation to make provision for an exemption allowing bona fide Rastafarians to possess and use cannabis for religious purposes constitutes a violation of his constitutional rights under the South African Bill of Rights”.

Mr Prince lost in all of the lower domestic courts where his case was heard. Later, the case was brought to the South African Constitutional Court, the African Commission on Human Rights and People’s Rights as well as the United Nations Human Rights Committee. In each of the hearings, an infringement of Mr Prince’s right to freely manifest his religion was identified, but all deemed the restriction reasonable and proportionate. A reading of the judgements of

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these national courts and of those human rights bodies provides valuable insights in relation to the research questions of this study, that is; what is the conflict between drug control and human rights in a given circumstance and how has the conflict been interpreted and addressed by official, judicial and human rights bodies?

5.4.2.2.1 The South African Constitutional Court

The South African Constitutional Court delivered two judgements in the Prince case.\(^7\)\(^0\)\(^3\) In the later one, it decided, by a majority of 5 to 4, that although the *Drugs and Drugs Trafficking Act* did restrict the author’s constitutional rights of freedom of religion under section 36 of the Constitution, such limitations were reasonable and justifiable.\(^7\)\(^0\)\(^4\) One of the main arguments held by the majority was that an exemption for the possession and use of cannabis for religious purposes could not be implemented in practice. As the Court stated:

> There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purpose and the use of cannabis for recreation purposes. It would be even more difficult, if not impossible, to distinguish objectively between the possession of cannabis for one or the other of the above purposes. Nor is there any objective way in which a law enforcement official could determine whether a person found in possession of cannabis, who says that it is possessed for religious purposes, is genuine or not. Indeed, in the absence of a carefully controlled chain of permitted supply, it is difficult to imagine how the island of legitimate acquisition and use by Rastafari for the purpose of practicing their religion could be distinguished from the surrounding ocean of illicit trafficking and use.\(^7\)\(^0\)\(^5\)

\(^7\)\(^0\)\(^3\) *Prince v. President, Cape Law Society and Others* 2001 2 SA 388 (CC), delivered on 12 December 2000 (Prince I) and *Prince v. President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002 (Prince II).

\(^7\)\(^0\)\(^4\) *Prince v. President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002 (Prince II), para. 139.

\(^7\)\(^0\)\(^5\) *Prince v. President, Cape Law Society and Others* 2002, 2 SA 794 (CC), decided on 25 January 2002(Prince II), para. 130.
Contrary to the majority, Judge Sachs makes the argument that:

By concluding that the granting even of a limited exemption in favour of the Rastafari would interfere materially with the ability of the state to enforce anti-drug legislation, … in my view unnecessarily, subjects the Rastafari community to a choice between their faith and respect for the law. Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind sets are the price that constitutionalism exacts from government.706

It is reasonable that when determining the most workable solution, governments will have to consider administrative costs and practical issues. However, although these considerations may affect which measures will be adopted, by no means can they be employed to justify any unreasonable restriction of an individual’s rights. While states may raise practical issues to avoid initiating a policy change, states’ obligations to respect, protect and promote human rights are “not in any way eliminated as a result of resource constrains”.707 As Judge Sachs argued, it is the state’s obligation to make extra effort to accommodate the religious practice within the drug control legal framework.708 By the same token, the obligation remains for governments to “strive to ensure the widest possible enjoyment of the relevant rights” in any given circumstance.709 Simply prioritising drug control over the protection of human rights is irresponsible and questionable.

It is noteworthy that the minority also challenges the government’s human rights obligations by showing the evolvement of public opinion with regard to cultural and religious diversity in South Africa.\footnote{Per Sachs J, \textit{Prince v. President, Cape Law Society and Others}, 2002 2 SA 794 (CC), decided on 25 January 2002, para. 149. Also see: Albie Sachs, \textit{The Strange Alchemy of Life and Law}, New York: Oxford University Press, 2009, pps. 220-221.} To this extent, despite the fact that the claim for exemption based on the use of cannabis for religious purposes failed in the \textit{Prince} case, the dissenting judgment demonstrates the minority’s attempt to accommodate Rastafari reality within the drug control regime and point out a possible expansion based on minority religious toleration in the society.\footnote{Matthew Gibson, \textit{Rastafari and Cannabis: Framing a Criminal Law Exemption}, 12 \textit{Ecclesiastical Law Journal}, 2010, p.333.}

\textbf{5.4.2.2 African Commission on Human and Peoples’ Rights}

After failing in the domestic justice system Mr Prince applied to the African Commission on Human and Peoples’ Rights. The issue brought to the African Commission was whether the failure to exempt Rastafarians from using and possessing cannabis for religious purposes violated the African Charter on Human and Peoples’ Rights. In December 2004, the African Commission found no violation of the complainant’s rights as alleged. With regard to the infringement of the right to freedom of religion protected under article 8 of the African Charter on Human and Peoples’ Rights, the African Commission reasoned that:

\begin{quote}
[a]lthough the freedom to manifest one’s religion or belief cannot be realised if there are legal restrictions preventing a person from performing actions dictated by his or her convictions, it should be noted that such a freedom does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious beliefs should be absolute, the right to act on those beliefs should not. As such, the right to practice one’s religion must yield to the interests of society in some circumstances.\footnote{\textit{Prince v. South Africa} (2004) AHRLR 105 (ACHPR 2004), Communication 255/2002, p. 41.}
\end{quote}

In this way the African Commission of Human Rights justified the restriction on the freedom to manifest one’s religion by making a distinction between the “right to hold religious beliefs” and the “right to practice one’s religion”. It is
recognised under human rights law that the right to practice one’s religion may be restricted in given situations.\textsuperscript{713} However, whether drug control can be simply used to invoke such a restriction is a separate question, to which the Commission failed to provide a clear and strong answer. At least, above arguments failed to establish the proportionality relationship between the restrictions of rights to freedom to manifest religion and achievements of legitimate goals of drug control. Not to say, no assessment whether other less intrusive measures are provable.

It also noted that, in light of the argument of discrimination based on religious belief in the \textit{Prince} case, the African Commission referred to the opinion of the UN Human Rights Committee in the case of \textit{K Singh Bhinder v. Canada}. The African Commission found that:

\begin{quote}
\[\text{[a]}\text{s the limitations are of general application, without singling out the complainant and his fellow Rastafari but applying to all across the board, they cannot be said discriminatory so as to curtail the complainant’s free exercise of his religious rights.}\textsuperscript{714}
\end{quote}

In this regard, simply claiming it is a “general application” to justify a restriction on the exercise of religious rights of certain religion group is not sufficient. This is a point will be discussed in the following part.

\textbf{5.4.2.2.3 United Nations Human Rights Committee}

The Human Rights Committee declared the case admissible but concluded, through an assessment of whether there was an “objective and reasonable” justification for an allegedly discriminatory distinction, that the complainant did not demonstrate a violation of his rights.\textsuperscript{715} The main issues addressed by the Human Rights Committee are as follows.

\textsuperscript{713} Article 18 (3), International Covenant on Civil and Political Rights.


With regard to freedom of religion, Mr Prince claim that the government “failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates the freedom to manifest his religion guaranteed by article 18”.\textsuperscript{716} In this connection, according to international human rights law, the right to freedom of religion cannot be derogated from in any circumstance.\textsuperscript{717} That is to say, the freedom of religion is protected unconditionally. However, certain limitations can apply to the right to freely manifest and practice ones religion.\textsuperscript{718}

The relevant limitation clauses are contained in article 18(3) of the International Covenant on Civil and Political Rights, which provides that:

> freedom to manifest one’s religion or beliefs 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.\textsuperscript{719}

Similar restrictions can also be found in the European Convention on Human Rights, in which article 9(2) reads; “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.\textsuperscript{720} The American Convention on Human Rights, article 12(3) also provides that “freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.”\textsuperscript{721}


\textsuperscript{717} Article 4(2), International Covenant on Civil and Political Rights; also see Human Rights Committee, General Comment 22, para.1. Even in time of public emergency, the right to freedom of thought, conscience and religion, is not derogated.

\textsuperscript{718} Human Rights Committee, General Comment 22, para. 8.

\textsuperscript{719} Article 18 (3), International Covenant on Civil and Political Rights.

\textsuperscript{720} Article 9(2), European Convention on Human Rights.

