

***A Human Rights-based
Approach to the International
Drug Policy***

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Introduction

This paper is concerned with two entirely different policy areas of the United Nations which pursue very different aims and at first sight do not seem to be related, namely human rights and the policy on drugs. The international drug policy is conducted under the auspices of the UN which also has as one of its main purposes the promotion of human rights. The international drug policy continues to be governed by a moralistic presumption that all drugs are evil and should be eradicated from society. To achieve this 'drug-free world', the policy has been centred around a 'global prohibition' on drugs. Obviously this has not been achieved seeing that we do not live in a 'drug-free world'. In contrast, there seem to be an increasing number of states which are liberalizing their domestic laws on drugs. Even though the three Conventions adopted by the UN regulating the drug policy are still in force, they have come under increased pressure of these domestic policies. The prohibition on drugs is out of touch with reality and has a lot of negative side-effects to it. These side-effects have to do with health concerns of drug users and discriminatory law enforcement practices for example, which can be translated into specific human rights violations.

Not a lot has been written about the human rights aspect of the international drug policy. Most of the discussion has centred around the inclusion of harm reduction measures. The term harm reduction measures is derived from the fact that they attempt to reduce the harms on health related to drug use. Even though this movement has a rather limited focus, being only concerned with health related aspects, it has been of the utmost importance for opening up the discussion on drugs. It had started to recognise and raise awareness of the negative impact of the prohibitionist policy. This paper will attempt to take the discussion a step further and focus more broadly on the drug policy and the problems surrounding it. The fact that the international drug policy has resulted in widespread human rights violations has been extensively documented by NGO's engaged in this topic. One author has argued for the application of harm reduction measures based on specific human rights: "*Combining the two approaches, however, may strengthen such a case: public health evidence can support principled legal arguments with a sound evidentiary basis, and the principles of human rights law strengthen statistical or other data with the normative claim that states have an ethical and legal obligation to act upon that evidence. Joining human rights law with public health evidence can help shift global drug control policy away from the current, failed emphasis on prohibition to a more rational, health-promoting framework that is both pragmatic and principled.*"¹

Harm reduction movements have focused on the inclusion of these measures within the existing legal framework, hence within the 'global prohibition'. Even though this is a very rationale and pragmatic

¹ Elliot, Richard a.o., *Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy*, Health and Human Rights, Vol. 8 No. 2, 2005, p. 106 – 107.

way of counteracting the negative side-effects it also contradictory. Harm reduction measures are then included into a framework which is actually the cause of most of the problems it is attempting to reduce.²

Harm reduction measures have been a useful tool and a first step towards a more sensible approach to drugs, this paper will however, focus on a new policy which is based on human rights. A human rights-based approach means the incorporation of all the applicable human rights standards into the international drug policy and not merely addressing specific violations. Within the UN framework the emphasis in recent years has been on streamlining the human rights policy throughout the organization and introduce human rights within all its policy areas. A human rights-based approach has already been applied in some instances, however, when the topic concerns drugs there seems to be an almost complete silence on the issue. As one of the NGO's observed: *"Yet it remains the case that, in most countries, drug policy and legislation are rarely informed by international human rights obligations, and drug issues rarely enter into the discourse of human rights mechanisms and monitors, at either the national or the international level."*³

This paper will set out some of the basic parameters which a human rights-based approach to the international drug policy should comply with.

The first chapter will give a general overview of human rights as well as its place within the UN framework. It will first briefly discuss the development of human rights and the different types of rights in existence. Subsequently the treaties which have laid down the basic human rights norms will be touched upon and the institutional framework administering the human rights policy within the UN will be set out. The last part consists of the most recent developments within the human rights movement and the notion of a human right-based approach.

The second chapter will discuss the same issues but then in relation to the international drug policy conducted under the auspices of the UN, hence the legal and institutional framework and the most recent developments.

In the third chapter the problems surrounding the international drug policy take the centre stage. These problems will be discussed in relation to the human rights standards they infringe upon. Examples will be given of measures prescribed by the three drug conventions and translated into domestic policies which are in flagrant contradiction to, very often, the most basic human rights.

The fourth chapter will attempt to solve these problems or at least reduce the negative impact by setting out a new policy on drugs which incorporates human rights. Hence, a human rights-based approach will be applied to the international drug policy.