\textsuperscript{721} Article 12(3), American Convention on Human Rights.
law and order, be submitted to measures restricting the exercise of these freedoms.” 722

Regarding the interpretation and scope of permissible limitations inherent in article 18(3) of the International Covenant on Civil and Political Rights, the Human Rights Committee’s General Comment 22 provides:

Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. … [R]estrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. 723

With regard to whether the ban on cannabis drug use for Rastafarians is encompassed by these limitation clauses, the South African government argued that:

while its legislation indeed results in a limitation of the right to freedom of religion of Rastafarians, such limitation is reasonable and justifiable in terms of the limitation clause contained in article 18, paragraph 3. Furthermore, it is proportionate to and necessary for the achievement of the legitimate aims provided for in that article, namely the protection of public safety, order, health, morals or the fundamental rights and freedoms of others. 724

The UN Human Rights Committee acknowledged the justification for the limitation in the Prince case on the need to protect the public interest. It observed that the need to protect the public from the harm of cannabis overrides the right to freedom of religion for Rastafarians. As the Committee stated:

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,

723 Human Rights Committee, General Comment 22, para. 8.
transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis to 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.725

While the necessity to protect the public interest from any harm that may result from cannabis is undeniable, no direct link has been established between the religious use of cannabis by members of the Rastafarian religion and a threat to public safety, order, health, morals or the fundamental rights and freedoms of others. Therefore, there may be a lack of legitimate necessity to impose a restriction on Rastafarians in this case. In addition, the claimed threat to the public is based on the presumption that “an exemption allowing a system of importation, transportation and distribution to Rastafarians” will treat the public at large.726 However, the issue at stake is the legitimacy of an exemption from the prohibition of cannabis use and possession for Rastafarians in accordance with their right to manifest their religion. It is true that the exemption for cannabis use and possession among Rastafarians will require the establishment of a system of transportation and distribution of cannabis to Rastafarians. Nevertheless, the possible threat of using cannabis among Rastafarians cannot be established on or equal to the possible threat caused by illicit drug transportation and distribution. What is more, no evidence shows that the ban on drug use for religious purposes is the only way to protect the public from the threat of cannabis. Before exhausting other less intrusive measures, a blanket ban on drug use, including use for practicing religion, is questionable. As Mr Prince contends, “the government did not properly consider all the possible forms that an appropriate statutory amendment and administrative infrastructure allowing for a circumscribed exemption could take”.727 Also, as pointed out early on by Judge Ngcobo of the South African Constitutional Court, there is a lack of evidence

demonstrating that “it would be impossible to address these problems by appropriate legislation and administrative infrastructure”. 728

In short, where restrictive measures have to be applied according to law, they must be directly related and proportionate to the specific need, and where the state’s drug control measures cause a restriction on an individual’s enjoyment of their rights the least intrusive measures, if available, should be employed. The cannabis drug control legislation in South Africa constitutes a restriction on a certain group’s right to enjoy their freedom to practice religion; and this restriction, at least from the above arguments, is unlikely to meet the relevant human rights standards.

5.4.2.2.3.2 Article 26 and Article 27

According to the International Covenant on Civil and Political Rights, States parties’ legislation must comply with article 26, in which the equal protection of the law and prohibition of discrimination are established. 729 According to the definition provided by the Human Rights Committee in General Comment 18, this provision should be interpreted as prohibiting both direct and indirect discrimination. As the Committee clarified, “the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. … [A]n act which is not politically motivated may still contravene article 26 if its effects are discriminatory”. 730 As such, both the purpose and the practical consequence of a specified piece of legislation are deemed to be subject to the principle of non-discrimination.

Based on the above understanding, Mr Prince claimed that the current drug control legislation in South African constituted a de facto violation of his right to equality. He also argued that the government has a duty to correct that situation. 731 To respond adequately, there are two issues facing the UN Human

Rights Committee that must be addressed in relation to article 26. The first issue is whether the “indirect discrimination” toward Mr Prince due to the ban on cannabis use is justifiable. The second issue is whether the government has the obligation to correct the situation by establishing an exemption for certain religious groups to use cannabis in order to enjoy their rights to freely manifest their religion. In regard to the first question, the Human Rights Committee observed that:

> a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. …[R]ules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the present case, the Committee notes that the prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs. Accordingly, it considers that the prohibition is based on objective and reasonable grounds. It concludes that the failure of the State party to provide an exemption for Rastafarians does not constitute differential treatment contrary to article 26.732

Not only did it fail to address the question with regard to indirect discrimination, the position taken by the Committee is side-stepping the point. Recognising the beneficial nature of drugs by no means equates to the using of drugs as part of religious practice. For those who do not require drug use as part of their religious practice but “believe in the beneficial nature of drugs”, the effect on their rights due to the ban on cannabis use is not on a par with the effect on those whose exercise of their religion requires the use and possession of cannabis. The ban on cannabis for personal use caused detrimental effects exclusively and disproportionately toward Rastafarians as a religious group in the society, which amount to indirect discrimination.

On the second question the UN Human Rights Committee held that the legislation applied equally to all members of society, therefore the government does not have to make an exemption for certain groups of people to fulfil their

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obligation to ensure non-discrimination under article 26. The conclusion that “equal protection does not include an obligation to make exemptions” may be unjustifiably perfunctory, especially given the fact that exemptions are given to people who have a medical need for drug use, among certain other exemptions. If an exception is made for people who have a medical need for protecting of their right to health, then the argument that states have no obligation to make exemption for religious practice would seem to lack substance. While it is not the intention of this study to provide a detailed examination of the circumstances in which exemptions can be allowed in the context of drug control, the question of whether certain rights are superior to others in a given context is relevant. In regard to this discussion, it is worth inquiring whether the right to health is superior to the right to religion in the context of drug control. In other words, does the right to health outweigh the requirements of drug control, while the right to religion does not? Only if the answer to this question is affirmative should legislation that protects the right to health and the right to religion differ in the context of drug control.

Relevant issues have also been raised in relation to article 27 of the International Covenant on Civil and Political Rights. In response to Mr Prince’s claim that the failure to provide an exemption for Rastafarians violated his rights under article 27, the Committee noted that:

…not every interference can be regarded as a denial of rights within the meaning of article 27. Certain limitations on the right to practice one’s religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable


734 For example, the South African relative legislation allow for exemptions under specified conditions such as: for patients, medical practitioners, dentists, pharmacists, other professionals, or anyone that has “otherwise come into possession” of a prohibited substance in a lawful manner.” (section 4(b) (i), (ii), (iii), (iv) and (v) of the Drugs and Drugs Trafficking Act of South African)

735 Article 27, International Covenant on Civil and Political Rights.
justification for the interference with the author’s rights under this article and concludes that the facts do not disclose a violation of article 27.\textsuperscript{736}

A blanket ban on using cannabis, applicable to all members of the society, including Rastafarians, is a drug policy that is without distinction toward any group in the society. Therefore, it is open to debate whether different treatment should be given to particular groups of people to achieve equal protection of the law. In this connection, there is a positive obligation on States parties to ensure equal protection of the law and non-discrimination, which requires states to take action to correct conditions that lead to unequal treatment or discrimination. As stated by the UN Human Rights Committee:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, states should take specific action to correct those conditions.\textsuperscript{737}

Drug control policies such as blanket bans on drug consumption or possession for personal use, without making any distinctions or exceptions for religious purpose, may result in unequal protection under the law and discriminatory treatment. Therefore, the need for different treatment in different situations in order to secure equal protection should be considered. This is a notion that has been upheld by the European Court of Human Rights. In the case of \textit{Thlimmenos v. Greece}, for instance, the Court expressed that, “[t]he right not to be discriminated against in the enjoyment of the rights … is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.\textsuperscript{738} In this regard, where the drug control policy constructs a situation wherein a certain group of peoples’ right are infringed while those of other members of the society are not, states


\textsuperscript{737} Human Rights Committee, General Comment No.18, para.10. See also: General Comment No.23, para.6.2, and General Comment No.28, para.3 and 29.

\textsuperscript{738} \textit{Thlimmenos v. Greece}, Application no. 34369/97, ECHR, Judgment, 6 April 2000, para. 44.
have the obligation to address the issues raised and to prevent the discrimination of that certain group of people. To this extent, in fact, it may not be an unachievable task for states to fulfill their human rights obligations in the context of drug control provided that the rights of certain groups of people have been recognised. As the Committee on Economic, Social and Cultural Rights in its General Comment No.21 stated:

the elimination of all forms of discrimination in order to guarantee the exercise of the right of everyone to take part in cultural life can, in many cases, be achieved with limited resources by the adoption, amendment or repeal of legislation, or through publicity and information. In particular, a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories.739

5.4.2.3 The Question and Beyond

Courts in other jurisdictions aside from South Africa have also addressed cases that question the prohibition of drug use for religious purposes. For instance, in Employment Division v. Smith, the US Supreme Court ruled against the religious drug use exemption claim of two Native Americans.740 The US Supreme Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from subjecting religious practices through generally applicable laws. The Court reached the conclusion without imposing strict scrutiny but only rationality review to which the state’s interest in fighting illicit drugs has been noted.741 In England, the R v. Taylor case also addressed the tension between religious freedom and drug prohibition. In this case, Taylor was arguing that his action, namely, possession of cannabis drugs when approaching a Rastafarian temple, should be interpreted as a form of practicing his religion under article 9(1) of the European Convention on Human Rights. Therefore, any criminal charge against him would require justification under article 9(2) of the Convention. However, the Court of Appeal deemed the absolute prohibition of possession of

739 Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), UN Doc. E/C.12/GC/21 (2009), para. 23.
740 Employment Division v. Smith, 494 U.S.
741 Employment Division v. Smith, 494 U.S. at 872 and 879-881.
cannabis including for religious purposes and the resultant criminal proceedings against him justifiable. The Court came to the conclusion by following the derogations clauses contained in article 9(2) of the European Convention on Human Rights to which the reasoning heavily reliance on the international drug control mandate.\textsuperscript{742}

When determining whether rights limitation is compatible with human rights law, courts in different jurisdictions have generally placed a substantial emphasis on states’ drug control mandate to justify restrictions on the use of drugs for religious purposes while reluctant to consider other factors. This has been well demonstrated in the Judgement of the \textit{R v. Taylor} case. As the Court of Appeal noted:

\begin{quote}
… the limitations on cannabis supply imposed by the Misuse of Drugs Act 1971 are limitations prescribed by law, the crucial question was whether those limitations were necessary in the terms of Article 9(2). That necessity, the judge said, would be shown by the existence of pressing social need, and a reasonable relationship between the terms employed and the aims pursued. This, the judge commented, raised complex issues, not easy for a Crown Court judge to resolve. But the Misuse of Drugs Act, … fulfilled the United Kingdom's obligations, under the Conventions of 1961 and 1998. These provided powerful evidence of an international consensus that an unqualified ban on the possession of cannabis, with intent to supply, is necessary to combat public health and public safety dangers arising from such drugs.\textsuperscript{743}
\end{quote}

In many aspects, such reliance of states drug control obligations to determine whether rights limitation is justifiable under human rights law is not beyond question.\textsuperscript{744} First of all, simply rely on the “international consensus” of drug control understanding, which itself open for question, to justify rights limitation while not address the points such as “existence of pressing social need” and “reasonable relationship between the terms employed and the aims pursued” is problematic and irresponsible. Secondly, such emphasis is not well supported by

the international drug control law themselves. In fact, according to international drug control conventions, national drug laws enacted by state parties are “subject to their own constitutional limitations”. 745 Pursuant to this understanding, constitutional protection of the right to freedom of religion can be relied upon where states seek to make exemptions allowing drug use for religious purposes in their national drug legislation without breaching international drug control laws. 746 In other words, their obligations under international drug control conventions need not serve as an automatic bar to an exemption permitting drug use for religious purposes. As noted in the Prince case, religious rights are protected by the South African Constitution. Therefore, exemptions for religious drug use within the South African drug control regime are legitimate in so far as they are based upon the protection of the right to freedom of practice of religion. Finally, within a given country, questions have also been raised with regard to the relationship between international drug control law and human rights law in national legal framework. For instance, in relation to the Taylor case, Walsh argues that overreliance on international drug control law is not legally persuasive considering that the international drug control law shall not take precedence over the European Convention on Human Rights which has been incorporated into UK domestic law. 747

It is noted however, that not all court decisions prioritise drug control over the protection of the right to freedom of religion. For instance, in the case of Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, a US court allowed a religious exemption for a New Mexican branch of a Brazilian church, so that its members could continue to consume a yahuasca tea, a tea which contained prohibited drugs. 748 In 2008, the Italian Supreme Court reversed a lower court’s decision to convict a Rastafarian defendant for unlawful possession

of cannabis with intent to supply. The Italian Supreme Court based its judgment on the fact that the applicant had engaged in religious action immediately prior to his arrest and the fact that his “allegiance to a specific religious belief” had not been given sufficient consideration.\textsuperscript{749} The Court, however, did not address the issue of how national drug control law would be affected as a result of such an exemption. Irrespective of this, from a human rights perspective and as compared with the previously discussed cases, this judgment demonstrated the Italian judiciary’s “awareness not only of religious human rights considerations, but also respect for, and protection of, religious minorities”.\textsuperscript{750}

It is not claimed that drug use for religious purposes should automatically warrant an exemption from national drug control legislation. It also is not suggested that making such an exemption will not affect the integration of the international and national drug control systems. The point is judicial and political approaches, as previously discussed cases illustrated, have not sufficiently addressed the key issue, namely, the conflict between rights protection and drug control. Also, most of the relevant judgments have not included a meaningful discussion of the impact of a possible exemption allowing drug consumption for religious purposes on human rights.

In an era of heightened human rights, a legal system is increasingly asked to solve problems of accommodation of individual rights while protecting the interests of society as a whole. As the above cases demonstrated, the conflict between human rights and drug control provides an important example of this phenomenon. In doing so, courts are expected to perform appropriate interest balancing exercises and to interpret the provision “no more broadly than necessary to achieve the legislative goal”.\textsuperscript{751} In other words, rather than having fixed ideas and theories, the court may solve problems in a practical and sensible

\textsuperscript{749} Cassazione Sesta Sezione Penale n. 28720 del 3 Luglio 2008 (The Italian Supreme Court of Cassation (Criminal Division) Judgement No. 28720 of July 3rd 2008).


way. As Mark S. Kende suggests courts should utilise the ‘pragmatism’ approach which requires the understanding of every aspects of the factual and social context relating to a given case in order to allow the judiciary to render superior decisions that reject formalism. 752 In this connection, Judge Sachs of the South Africa Constitutional Court points out that: “the weighing of the respective interests at stake does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality. The balance has to be done in the context of a lived and experienced historical, sociological and imaginative reality”. 753 He further explains that:

what is required is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. 754

While courts are expected to address issues in a given case, it is the drug legislation that results in the conflict between drug control and human rights. In this regard, it may be understandable that governments usually believe that the effectiveness of their drug control regime will be necessarily undermined if drug control law is not uniformly applied. Nevertheless, such a belief should not be developed and reinforced without regard to the burden it may place on an individual’s enjoyment and exercise of the human rights and freedoms to which they are entitled. Minimizing the impact of a state’s drug control law on an individual’s enjoyment of their rights requires a greater level of state engagement in human rights protection. 755 As Judge Sachs argued:

[w]here there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile.\textsuperscript{756}

In this regard, the following section uses Bolivia as a case study to demonstrate how the government of Bolivia has shown itself willing to “walk the extra miles” in order to fulfil its human rights obligations in the realm of drug control.

5.4.3 Plurinational State of Bolivia: Traditional Coca Leaf Chewing

5.4.3.1 The Conflict: Drug Control and Human Rights Obligations

South American Indians have customarily chewed coca leaves for centuries. The leaves are said to provide a mild stimulant, boost energy and they reputedly have medicinal qualities. Socially, coca is also well integrated into the economic and social systems in South American communities.\textsuperscript{757} Also, it is the case that “traditional coca leaf chewing is consistent with the right of indigenous peoples to maintain their traditional health and cultural practices”.\textsuperscript{758} Meanwhile, coca has been classified as a narcotic drug because it contains alkaloids which can be used in producing cocaine. It is illegal to use coca for any non-medicinal, non-scientific purposes under international drug control law.\textsuperscript{759} Therefore, the chewing of coca leaves is not permitted under the international drug control law to which the Plurinational State of Bolivia is bound by.\textsuperscript{760}

5.4.3.1.1 International Drug Control Law

Bolivia is a State party to the 1961 Single Convention as amended by the 1972 Protocol, under which it has an obligation to ban personal drug use that is not for “medical and scientific” purposes. The chewing of coca leaves is beyond the

\textsuperscript{756} Sachs J in \textit{Prince v. President, Cape Law Society and Others}, 2002 2 SA 794 (CC), decided on 25 January 2002, para. 149. (internal citation omitted)


\textsuperscript{759} Article 2(5)(b), 1961 Single Convention.