² See also Transform Drug Policy Foundation, *After the War on Drugs. Options for Control*, March 2006, p. 12.

³ The Beckley Foundation Drug Policy Program, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, March 2008, p. 11.

Chapter 1 Human Rights

Introduction

International human rights law, as compared to other fields of international law, is still a very recent concept. The development and recognition of contemporary international human rights really started after WW II. The atrocities committed against the civilian population led to the inclusion of a reference to human rights in the Charter of the newly found United Nations. The organization set as one of its fundamental purposes the promotion of human rights and fundamental freedoms.

For centuries international law had only regulated states' behaviour *vis à vis* and considered human beings as mere objects being outside the realm of international law. This dramatically changed with this new notion of international human rights, it led to the recognition of people as not being mere objects but subjects of international law, i.e. people having their own rights and obligations directly derived from international law. The international human rights treaties and institutions responsible for its implementation, hence the framework of human rights we know nowadays, gradually developed over the last six decades and is still constantly developing. Especially seeing the fact that international human rights is such a new field of law, the institutions responsible for the promotion of human rights (particularly within the UN framework) are continuously trying to increase the compliance of states with human rights law. Naturally law is always in development, it must adapt to ever changing needs and morals of society, this holds even more true for human rights because it is such a new field of law.

The UN has played a crucial role in this development from the beginning. Initially by setting the normative standards and codifying substantive human rights, later on in institution building and strengthening compliance and enforcement of these rights and recently by promoting the adoption of policies which are based on human rights by thus giving human rights the prominence they require and deserve.

This chapter will first briefly discuss the development of human rights and the different types of rights, i.e. the distinction between civil and political rights, economic, social and cultural rights and the fairly new concept of solidarity rights. Because this paper is concerned with the human rights framework of the UN an overview will be given of the basic human rights instruments and the responsible organs within the UN structure. Finally, the latest developments within the field of human rights will be discussed ending with a discussion of what exactly constitutes a human rights-based approach and the basic principles it consists of.

§ 1. Development of Human Rights

1.1. Different generations of rights

Human rights are often categorised in ‘first generation’, ‘second generation’ and ‘third generation’ rights. The first group of rights corresponds to the ‘classical’ civil and political rights, the second to economic, social and cultural rights and the third group of rights refers to collective or solidarity rights which are, however, still very controversial. Human rights are distinguished into these categories based on the differing obligations they would impose upon states, on their ideological or historical basis and chronologically. Even though this distinction is flawed, it is still often used when describing human rights and in particular its development.

When distinguishing human rights as such, ‘first generation’ rights, also referred to as ‘negative’ rights, impose an obligation upon states to abstain from interfering in personal freedoms. ‘Second generation’ rights on the other hand, i.e. ‘positive’ rights, impose an obligation of conduct or result upon states. This distinction is difficult to uphold in the case of ‘third generation’ rights because they are far from being universally recognized from which necessarily follows that it is not possible to determine exactly what, if any, kind of obligations are imposed upon states.⁴

This distinction based on the imposed obligations upon states, specifically between rights of the ‘first’ and of the ‘second’ generation, is of itself incorrect. It is true that the obligations imposed upon states by civil and political or by economic, social and cultural rights are often phrased in a different manner and that the means to achieve the compliance with a specific human right may be different. However, both types of rights impose ‘positive’ obligations upon states to achieve a certain result. Arguably all human rights impose three types of obligations upon States: the duty to protect, promote and ensure. It is a fallacy that the observance of civil and political rights could be achieved by mere non-interference of states.

Another ground used to distinguish between the different types of rights is the philosophical or ideological foundation. The first generation rights or civil and political rights originate in the French and American revolutions of the eighteenth and nineteenth century and are the legal expression of two different concepts of freedom: the ancient democratic concept of achieving collective freedom through active participation in the political decision-making process, and the modern liberal concept of achieving collective freedom by creating a private sphere for every human being which is to be protected against any undue interference by the state and other powerful actors, such as religions.⁵

⁴ See also Tomuschat, Christian, *Human Rights. Between Idealism and Realism*, 1st ed, Oxford University Press, 2003, p. 24.