\textsuperscript{760} Article 49, 1961 Single Convention.
scope of this exception. \(^{761}\) As a matter of fact, coca leaf is, along with other narcotic drugs such as heroin, morphine and cocaine, which attracts the strictest control. \(^{762}\) Coca leaf chewing as a traditional use, however, was acknowledged under the 1961 Single Convention. Article 49 of the 1961 Single Convention allows States parties to obtain a transitional reservation for the non-medical use of certain types of narcotic drugs, which including coca leaf chewing. \(^{763}\) Accordingly, States parties that obtained transitional reservations under article 49(1) of the Single Convention “may be authorised only to the extent that they were traditional in the territories in respect of which the reservation is made”. \(^{764}\) However, a provision in the same article also stipulates that “[c]oca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention”. \(^{765}\) No transitional reservation under article 49 was made by Bolivia at the time of its accession to the 1961 Single Convention. But under the terms of the agreement, within 25 years of the 1961 Single Convention entering into force all non-medical use of narcotic drugs must be banned. \(^{766}\) Bolivia deposited its instrument of ratification of the 1961 Single Convention on Narcotic Drugs on 23 September 1976. Consequently, the Convention entered into force in Bolivia on 23 October 1976. It is therefore the period of 25 years referred to in article 49, paragraph 2 (e) elapsed in 2001.

The United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 was ratified by Bolivia in 1990. Article 3, paragraph 2 of the 1988 Convention requires States parties to

    adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal

\(^{761}\) Article 49, 1961 Single Convention.

\(^{762}\) Those control requirements are includes: article 4(c), articles 23, 26 and 27 of the 1961 Single Convention.

\(^{763}\) Article 49(1)(c), 1961 Single Convention.

\(^{764}\) Article 49(2)(a), 1961 Single Convention.

\(^{765}\) Article 49(2)(c), 1961 Single Convention.

\(^{766}\) Article 49(2)(c), 1961 Single Convention.
consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.767

With regard to the traditional uses of coca, Bolivia has a reservation on article 3, paragraph 2. While it expresses the commitment to continue to take all necessary legal measures to control the illicit cultivation, consumption and purchase of narcotic drugs and psychotropic substances, the government of Bolivia declares:

[There is] inapplicability to Bolivia of those provisions of that paragraph which could be interpreted as establishing as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption. For Bolivia such an interpretation of that paragraph is contrary to principles of its Constitution and basic concepts of its legal system which embody respect for the culture, legitimate practices, values and attributes of the nationalities making up Bolivia’s population. Bolivia’s legal system recognizes the ancestral nature of the licit use of the coca leaf which, for much of Bolivia’s population, dates back over centuries.768

In addition, there is another article in the 1988 Conventions refers to the traditional use of drugs. In connection with the eradication of illicit drugs, article 14(2) of the 1988 Convention explicitly requires States parties to take consideration of traditional use of drugs and respect human rights when taking any measures aimed at drug control. As the provision reads:

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.769

767 Article 3(2), 1988 Convention.
769 Article 14(2), 1988 Convention. (my emphasis)
However, States parties also have the obligation under article 14(1) which requires that:

> [a]ny measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention.\(^{770}\)

As such, despite recognition of the traditional use of drugs by the 1988 drug control conventions, states’ coca plant control measures must still follow the 1961 Convention, under which personal use and possession of coca leaves is prohibited. Therefore, coca leaf chewing as a part of cultural and traditional practice must be banned in territory of Bolivia under international drug control law. However, Bolivia is also a State party to a number of human rights treaties, under which it has obligations to protect indigenous people’s rights as well as the right to freedom of culture and religion.

5.4.3.1.2 *International Human Rights Law*

The International Covenant on Civil and Political Rights was acceded to by Bolivia in 1982.\(^{771}\) As article 27 of the Covenant relates to the freedom of cultural and religious rights of ethnic, religious or linguistic minorities, it may be read alongside article 1 common to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, which stipulates: “All peoples have the right of self-determination. By virtue of that right they freely determine their …cultural development”.\(^{772}\) In addition, the case law of the UN Human Rights Committee has provided further understanding of the application of article 27. Firstly, where a state’s activity substantially impacts on the culture of any ethnic groups, its application to an

\(^{770}\) Article 14(1), 1988 Convention.


\(^{772}\) Article 1, International Covenant on Civil and Political Rights; Article 1, International Covenant on Economic, Social and Cultural Rights.
individual within such a group may fall under article 27 of the Covenant. Secondly, states’ legislation, policy and its implementation that amounts to a denial of the right to enjoy one’s culture will not be compatible with the obligations under article 27. However, the Committee also point out that those measures that only “have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27”.

Bolivia also acceded to the International Covenant on Economic, Social and Cultural Rights in 1982. Article 15, paragraph 1(a) of the Covenant requires States parties to the Covenant recognise the right of everyone to take part in cultural life. In its General Comment No. 21, adopted in 2009, the UN Committee on Economic Social and Cultural Rights developed the normative content of article 15, paragraph 1(a). The Committee found, inter alia, that

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\text{[t]he right to take part in cultural life can be characterised as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).}
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According to the Comment, the full realisation of the right to cultural life is reliance on conditions such as the availability of materials for cultural practice, the equal opportunities for all to enjoy their culture fully without

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776 Article 15(1)(a), International Covenant on Economic, Social and Cultural Rights.
777 Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), UN Doc.E/C.12/GC/21 (2009), para.6.
778 Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), UN Doc.E/C.12/GC/21 (2009), para.16 (a).
discrimination, and that laws, policies, strategies, programmes and measures be formulated and implemented in a manner that is acceptable to the individuals and communities involved.

Many other human rights instruments also protect the cultural and traditional rights of indigenous people. For instance, the United Nations Declaration on the Rights of Indigenous Peoples recognises the right of indigenous people to “practice and revitalise their cultural traditions and customs” and requires states to undertake effective mechanisms to redress any situations preventing indigenous people from fully enjoying their rights. Article 24, clearly states that “[i]ndigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants”. Article 31 also recognises the right for indigenous people maintain their cultural heritage and manifest their knowledge of plants, seeds and medicines. In addition, the ILO Convention 169 (Indigenous and Tribal Peoples Convention) was ratified by Bolivia in 1991, according to which States parties shall adopt appropriate measures to ensure that indigenous and tribal peoples fully enjoy their culture without discrimination. Bolivia ratified the International Convention on the Elimination of All forms of Racial Discrimination in 1970. The UN Committee on the Elimination of Racial Discrimination, in 1997, adopted General Recommendation 23 with regard to the

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779 Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), UN Doc. E/C.12/GC/21 (2009), para.16 (b).
780 Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), UN Doc. E/C.12/GC/21 (2009), para.16 (c).
781 Article 11, United Nations Declaration on the Rights of Indigenous Peoples.
783 Article 31(1), United Nations Declaration on the Rights of Indigenous Peoples.
application of the Convention to indigenous peoples. Accordingly, States parties must

[r]ecognise and respect indigenous distinct culture, history, language and way of
life as an enrichment of the State’s cultural identity and to promote its
preservation;\textsuperscript{787} …

Ensure that indigenous communities can exercise their rights to practise and
revitalise their cultural traditions and customs and to preserve and to practise
their languages.\textsuperscript{788}

The above illustrated drug control and human rights obligation have created
tension in Bolivia. On the one hand, the coca chewing goes beyond what is
permitted in the relevant provisions of the 1961 Single Convention. The fact that
Bolivia had made the reservation to article 3, paragraph 2 of the 1988
Convention does not absolve Bolivia from fulfilling its obligations under the
1961 Single Convention. On the other hand, as illustrated above, Bolivia also has
human rights obligations in relation to cultural, religious rights and indigenous
people’s rights. In this connection, if Bolivia completely banning coca chewing
from its territory as required by the international drug control law, the
government would find itself in the position of breaching many international
human rights treaties which Bolivia also a party to. It therefore must develop a
strategy to address the conflict between its obligations under international drug
control conventions and the obligation of protecting cultural and religious rights
under international human rights law.

5.4.3.2 Bolivia’s Approaches toward the Conflict of Obligations

The government of Bolivia believes that the chewing of the coca leaf is an
ancestral practice of the indigenous people that should not be prohibited. In
accord with this understanding the Government has taken a number of steps to
address the given issue since 2006. For example, in September 2006, the
President of Bolivia addressed the UN General Assembly at its sixty-first session,

\textsuperscript{786} UN Doc. A/52/18, annex V.

\textsuperscript{787} UN Doc. A/52/18, annex V, para.4(a).

\textsuperscript{788} UN Doc. A/52/18, annex V, para.4(e).
calling upon the international community to support his proposal to remove coca leaf from international drug control schedules. In 2007, the Minister of Foreign Affairs of Bolivia requested the World Health Organization to carry out a process of validation of the medical uses of coca leaf and recognise its contribution, as part of traditional medicine, to public health in the Andean region. March 2009, during the high-level segment of the fifty-second session of the Commission on Narcotic Drugs in Vienna, Morales, the President of Bolivia, addressed the delegates:

I want to ask the assistance of the international community in correcting a historical error that was committed against the Bolivian people when it unreservedly ratified the Single Convention Against Narcotic Drugs of 1961.

Meanwhile, the international drug control bodies have also initiated several communications with Bolivia to address the given issue. For instance, in 2007, the International Narcotics Control Board sent a mission to the country to discuss its coca production policies. In November 2008, a high-level delegation from the Bolivian Government was invited and attended the ninety-third session of the International Narcotics Control Board to discuss on issues with regard to the Government’s implementation of the international drug control conventions. Regardless of these national and international efforts, it has not proved possible for Bolivia to solve the conflict between drug control and rights protection in relation to traditional coca leaf using. Therefore, the government of Bolivia remains under a duty to reconcile the drug control obligations under international drug control conventions with its obligations under human rights treaties.

5.4.3.2.1 Proposal to Amend the International Drug Control Convention

A proposed amendment of the relevant provision in the international drug control convention was firstly initiated by Bolivia. On 12 March 2009, the Permanent Mission of the Plurinational State of Bolivia to the United Nations submitted a proposal to amend article 49 of the 1961 Convention as amended by the 1972

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791 Morales, President of Bolivia, in the 55th session of the Commission on Narcotic Drugs Vienna, Austria, 2012.
Specifically, article 49, paragraph 2(e) which states that “coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41” and paragraph 1(c) which states that a party to the Convention may reserve the right to permit coca leaf chewing temporarily in any one of its territories, subject to the restrictions established in paragraph 2(e), that is, for a period of no more than 25 years. Bolivia presented four main arguments for the proposal: 1) coca leaf chewing is a thousand year old ancestral practice of the Andean indigenous peoples, which is closely linked to their history and cultural identity; 2) coca leaf chewing does not harm human health but helps to relieve feelings of hunger, provides energy and improves metabolism at high altitudes; 3) coca leaf chewing should be considered as a “habit”, which thereby exempts it from the referred convention that prohibits drug abuse, but not in relation to habits or sociocultural practices; 4) the prohibition of coca leaf chewing by article 49 paragraphs 1(c) and 2(e) of the referred convention constitute a violation of the rights of indigenous peoples which are protected under many human rights instruments. In short, the government of Bolivia requested:

[that article 49, paragraph 1(c), of the Single Convention on Narcotic Drugs of 1961 be deleted, because the sociocultural practice of coca leaf chewing cannot be permitted temporarily as if it were doomed to disappear some day and as if it were an evil that should be permitted only for a transitional period; and

That article 49, paragraph 2(e), be deleted, because it is a serious mistake to seek to abolish coca leaf chewing within 25 years.]

On 6 April 2009, the UN Secretary-General communicated the Bolivian proposal to all parties to the 1961 Convention and to the Economic and Social Council.
Later, at its substantive session in July 2009, the Economic and Social Council decided to initiate the procedures set out in article 47, paragraph 1(b) of the 1961 Single Convention, which provides that the parties shall be asked whether they accept the proposed amendment and also to submit to the Council any comments on the proposal. 797 By 31 January 2011, the deadline for reactions to the Bolivia’s proposal; formal rejections were submitted by 18 States parties. 798 Three states, namely Macedonia, 799 Colombia 800 and Egypt 801 have withdrawn their objections. Even though it was not required, four states, Ecuador, 802 Uruguay, 803 Venezuela 804 and Costa Rica, 805 submitted their support to Bolivia’s proposal. These countries supported the opinion that coca leaf chewing is an “inalienable right of peoples”, 806 that the prohibition of coca leaf chewing as an indigenous cultural practice is “unjustifiable and discriminates against indigenous peoples” and that to end the prohibition would not be contrary to the necessary efforts to combat illicit drugs. 807

The main argument held by those objecting state parties is that the Bolivian proposal of amendment will affect the integrity of the 1961 Single Convention and undermine international drug control efforts. But, the human rights issues raised by Bolivia have not been specifically or sufficiently attended to. For instance, the United States, who argued strongly against any amendment of the international drug control Convention, simply based its objection on a statement that the objective of the 1961 Single Convention is to limit the use of narcotic drugs exclusively to medical and scientific purposes; coca leaf is classified as a

797 UN Doc. E/2009/78.
798 These countries are: Bulgaria, Canada, Denmark, Estonia, France, Germany, Italy, Japan, Latvia, Malaysia, Mexico, Russian Federation, Singapore, Slovakia, Sweden, United Kingdom and United States.
800 UN Doc. E/2011/59.
801 UN Doc. E/2010/7.
802 UN Doc. E/2011/64.
804 UN Doc. A/65/714-E/2011/70.
805 UN Doc. E/2011/68.
806 UN Doc. A/65/714-E/2011/70.
807 UN Doc. E/2011/64.
narcotic drug under the Convention and States parties must remain guided by the
objective of the 1961 Single Convention. 808 No further explanation was provided.
Countries like the UK, 809 Canada, 810 Japan, 811 Bulgaria 812 and Russia 813 all
articulated the same simplistic argument as the United States without touching
upon the real issues involved.

Countries like Sweden, 814 France, 815 Germany 816 and Italy 817 phrased their
objections somewhat differently compared to the United States and provided
more explanation. For instance, Sweden, while expressing its understanding of
the issue of conflict between the drug control mandate and traditional coca leaf
chewing, still believes that:

the proposal poses the risk of creating a political precedent and might directly
infringe on the international framework for the fight against drugs. This would
send a negative signal that would be out of step with the actions undertaken in
order to fight drug trafficking and drug use. 818

France raised the issue that the amendment concerns the coca leaf chewing; a
practice that is associated with indigenous peoples rights and is a component of
cultural identity in Bolivia. Therefore, France declared that it was “open to
dialogue aimed at arriving at a solution that would better accommodate the
tradition of coca leaf chewing while maintaining the integrity of the Single
Convention of 1961”. 819 Nevertheless, France remained concerned that the
amendment had “the potential to weaken the framework and general obligations”
of the Convention, and it was also “desirable to avoid setting a precedent that

808 UN Doc. E/2011/47.
809 UN Doc. E/2011/49.
817 UN Doc. E/2011/58.
would undermine the international legal framework for combating narcotic drugs”. 820 Along with Sweden and France, Italy also expressed a similar concern that Bolivia’s proposed amendment would jeopardise the international drug control effort. 821 Germany, like France, was also aware of the issues of indigenous people’s rights and cultural identity involved with regard to Bolivia’s amendment proposal. In addition, Germany is the only country among those objecting states that recognise that the proposal also “touches upon complex development and health policy issues”. 822

Asian countries also objected to Bolivia’s proposal yet did not really mention the conflict that drove the Bolivian amendment proposal. For instance, Singapore, which has long adopted a zero-tolerance drug policy, states that

the Single Convention as a fundamental component of our national anti-drugs policy as it, inter alia, facilitates the taking of effective measures against abuse of narcotic drugs through coordinated and universal action. The Single Convention’s multipronged approach has proven effective over time and Singapore does not see any benefit in making amendments which weaken it. 823

Despite the fact that many of these objections do not directly address the issues which Bolivia has raised, inter alia, the conflict between coca leaf chewing as a cultural and indigenous practice and the ban on such use by the 1961 Single Convention, they have rendered the automatic adoption of Bolivia’s amendment proposal impossible. Hence, according to article 47, paragraph 2 of the 1961 Single Convention: “if a proposed amendment is rejected by any Party, the Council may decide, in the light of comments received from Parties, whether a conference shall be called to consider such amendment”. 824 Pursuant to this procedure, calling a conference on the basis of a majority voting procedure to decide the amendment would be a logical course of action. However, this is exactly the path that those objecting countries are trying to avoid. In fact, Germany is the only country that explicitly expressed its support to convening a

821 UN Doc. E/2011/58.
822 UN Doc. E/2011/53.
conference of states to discuss the amendment. The reluctance to convene a conference of States parties arises not only because such an action is costly, but more importantly, due to the fear that it could provide a platform for more proposals of amendment, such as occurred in the 1972 amendment of the 1961 Single Convention. In addition, despite only 18 of the 184 States parties to the Convention objecting to the amendment proposal, many of them are very influential, especially considering the fact that all the G-8 countries are in the objecting group. In the end, a conference has not been called by the Economic and Social Council.