⁵ Nowak, Manfred, *Civil and Political Rights*, in *Human Rights: Concept and Standards*, ed. Janusz Symonides, UNESCO Publications, 2000, p. 69.

‘Second generation’ rights were developed at a later stage and are often claimed to be a result of the Industrial Revolution. They were introduced in the late nineteenth and early twentieth century and can be described as follows: “*Social rights ranging from the right to a modicum of economic welfare and security to the right to share to the full the social heritage and to live life as a civilized being according to the standards prevailing in society.*”⁶ Economic and social rights dictate a redistribution of welfare in order for all members of society to live their lives in dignity. It especially serves to protect the most vulnerable members of society from what is referred to by Franklin D. Roosevelt during a speech in 1941 as the ‘freedom of want’.

The difference in ideologies between civil and political and social, economic and cultural rights came to the centre stage during the drafting of the two Covenants which form the basis of international human rights law, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Western States, on the one hand, prioritized civil and political rights asserting them as the basis of liberty and democracy in the ‘free world’. The Soviet States, on the other hand, emphasised economic, social and cultural rights, which were associated with the aims of a socialist society.⁷ The classification and determination of these two groups of rights as being inherently different was further emphasized by the drafting of two separate Covenants.⁸ The effect has been that economic, social and cultural rights were not considered as important as civil and political rights and a kind of hierarchy of norms came into being. This was however never intended, the Universal Declaration of Human Rights which preceded the drafting of both Covenants did not distinguish between both groups of rights and emphasized their indivisibility: “*Everyone is entitled to all the rights and freedoms set forth in this Declaration.*”

Third generation rights are sometimes also referred to as collective rights or solidarity rights. Three prominent examples of such rights are the right to peace, the right to development and the right to a clean environment.⁹ The right to development has been defined in the Declaration on the Right to Development adopted by the General Assembly as follows:

⁶ Eide, Asbjørn, *Economic and Social Rights*, in Human Rights: Concepts and Standards, ed. Symonides, Janusz, UNESCO Publishing, 2000, p. 113 – 114.

⁷ Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Oxford Monographs in International Law, 1st ed., Oxford University Press, 1995, p. 9.

⁸ See also Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its Development*, p. 9 and Eide, Asbjørn, *Economic and Social Rights*, in Human Rights: Concepts and Standards, ed. Symonides, Janusz, p. 112.

⁹ See also Tomuschat, Christian, *Human Rights. Between Idealism and Realism*, 1st ed., Oxford University Press, 2003, p. 48.

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁰

The right to development includes, among other aspects, popular participation, equality of opportunity, and the advancement of adequate conditions for the enjoyment of other civil, cultural, economic, political and social rights.¹¹ These so-called ‘third generation’ rights were developed at a much later stage and raise awareness of the fact that all human rights are indivisible and interconnected. These rights are far from being universally recognised and it is furthermore difficult to extract specific obligations from these rights which states have to comply with. It is more accurate to define these rights as policy objectives pledged to pursue by the international community and not as true rights creating claim holders and duty bearers. These rights aspire to set out a general framework of favourable conditions in which individual human rights can be fully enjoyed.¹²

1.2. Development

The preceding paragraph partially showed the way in which human rights have developed over the years. Within the UN different phases can be distinguished based on the content and the way in which human rights have been promoted within the organization. The first phase evidently starts with the adoption of the Charter and lasted for approximately two decades. This initial period can be characterized by the internationalization of human rights and standard-setting. Standard-setting took place by first of all the adoption of the Universal Declaration of Human Rights in 1948 and secondly the adoption of the two Covenants which translated the aspirations of the UDHR into binding legal obligations. The codification of these norms in two international treaties also resulted in the recognition that human rights could no longer be considered as a purely domestic affair.¹³

The second phase in this development concerned the implementation of the newly codified rights and the monitoring of those rights by the institutions created for this purpose. It can be argued that this period lasted until the end of the Cold War, one author refers to this phase as the ‘era of institution building’.¹⁴ Both Covenants entered into force in the 1970’s and the respective committee’s could begin to monitor states’ compliance with the specific human rights norms and address any violations of those rights. One huge step forward was the adoption by the GA of resolution 3219 in 1974: it expressed deep concern of the human rights violations continuing to take

¹⁰ General Assembly resolution 41/128, 4 December 1986.