However, this does not mean that all procedures have been exhausted. In other words, with regard to amending the Convention, it is also submitted that there are further procedures that are not prevented by article 47. As explained in the official Commentary to the Convention, other procedures the Council may follow are to either “submit proposed amendments to the General Assembly of the United Nations for consideration and possible adoption in accordance with Article 62, paragraph 3 of the United Nations Charter”, or to “refuse to act on a proposal to revise the Convention” in a case where an objection has been made by one or more state parties to the Convention. In the end, the Council has not submitted the amendment proposal to the UN General Assembly and Bolivia’s proposal has been refused.

5.4.3.2.2 Denunciation and Re-accession with Reservation

After the failure of the amendment initiative, making a reservation on the relevant provisions in the 1961 Single Convention was the option left for the Bolivian government. Given the fact that a reservation on coca leaf chewing, which is permitted under article 49 of the 1961 Single Convention, expired in

826 Martin Jelsma, Lifting the ban on coca chewing: Bolivia’s proposal to amend the 1961 Single Convention, Transnational Institute, Series on Legislative Reform of Drug Policies Nr. 11, March 2011.
827 Article 47, Commentary on Single Convention on Narcotic Drugs, 1961, UN publication Sales No. E.73.XI.1., para. 1, pp. 462-463.
828 Article 47, Commentary on Single Convention on Narcotic Drugs, 1961, UN publication Sales No. E.73.XI.1., para. 2, pp. 462-463.
2001; the government of Bolivia has undertaken an unusual approach, that is, denunciation of the Convention and re-accession with a reservation. On 29 June 2011, the government of Bolivia formally announced its denunciation of the 1961 Single Convention as amended by the 1972 Protocol. The denunciation is permitted by article 46 of the Convention, as paragraph 1 of this article reads:

After the expiry of two years from the date of the coming into force of this Convention (article 41, paragraph 1) any Party may, on its own behalf or on behalf of a territory for which it has international responsibility, and which has withdrawn its consent given in accordance with article 42, denounce this Convention by an instrument in writing deposited with the Secretary-General. 829

In accordance with the regulation established under article 46, paragraph 2 of the Convention, Bolivia’s denunciation took effect on 1 January 2012. 830 At the same time, the government of Bolivia took steps to once again adopt the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol. On 29 December 2011, the President of Bolivia submitted a letter to the UN Secretary-General which contains an instrument of accession to the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol. The instrument of accession also includes a reservation which reads:

The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.

At the same time, the Republic of Bolivia will continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.

The effective accession of Bolivia to the aforementioned convention is subject to the authorization of this reservation.\footnote{Secretary-General of the United Nations, depositary notification, Reference: C.N.829.2011.TREATIES-28.}

The government of Bolivia indicated that the reservation is submitted in accordance with article 50, paragraph 3 of the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol.\footnote{Article 50 (3), 1961 Single Convention.} Accordingly, Bolivia’s accession was subject to the authorisation of the reservation by the States parties to the Convention during the twelve-month period for objections which expired on 10 January 2013. In this regard, if in the period of the twelve months less than one third of the 183 States parties of the Convention (that is 61 states), objected to the reservation, the re-accession of Bolivia to the Convention would be authorised. In the end, Bolivia’s reservation was objected to by the following fifteen states: Canada, Finland, France, Germany, Ireland, Israel, Italy, Japan, Mexico, Netherlands, Portugal, Russian Federation, Sweden, the UK and the US.\footnote{Secretary-General of the United Nations, depositary notification, Reference: C.N.94.2013.TREATIES-VI.18, 22 January 2013.} In accordance with paragraph 3 of article 50 of the Convention, consequently, Bolivia’s accession with reservation was authorised and effected on 11 January 2013. Since then the chewing of coca leaf along with other consumption for “cultural and medicinal purposes” are legal on the territory of Bolivia by the virtue of the reservation.\footnote{Annual Report of the International Narcotics Control Board 2013, para. 418.}

### 5.4.3.3 The Response and Beyond

Such extraordinary action taken by Bolivia is the first of its kind in the history of international drug control which has stirred up worldwide debates. Some believe it could be the “most reasonable and proportionate” approach to obtain release from the conflict between drug control and human rights protection. As Damon Barrett pointed out,

> [t]he manner in which Bolivia translates international obligations under the 1961 Single Convention on Narcotic Drugs into national legislation, programmes and
policies must be consistent with its obligations to respect indigenous peoples' rights that flow from its obligations under contemporary international, constitutional and (indigenous) customary law. The proposed reservation provides the means through which these obligations can be harmonised.835

This is a kind of opinion underpinned by many other supporters of Bolivia’s action. For instance, Danny Kushlick, head of external affairs at the Transform Drug Policy Foundation believes that: “any country that has had enough of the war on drugs can change the terms of its engagement with the UN conventions”.836 Nancie Prud’homme, then projects director at the International Centre on Human Rights and Drug Policy, criticised those opposition to Bolivia’s demands by pointing out that:

These objections are legally questionable. They support an arbitrary and over-broad provision and apply international drug laws in a vacuum. This is not appropriate. No state has paid any attention to decades of developing international norms on cultural and indigenous rights which support Bolivia’s efforts.837

Not only supported by civil society, the government of Bolivia may also find some strength from UN bodies. For instance, the United Nations Permanent Forum on Indigenous Issues openly welcomes the call for the amendment of the international drug control conventions in relation to the issue of traditional use of narcotic plants. As the Permanent Forum claimed in its eighth session report,

[t]he Permanent Forum recognizes the cultural significance and medical importance of the coca leaf in the Andean and other indigenous regions of South America. It also notes that coca leaf chewing is specifically banned by the United Nations

Single Convention on Narcotic Drugs (1961). The Permanent Forum recommends that those portions of the Convention regarding coca leaf chewing that are inconsistent with the rights of indigenous peoples to maintain their traditional health and cultural practices, as recognized in articles 11, 24 and 31 of the Declaration, be amended and/or repealed.838

In the following year, the Permanent Forum in its ninth session report further expressed its position and welcomed the proposal to further amend the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol.839 This position has been reconfirmed in its tenth session report.840

Despite such support, the response from the international community is generally discouraging. A number of state parties all opposed Bolivia’s initiative to remove the coca leaf from the international drug control regime within its territory. The arguments with regard to Bolivia’s re-accession with a reservation are not much different to those expressed toward Bolivia’s initial proposal of amendment. Again, the main argument is that Bolivia’s action will weaken the international drug control system and undermine the international drug control effort. This is a position shared by countries like the US,841 the UK,842 Italy,843 Sweden,844 Canada,845 France,846 Ireland,847 and Israel.848 Concern has also risen by


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Italy, \(^{849}\) Netherlands \(^{850}\) and Russia \(^{851}\) that Bolivia’s approach will create “a precedent” and “send a negative signal”, which may lead more countries to follow suit. In addition, criticisms also expressed by some of those objecting countries with regard to the manner of Bolivia’s re-accession. For instance, France believes that such an approach “disregards the principle of legal certainty, which is essential to the stability of treaty relations”. \(^{852}\) The government of the Netherlands considers that Bolivia’s action is “contrary to the rules of the law of treaties that prohibit the formulation of reservations after ratification”. \(^{853}\) Other countries, namely Italy, \(^{854}\) Ireland \(^{855}\) and Finland \(^{856}\) hold the same position. It is noteworthy that while a majority of those objecting countries only address issues with regard to international drug control and procedural problems, Mexico is one which refers to the human rights issues involved. Despite its objection, the government of Mexico explicitly expressed its wish to “reiterate its respect for the human rights of indigenous peoples and for their customs and practices, a


commitment it fully shares with the Government of the Plurinational State of Bolivia.”

It is not only state parties that have objected. The International Narcotics Control Board, the treaty body established by the international drug conventions, accused Bolivia of threatening the integrity of the international drug control regime and expressed its opposition to any lifting of the ban on coca chewing. As the Board noted:

while this step by Bolivia may be in line with the letter of the Convention, such action is contrary to the Convention’s spirit. The international community should not accept any approach whereby Governments use the mechanism of denunciation and re-accession with reservation, in order to free themselves from the obligation to implement certain treaty provisions. Such an approach would undermine the integrity of the global drug control system, undoing the good work of Governments over many years to achieve the aims and objectives of the drug control conventions, including the prevention of drug abuse which is devastating the lives of millions of people.

All in all, to address the conflict among obligations under multiple international agreements, namely drug control law and human rights law, Bolivia adopted an unusual approach. How effective it is shall be seen in the future. Bolivia’s action as such, from a human rights perspective, at least shows that the government is standing up for the rights of its indigenous people rather than simply yielding to the international pressure of the drug control regime.