¹¹ *Human Rights. A Basic Handbook for UN Staff*, Office of the High Commissioner on Human Rights, p. 18.

¹² See also Tomuschat, Christian, *Human Rights. Between Idealism and Realism*, Oxford University Press, 2003, p. 52.

¹³ See also Buergenthal, Thomas, *International Human Rights in an Historical Perspective*, in *Human Rights: Concepts and Standards*, ed. Symonides, Janusz, UNESCO Publishing, 2000.

¹⁴ Buergenthal, Thomas, *International Human Rights in an Historical Perspective*, in *Human Rights: Concepts and Standards*, ed. Symonides, Janusz, UNESCO Publishing, 2000.

place in Chile.¹⁵ It has by now become standard practice of the GA to adopt resolutions on human rights situations in specific countries but at that time it created a sort of precedent making the work of the treaty-monitoring bodies easier.

The third phase started after the end of the Cold War which also, at least partially, ended the ideological conflict between the East and the West. This has had an enormous impact on human rights, it became less politicized which finally led to the recognition that all human rights are equal and mutually reinforcing. Very shortly after the end of the Cold War the 2nd World Conference on Human Rights took place in Vienna, the final document of this conference reflects and places emphasis on this aspect. Paragraph 5 of the Vienna Declaration states the following:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”¹⁶

By now institutions could really focus on effective measures to ensure state compliance and within the UN several initiatives were taken to give human rights the prominence they deserve. The first of these followed from a recommendation of the World Conference in Vienna, namely the creation of the Office of the High Commissioner for Human Rights by the GA with a mandate to coordinate and implement all aspects of human rights throughout the UN system. This can arguably be seen as the first step towards the adoption of rights-based approaches in all policy areas of the UN. A second initiative which reinforced this position took place in 1997. In July of 1997 a Programme of Reform was launched by Kofi Annan, former Secretary General of the UN. One of the recommendations contained therein concerned the adoption of strategies whereby human rights protection and promotion were to be integrated into all activities and programmes of the UN. The adoption and application of a rights-based approach was for the first time explicitly mentioned as one of the tools through which this objective was to be achieved.¹⁷

This new emphasis on mainstreaming human rights within the UN system and the application of a rights-based approach in all policy areas goes hand in hand with the earlier mentioned recognition of a right to development and another concept of this period namely the concept of good governance. This doctrine has been applied by the World Bank for example as off 1989 and been defined as follows:

¹⁵ General Assembly resolution 3219 (XXIX), 6 November 1974.

¹⁶ Final Declaration of the Vienna World Conference on Human Rights, General Assembly resolution 48/121.

¹⁷ Report Secretary General, *Renewing the United Nations: A Programme for Reform*, 14 July 1997, A/51/950.

*Good governance is epitomized by predictable, open, and enlightened policymaking (that is transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.*¹⁸

The application of the concept of good governance to policy making contributes to the achievement of a right to development. The main principles such as participation, transparency and accountability are the same in the concept of good governance and the right to development. As we will see later on a human rights-based approach includes these same principles as well, only goes a step further by integrating the compliance with all human rights. It could possibly even be argued that a right-based approach is the ultimate way to achieve the right to development and that the policy adopted to achieve this end has to be in compliance with the principles of good governance.

§ 2. Human Rights within the United Nations system

One of the main purposes of the UN, as laid down in the Charter, is the promotion of human rights.¹⁹ Universal respect for human rights based on the principle of non-discrimination is seen as a necessary pre-condition of stability and peaceful and friendly relations among nations. Human rights here are seen as a pre-condition for the maintenance of international peace and security, one of the other main purposes of the organization. However human rights have been developed and are in place to protect the dignity of all human beings. Human rights have had a prominent place within the UN from the beginning and the emphasis on this purpose of the UN has only increased during the past 6 decades.