Still, the tension between drug control and rights protection has not come to an end after Bolivia’s reaction. For one thing, coca leaf is not the only plant that has been used for cultural, religious and traditional purposes. For instance, chewing fresh khat leaves has a history dating back hundreds of years among communities.

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858 The International Narcotic Control Board has repeatedly stated in its annual report that the coca chewing in the Plurinational State of Bolivia is contravention of it treaty obligation under the 1961 Single Convention. See for instance, Report of International Narcotic Control Board 2011, para.274.

859 UN Information Service, Press Releases, UNIS/NAR/1114, 5 July 2011.
in the Horn of Africa and the Arabian Peninsula. The stimulant effects of khat leaves are mainly caused by the substances cathinone and cathine, both of which are controlled under the 1971 Convention. Like Bolivia and South Africa, countries where there is traditional use of drug plants are also parties to the international drug control conventions. Similar to coca, those plants are all required to be subject to certain control measures under international drug control law. To this extent, the conflict between drug control and rights protection is not a unique issue within the borders of only one country.

What is more, the traditional, cultural and religious use of some drugs has expanded to other territories where they have been used for purposes such as recreation. For instance, in South-East Asia, kratom is used in traditional medicine as an anti-diarrhoeal. It has also been investigated for the treatment for opioid dependence. However, it is also widely used recreationally, leading to its prohibition in countries like Thailand, Malaysia, Myanmar and Australia. Salvia divinorum, also known in Mexico as “skapastora”, “skaMaria”, “hierbaMaria” or “hierba des los dioses”, originally used by shamans of the Mazatec tribe of Mexico for religious purposes and during spiritual healing sessions has become popular not only where it has been traditional used in many Latin American countries, but also beyond this continent and its culture in European countries as well where its consumption is no longer for traditional

purposes. As such, to properly address the tension between drug control and rights protection issues concerning the shifting of territory and purpose of drug consumption must be taken into account as well. All of these issues, at some point, will require action to be taken to address the conflict between drug control and rights protection, both on the international and national fronts.

5.5 Conclusion

It is true that the government has the freedom to choose the policy which is considered appropriate in certain matters. It also noted that the significance of national particularities and various economy, social, religious and cultural backgrounds must be taken into consideration when adopt certain drug policy. Still, these regards may affect any particular policy it adopted, but cannot take as excuse to construct drug control policy that breach of individual’s rights. In those matters that are governed by human rights law, they are subject to review with regard to whether they are in conformity with the requirements of human rights obligation. In some cases, governments will have to take action to address the exist conflict of drug control and rights protection to both the states have obligations of. In this regard, states have to find a way to accommodate the individual’s rights protection within the drug control regime in order to fulfill their human rights and drug control obligations. This includes not only addressing the conflict between states’ obligation of drug control and rights protection under various international treaties that states are parties of, it is also a matter of how to adjust drug control legislation into human rights framework within their own jurisdiction.

As the above cases demonstrated, however, individual rights are at risk due to certain drug control policies. In practice, when initiations have been made in

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order to address the tension of drug control and rights protection, political and judicial responses often emphasis drug control and limit the protection of rights. It is undeniable that there is a mandate for states to take measures to combat drugs. While drug control is pressing, protecting individuals’ rights is also crucial; simply claim drug control as one of the legitimate goals to achieve is not sufficient to justify the restrictions of rights. In spite of the fact that some drug policies may have its basis in the interests of the public, community, certain groups or individuals, not all show a special need. Especially when other less intrusive measures are not exhausted, applying restrictive measures that ignore certain group people’s rights may not meet the requirement of proportionality. What is more, where the drug control policy constructs a situation in which the rights of a certain group of people are infringed while the rights of other members of the society are not, states have the obligation to prevent discrimination. In short, governments do not have unfettered lawful authority to initiate drug policies that invade individuals’ rights merely in the name of drug control.
6 Conclusion

It cannot be denied that great efforts are required to solve drug problems and prevent relevant harms. However, simply invoking the requirement of drug control to restrict, infringe or even violate individual rights is highly questionable. This study has approached the question of whether drug control policy is in line with human rights standards by identifying conflicts between drug control and human rights. The research presented here is a detailed study of issues, including the death penalty for drug offenders, drug treatment of drug users, mandatory drug testing for social welfare applicants, drug searches of school children, fumigation of drug crops and a ban on personal drug consumption in instances of use for cultural and religious purpose. The ultimate conclusion reached is that drug control policies are questionable in light of human rights norms and that there are conflicts between drug control and human rights. When there is a tension between drug control and human rights, the judicial and political response is often to prioritise drug control. This, in turn, raises serious human rights concerns that can be challenged with regard to states’ human rights obligations.

Chapter 2 identified that the international drug control regime lacks a human rights perspective. This is a situation reflected in both the laws of international drug control and the United Nations mechanisms. In respect of international drug control law, amending any of the three international drug control conventions is by no means an easy task and unlikely to happen in the near future. Nonetheless, even without amendments, international drug control conventions are expected to be interpreted and implemented consistently with human rights norms. This is because the conceptions of human rights form the backdrop for the interpretation of provisions in international law; international drug control law is no exception. Therefore, an updated interpretation of the provisions of the international drug control conventions in line with human rights

principles will provide meaningful guidelines to States parties pursuant to which they can base their domestic drug control regimes.

Within the United Nations, the engagement between drug control and human rights bodies has not fully developed. That is to say, there is insufficient attention paid by international drug control bodies with regard to rights safeguards and limited guidance and supervision from human rights mechanisms is given to drug control measures. Parallel developments and functions of the United Nations drug control and human rights mechanisms have resulted in noticeable conflicts in practice. Tensions arise between the need to combat drug harms and obligations to respect and protect individual rights. To this extent, normative guidance from the United Nations on appropriate drug control measures with regard to human rights is necessary. The key players of international drug control should follow human rights norms when fulfilling their drug control mandate. Meanwhile, international human rights mechanisms are also expected to give due attention to United Nations strategies by integrating human rights concerns across different agencies and their respective agendas, such as drug control.869

On the point of cooperation within the United Nations system, there are encouraging signs in recent years that both the human rights and drug control systems have started to interact with each other and that human rights perspectives are beginning to be integrated into drug control strategies.870

While international bodies may be able to assess how rights protection shall be reasonably accommodated in the drug control regime, regardless of whether these bodies have adequately addressed the issues so far, it is ultimately the duty of states to find a workable exemption clause where individual rights are not violated or arbitrarily restricted due to drug control. In this respect, the human rights cases reviewed in this study indicate a contradiction between states’ drug control efforts and human rights obligations. As discussed in chapters 3, 4 and 5, various drug control policies, such as the death penalty, compulsory treatment, crops eradication, drug testing and searching and bans on personal use, may

869 UN Doc. A/RES/60/251, 3 April 2006.
870 United Nations Office on Drugs and Crime Executive Director, Antonio Maria Costa, speech on the 51st session of the Commission on Narcotic Drugs, Vienna, 10 March 2008; also see Commission on Narcotic Drugs, Resolution 51/12.
contribute to drug control goals. However, those efforts also present human rights risks with regard to the right to life, right to privacy and liberty, right to health, right to religion and culture and other protected rights under international, regional human rights instruments and states’ constitutions.

States who are treaty members to the international drug control conventions have a mandate to take possible measures to combat illicit drugs. Meanwhile, States parties to human rights treaties also have the obligation to respect and protect human rights. Even for states without such treaty obligations, they are, as members of the international community, still expected to respect and protect human rights and to control illicit drugs and prevent related harms. In this regard, states can hardly avoid facing the tension between drug control and human rights. This tension in some cases may arise from a broad and problematic interpretation of international law (as illustrated in chapter 3 on the death penalty for drug offenders). In other cases, this may be due to drug legislation that is inconsistent with human rights standards (as discussed in chapter 4 with regard to drug treatment) or incompatible with human rights obligations (as analysed in chapter 5 in relation to the religious and cultural use of drugs). Other tensions may be the result of problematic drug policy and the implementation of measures adopted (as demonstrated in chapter 4 and 5: the inhuman treatment taken as a means to cure drug addiction, fumigating to eradicate illicit drug crops and the strip searching of school children).