There are two principal organs of the UN which are mostly involved in the promotion of human rights namely the General Assembly and the Economic and Social Council (ECOSOC) and both have established subsidiary organs to help discharge its tasks. The Charter itself does not further enumerate any substantive human rights norms. Even though there was agreement on the fact that human rights needed to be specified and codified during the drafting period of the UN Charter, it was chosen to do this in a separate instrument. The Commission on Human Rights was created in 1946 by ECOSOC especially for this purpose. The Commission immediately embarked upon the drafting of the International Bill of Human Rights which consists of the Universal Declaration of Human Rights and the two Covenants. This first led to the unanimous adoption of the Universal Declaration of Human Rights by the General Assembly in 1948²⁰ and years later followed by the adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

¹⁸ Tomuschat, Christian, *Human Rights. Between Idealism and Realism*, Oxford University Press, 1st ed., 2003, p. 55.

¹⁹ Article 1 UN Charter:

The purposes of the United Nations are:

3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion.

²⁰ General Assembly resolution 217 A (III), 10 December 1948.

Economic, Social and Cultural Rights (ICESCR) in 1966. Within the UN system there are more treaties dealing with specific human rights or human rights protection of specific groups of people, however, the instruments of the International Bill of Human Rights form the basis of international human rights law.²¹

2.1. Universal Declaration of Human Rights

The UDHR is the first document in which universal standards of human rights are laid down. The first paragraph of the preamble reflects the underlying principles of human rights: the ultimate aim of protecting human dignity, the intertwining principles of equality and non-discrimination and the indivisibility of human rights. Articles 1 and 2 further elaborate on these principles:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UDHR consists of civil, political, economic and social rights. The UDHR being a declaration adopted in a General Assembly resolution does not by itself create any entitlements for individuals or binding legal obligations upon States. The importance of this declaration should however not be underestimated. The fact that the resolution was unanimously adopted by the General Assembly shows the universal recognition of the principles contained therein. As such it has been an impetus for the human rights movement in general and specifically for the further codification of human rights. Moreover, it is now widely accepted that the human rights norms of the UDHR have developed into custom and are thus binding through customary international law. This is especially important since both Covenants are not as widely ratified as the acceptance of the UDHR has been and the possibility of entering reservations upon ratification has led to loopholes as well.

²¹ Other treaties include: International Convention on the Elimination of All Forms of Racial Discrimination of 1965, Convention on the Elimination of All Forms of Discrimination against Women of 1979, Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984, Convention on the Rights of the Child of 1989 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.

2.2. International Covenant on Civil and Political Rights

The ICCPR has also been drafted by the Commission on Human Rights. The ICCPR was adopted by the General Assembly on 16 December 1966²² and entered into force on 23 March 1976. The ICCPR established the Human Rights Committee which is responsible for the implementation and monitoring of the Covenant. The ICCPR codifies some of the most basic civil rights such as the right to life, right to self-determination and the right to a fair trial. The obligations imposed upon states are both 'negative' and 'positive' in nature. States must first of all refrain from violating and secondly, they must adopt legislative, judicial, administrative, educational and other appropriate measures to fulfil their legal obligations.²³

2.3. International Covenant on Economic, Social and Cultural Rights

The ICESCR also results from the codification efforts of the Commission on Human Rights. It was simultaneously adopted with the ICCPR by the General Assembly on 16 December 1966, however, entered into force a few months earlier namely on 3 January 1976. The ICESCR does not itself create a treaty-monitoring body but ECOSOC is the responsible organ in this respect. ECOSOC is responsible for the implementation and monitoring of the Covenant and has created the Committee on Economic, Social and Cultural Rights to assist it in its task. The ICESCR lays down basic norms such as the right to work, the right to social security, the right to an adequate standard of living and the right to education. The obligations derived from the ICESCR are somewhat different in nature than those imposed by the ICCPR. Under the ICESCR there are obligations of conduct and obligations of result. The core obligation upon states is to ensure at least the satisfaction of the minimum essential levels of each of these rights. The obligation of conduct implies the adoption of measures to progressively realize the rights covered by the ICESCR and the deliberate adoption of measures resulting in the retrogression of the rights enumerated in the ICESCR have to meet a very high threshold of justification.²⁴

§ 3. Institutional framework

As was mentioned in the preceding paragraph, the Charter has assigned the responsibility for the promotion of human rights within the organization to two of its principal organs, the GA and ECOSOC.²⁵ The GA is the plenary organ of the UN and is composed of all the member states. The

²² General Assembly resolution 2200 A (XXI), 16 December 1966.

²³ Human Rights Committee General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004.

²⁴ General Comment No. 3, *The Nature of States parties obligations* (Art. 2 par. 1), Committee on Economic, Social and Cultural Rights, 14/12/90.

²⁵ The other principle organs of the UN are: the Security Council, the International Court of Justice, the Secretariat and the Trusteeship Council (this organ has, however, suspended its operation on 1 November 1994), article 7 UN Charter. It must be said however that the other principal organs can also implicitly affect human rights in the course of its duties, furthermore the Secretariat has become increasingly involved in the issue of

Charter does not explicitly delegate the responsibility for human rights to the GA however, article 10 of the Charter enables the GA to discuss any matters falling within the scope of the Charter thus including human rights. Article 13 furthermore enables the GA to initiate studies and make recommendations for the promotion of human rights and fundamental freedoms. The GA does not have the power to make decisions which are binding upon member states.²⁶ This does however not prejudice the important role it plays in relation to human rights. The GA has been most active in standard setting and the codification of international human rights law. Both the ICCPR and the ICESCR for example have been drafted under the auspices of the GA and it also plays a role in reviewing the compliance of States with the obligations derived from those treaties.

As mentioned in the preceding paragraph the other principal organ responsible for human rights is ECOSOC. According to article 62 ECOSOC may make recommendations to the GA for the purpose of promoting respect for and observance of human rights. ECOSOC can furthermore submit draft Conventions to the GA relating to any matter falling within its competence. Even though ECOSOC is also one of the principal organs of the UN, it does fall under the authority and responsibility of the GA and reports back to the GA.²⁷ ECOSOC has the power to create subsidiary organs to assist it in discharging its tasks and has done so for the purpose of the promotion of human rights.

The Commission on Human Rights was one of the two functional commissions established by ECOSOC during its first session in 1946. Its mandate consisted of, among other responsibilities, the drafting of an International Bill of Human Rights. The Commission on Human Rights has been replaced in 2006 by the Human Rights Council. The Human Rights Council is established as a subsidiary organ of the GA, this new standing body has been created to give human rights more prominence within the UN structure.²⁸ The mandate of the Human Rights Council evidently consists of the promotion of human rights however, the emphasis differs from the Commission on Human Rights. The Council is mandated to address situations of violations of human rights and make recommendations thereon and should furthermore promote the effective coordination and mainstreaming of human rights within the UN system.

Under the auspices of the UN Secretariat another institution has been created which also deals with the issue of human rights namely the Office of the High Commissioner on Human Rights

human rights and has launched many initiatives to increase the awareness and implementation of human rights norms.

²⁶ Both article 10 and article 13 speak of recommendations concerning the power of the GA. The only principal organ of the UN which can make decisions binding upon all the member states is the SC according to article 25 of the Charter.

²⁷ Article 60 of the Charter:

Responsibility for the discharge of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

²⁸ General Assembly resolution 60/251, 3 April 2006, A/RES/60/251.

(OHCHR).²⁹ The OHCHR is mandated to promote and protect human rights but, just as the Human Rights Council, with a specific emphasis on the coordination and mainstreaming of human rights activities within the UN framework and enhancing the realization of the right to development.

§ 4. A human rights-based approach

As was discussed in the first paragraph of this chapter, the field of human rights is continuously changing and adapting to new circumstances and needs. The first phase of this development can be characterized by standard setting and codification, the second phase involved the monitoring of these new standards and the strengthening of enforcement mechanisms and arguably the third phase (in which we can find ourselves today) is pursuing the integration of human rights into all the policies adopted by the UN, the OHCHR cooperating with the Human Rights Council leads the efforts to this effect.³⁰

Most of the agencies of the UN and policies adopted by them explicitly or implicitly have an impact on the human rights situation of those affected. Essentially, a rights-based approach is integrating human rights standards into these policies. It serves the purpose of attaining the highest standard of compliance with human rights in a certain policy area. There are two important areas in which the principles of a rights-based approach have already been applied, firstly concerning developmental issues and secondly the eradication of poverty. The UN defines a rights-based approach in relation to development as follows: “*A rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.*”