These tensions are not all addressed by following human rights principles and fulfilling states’ human rights obligations. As explored in chapter 3, the death penalty for drug offenders is justified mainly by relying on the broad interpretation of international human rights norms with regard to the applicability of the death penalty to the “most serious crimes” and the problematic interpretation of the penal provisions of the international drug control law. With regard to the protection of the right to life, the official and judicial organs appear to have a tendency of reluctance or avoidance in applying the safeguards when it comes to capital punishment in drug cases. In relation to compulsory drug treatment and detention, as discussed in chapter 4, such approaches adopted are questionable with regard to the safeguards of the right to privacy and liberty. Moreover, states also fail to fulfill the obligation with regard to the right to health
in the course of drug treatment. Not only in relation to drug offenders and drug users, the tension between drug control policy and human rights protection is also seen in a broader context involving different groups in society. For instance, as discussed in chapter 5:

a) The right to privacy of applicants for government benefits and school children is breached in the name of drug control.  
b) States fail to fulfill human rights obligations of protecting people’s health and standard of living owing to drug control mandate to eradicate illicit drug crops.  
c) The right to religion and culture is restricted due to the drug control priority of combating illicit drug trafficking and consumption.

While acknowledging the importance of combating drug problems, the need to control drugs does not exempt states from their human rights obligations. In the context of drug control, simply denying or overlooking the human rights of individuals is not the solution. To this extent, a human rights based approach to drug control may address the tension by accommodating rights protection within the existing drug control regime. However, based on this study, when one considers how to pragmatically devote efforts to bring a human rights perspective to drug control, it is questions on how the conflict will be resolved are unavoidable. In this regard, one of the key findings explored in this study is where there is a tension between drug control and human rights protection, the political and judicial responses shows a priority to drug control. In other words, states determine that the guarantees of a right have to be relaxed in pursuance of the drug control aim. In doing so, individual’s rights are easily sacrificed in order to effectively achieve claimed drug control goals. This is clearly problematic from a human rights perspective regardless of whether those are valid goals. It must matter how drug control policy effectively combats illicit drugs and prevents the related harms. The crux of the matter is that a drug control mandate does not exempt states from their overall human rights obligations. In the realm of human rights, the effectiveness of drug control measures cannot be properly assessed without consideration of their compatibility with human rights standards. Therefore, ensuring respect and protect individual’s human rights within the drug control regime is not a choice but a requirement.

Nonetheless, accommodating human rights principles within the existing drug control regime is by no means a straightforward issue. One of the questions is
whether an exception has been created with regard to rights protection in the context of drug control? Based upon the findings of this study, the author does not believe that there is a convincing argument that it does. It is clear that when there is a tension between drug control and human rights protection, at least in some of the countries discussed, there are not always sound reasons applied in derogating from human rights obligations. It may well be that a credible argument can be made that in certain circumstances, drug control demands the restriction of rights. Notwithstanding this, any rights restriction still needs to be applied in line with human rights standards.

The question does not end there. Another challenge is how will human rights norms be adjudicated amongst complex drug control issues? Human rights requirements do not lend themselves to a clear answer. This depends on a number of factors, which are often culturally, historically and politically relativistic. Such factors include the attitudes towards drugs and drug users, the belief of effectiveness of harsh punishment and the recognition of the value of human rights itself. Unless there is a radical convergence of understanding on these issues, it is not easy to see how human rights standards can be integrated, smoothly or arduously, into every state’s drug control regime anytime soon. Nevertheless, changes in the perception of the relationship between drug control and rights protection may affect the conceptualization of drug control and bring it in line with human rights. Based upon the study and in spite of the conflicts identified, the integration between drug control and human rights can be represented in the following aspects.

Firstly, drug control laws must be in line with human rights principles. Drug control laws, however specified they are, cannot be seen to be divorced from principles that are enshrined in international human rights law. In other words, human rights principles continue to apply even when international drug control conventions request States parties to establish drug control mechanisms. Even in some circumstance where certain rights can be restricted, such limits can only be applied strictly and with safeguards. That is to say, in order for certain human rights infringements to be justified, states are obligated to demonstrate a special need for the drug control measures, to create laws that govern these measures, and to balance the state’s interest in conducting these measures and the potential
harms inflicted on individuals’ rights. Such as those demonstrated in chapter 4, where drug users’ rights to privacy and liberty are restricted due to drug treatment programmes, an evaluation of legitimate concerns of drug control and human rights is required.

Secondly, drug control efforts should not undermine human rights. In doing so, governments have the obligation to prevent the abuse of individual’s rights by drug control policies and actions. As the Colombia fumigation cases discussed in chapter 5 illustrates, the obligation to eradicate illicit drugs under the international drug control conventions shall not be interpreted and invoked for measures that create a human rights crisis where residents’ health and living environment are under threat. Also, as explored in chapter 3 with regard to the death penalty for drug offenders, safeguards shall not be understood as a barrier to achieve drug control goals but instead, as a means to ensure the full protection of the right to life for all of those concerned.

Thirdly, where there is a conflict between state’s drug control and human rights obligations, the rights of individuals are at stake. Individual rights may be restricted in certain circumstance; however, the desire for drug control should not always weigh heavier than the requirement to respect and protect individual’s rights. In cases where a balance of interests is not maintained, human rights obligation may take precedence.\(^\text{871}\) As the cases discussed in chapter 5 with regard to a ban on personal drug uses that affect the right to freely practice one’s religion and enjoy cultural life illustrated, rather than to simply prioritise drug control, states are expected to take extra efforts to accommodate rights protection within drug control regimes where such individual rights are affected.\(^\text{872}\) In this respect, the South African and Bolivian cases present opposite positions taken by the authorities. Effective or not, the efforts taken by states such as Bolivia to address the conflict between drug control and human rights obligations is worthy of notice and should receive further study.


Finally, while the question of how the human rights framework can integrate with drug control mechanism remains under discussion and debate, human rights norms can be applied to harmonise the existing conflicts between drug control and rights protection. As Professor Paul Hunt once said, “human rights do not provide magic solutions to complex issues because there are no magic solutions. But human rights have a constructive contribution to make.”873 This notion is well reflected in the discussion provided in chapter 5 with regard to drug searches in schools, where the tension between the urgent need to prevent drugs in schools and the importance of protecting school children’s rights can be harmonised by referring to human rights instruments, such as the Convention on the Rights of the Child. In addition, while the argument that individual rights can be infringed in order to protect public interests in the context of drug control may sound invulnerable, human rights principles can be applied as a counterbalance to drug policies that build upon ideology, prejudice and discrimination toward certain groups of people in society (as established in chapter 5 with regard to the drug testing of applicants for public funding). In this regard, an examination of drug control policy in line with human rights principles, as conducted in this study, will provide valuable insights and build the foundation for further discussion and development of a human rights based approach of drug control.

All in all, when considering states’ human rights obligations together with their drug control mandate, undeniable tensions exist. States’ responses to these tensions are varied and some raise human rights concerns. The relationship between drug control and human rights may be interpreted differently amongst countries, and certainly this can differ from one drug issue to another. While illicit drugs raise complex social problems that governments have a responsibility to resolve, states also bear human rights obligations that cannot be exempted simply due to the pressing need for drug control. While it is irresponsible to simply deny either the requirements of drug control or rights protection, an approach that prioritises drug control mandate over human rights obligations is problematic. Therefore, it is the central argument made in this study that a human

rights based approach for drug control is a way to reconcile the conflict between states’ drug control and human rights obligations.

The 1993 Vienna Declaration and Programme of Action affirmed that states have the duty to promote and protect universal human rights standards and fundamental freedoms in all contexts. Drug control cannot be held to excuse states from this calling. A human rights based approach to drug control, therefore, is founded on states’ obligations in relation to respecting, protecting and fulfilling human rights. As identified at the beginning of the study, this work highlights aspects of the drug control regime that must be considered in order to address inconsistencies with human rights norms. Such an outcome requires a change in the understanding of what human rights concerns mean to drug control. It is, therefore, imperative that when formulating drug control policies, human rights considerations play a vital role in the decision-making process. That is to say, a human rights based approach of drug policy requires policymakers to be guided by fundamental human rights standards when formulating the direction and content of drug policy measures.

Still, at the practical level, how states apply their human rights obligations in the context of drug control is worth further discussion. In this connection, the following points deserve mention: 1) While the author believes a human rights based approach to drug control is necessary and important, its realisation poses serious challenges. In order to progress towards that end, current perceptions of drugs and drug users need to be addressed.2) Due to space constrains, the present study is unable to cover all of the issues related to drug control and human rights. In this regard, the following areas have been identified for further research: a) a study of other problems of rights protection in the context of drug control, such as the right to education; rights related to criminal proceedings; rights for certain groups of people including women and disabled persons; b) an exploration of what a human rights based approach to drug control would look like and the practical difficulties that its implementation would confront in both domestic and international spheres.

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