The rationale of a rights-based approach in connection to the eradication of poverty has been described as follows: “*The human rights approach underlines the multidimensional nature of poverty, describing poverty in terms of a range of interrelated and mutually reinforcing deprivations, and drawing attention to the stigma, discrimination, insecurity and social exclusion associated with poverty.*”³¹

It is not too difficult to draw a parallel between people living in poverty and people living with a drug addiction, drug users often face the same marginalization, stigmatization and social exclusion. Moreover, the underlying causes of drug dependence can very often be found in poverty, and on the other hand can drug addiction push people into poverty. Because this idea of a rights-based approach has already been developed and applied to poverty reduction strategies and development

²⁹ General Assembly resolution 48/141, 20 December 1993, A/RES/48/141.

³⁰ The Office of the High Commissioner on Human Rights is mandated to “*coordinate the human rights promotion and protection activities throughout the United Nations system.*” General Assembly resolution 48/141, 20 December 1993, A/RES/48/141.

³¹ Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, Office of the United Nations High Commissioner for Human Rights, HR/PUB/06/12, p. 4.

policies these will be used as a guiding line for the application of a rights-based approach to the international drug policy.

4.1 Main principles

The rationale of human rights lies in the protection of human dignity and a human rights-based approach attempts to protect just this. The main principles of a rights-based approach can be summed up as follows: empowerment; protection of particularly the most vulnerable groups of society; the intertwining principles of non-discrimination and equality; the principle of participatory decision-making; the notion of accountability; interdependence of all human rights; and the principle of proportionality. All of these principles can be traced back to or are explicitly derived from the human rights standards which are codified in both Covenants. The underlying rationale of political rights for example is empowerment. The underlying idea of human rights and specifically social rights is the protection of the most vulnerable of society.

Empowerment

Empowerment is the core concept of a rights-based approach and the most fundamental way in which empowerment occurs is through the introduction of the concept of rights itself.³² If the concept of rights is being introduced into a specific policy this recognizes that people are not merely being helped out of sympathy or charity but for the simple reason that they have a right to certain assistance by their countries, i.e. those rights/entitlements give rise to legal obligations on the part of others. The objectives of a policy are then shaped in terms of particular rights. In other words, it translates people's needs into rights, and recognises the human being as an active subject and claim-holder.³³

Protecting the vulnerable groups/people of society

The interests of the most vulnerable, marginalized and excluded people or groups within society should be prioritized in policy-making. A rights-based approach requires states to identify those groups and prioritize their specific needs. This protection implicitly follows from the principle of non-discrimination which imposes a 'positive obligation' upon states to actively identify those individuals and groups in need of special measures and to take measures in order to diminish or eliminate conditions that cause discrimination.³⁴

³² Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, Office of the United Nations High Commissioner for Human Rights, HR/PUB/06/12, p. 4.

³³ See also Elliot, Richard a.o., *Harm Reduction, HIV/AIDS, and the Human Rights Challenge to Global Drug Control Policy*, Health and Human Rights, Volume 8 No. 2, p. 124.

³⁴ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p. 20.

Principles of non-discrimination and equality

The principles of non-discrimination and equality go to the heart of the concept of human rights and is thus one of the most important aspects of a human rights-based approach. These two principles are both one side of the same coin, the principle of equality establishes a positive norm or right that all people are and should be treated equally, the principle of non-discrimination prohibits discrimination to achieve equality for all. The fundamental issues in this respect are, which circumstances are determined as equal or different, and the considerations which may form legitimate justifications for differential treatment. Non-discrimination should not only focus on the prohibition of differential treatment but should identify those forms of action that are necessary to achieve substantive equality.³⁵ This has also been emphasized by the 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.*”³⁶ A rights-based approach requires states to take the necessary steps to eliminate discrimination both *de jure* and *de facto*.

Principle of participatory decision-making.

Participation is not only important as a means to achieve other ends, it is also a fundamental human right which should be achieved for its own sake.³⁷ Participation of those affected in setting policy objectives contributes to its effectiveness by taking their specific needs into account and working together on sustainable solutions. Engagement of civil society and decision-making on lower levels are important aspects of this principle.

Notion of accountability

Rights implies duties and duties demand accountability. Arrangements for ensuring accountability must therefore be built into any adopted policy and must be accessible, transparent and effective.³⁸ It could be argued that accountability requires institutions to behave in accordance with the principles of good governance. Incorporating mechanisms of redress into policies enhances and ensures accountability on the part of policy-makers.

³⁵ Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, p. 155 – 156.

³⁶ General Comment No. 18: Non-discrimination, Human Rights Committee, 10/11/89, p. 2.

³⁷ *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Office of the United Nations High Commissioner for Human Rights, HR/PUB/06/12, p. 5.

³⁸ *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Office of the United Nations High Commissioner for Human Rights, HR/PUB/06/12, p. 5.

Recognition of the interdependence of rights

The interdependence and indivisibility of human rights has already been discussed in the first paragraph of this chapter. Even though there is a formal division between civil and political rights on the one hand and economic, social and cultural rights on the other hand, they are all part of one intrinsic set of human rights standards within which no hierarchy of norms exists. Within the UN system this has always been emphasized and now seems to be universally accepted as well. There are civil and political rights which can enhance the enjoyment of economic and social rights, on the other hand if the enjoyment of economic and social rights cannot be achieved very often civil and political rights are not enjoyed as well. A rights-based approach takes this interdependence and indivisibility into account, however, prioritization of certain rights can sometimes be necessary and is therefore not by definition precluded. This should however, under no circumstance, lead to the retrogression of other rights seeing that all human rights are equally important for the protection of human dignity.

Principle of proportionality

Another aspect of a human rights-based approach cautions against trade-offs or prioritization which could lead to the retrogression of a human right from its existing level of realization and rules out the non-achievement of certain levels of realization.³⁹ However, as mentioned before, prioritization can sometimes be necessary and is thus not excluded. There are only a few human rights which are absolute, the prohibition of torture is an absolute right for example, this means that whatever the circumstances, infringements of this prohibition are never allowed. Most other human rights do not possess this absolute character so infringements are not by definition precluded, however, when human rights are restricted it is conditioned by the principle of proportionality. The principle of proportionality prescribes that the restricting measure must be necessary to achieve a legitimate aim. The conditions set out by the principle of proportionality are threefold: the measure must be necessary; the aim to be achieved must be legitimate; and the restricting measure must be as least restrictive as possible.⁴⁰

³⁹ Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, Office of the United Nations High Commissioner for Human Rights, HR/PUB/06/12, p. 5.

⁴⁰ The Human Rights Committee has also emphasized the importance of the principle of proportionality when adopting measures which can restrict the rights enjoyed under the ICCPR:
“Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”

General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, 26/05/2004, CCPR/C/21/Rev.1/Add.13, p. 2.

Chapter 2 International drug policy within the United Nations system

Introduction

Most, if not all, domestic laws and policies on drugs are very much influenced by international policy.⁴¹ The League of Nations already exercised some functions regarding narcotic drugs and there were several international treaties in existence, such as the International Convention relating to Dangerous Drugs of 1925 and the International Convention for Limiting the Manufacture and Regulating Distribution of Narcotic Drugs of 1931. The international framework regulating the international drug policy now operates under the auspices of the UN. As mentioned before ECOSOC is the responsible organ within the UN for economic, social, health and other related matters and the regulation of drugs falls within its sphere of competences. ECOSOC therefore created a subsidiary organ in 1946, namely the Commission on Narcotic Drugs. The CND first assumed the functions exercised by the League of Nations while simultaneously drafting a new Convention to succeed the other existing Conventions. The legal framework which was developed consist now of three conventions:

- The Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol;
- The Convention on Psychotropic Substances (1971) and;
- The Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

All three conventions deal with different aspects of drug policy however the main focus is supply reduction. The Single Convention of 1961 replaced the multiple pre-existing treaties concerned with the control of narcotic drugs and deals exclusively with plant-based substances. The 1971 Convention was drafted to control the use of synthetic – psychotropic drugs. And the 1988 Convention deals with the globalization of the international drug problem such as trafficking issues.

The approach taken towards the international drug problem is the same in all three Conventions namely prohibitionist and punitive. The punitive drug prohibition refers to policies that rely on penal sanctions to punish those involved in illicit drugs. In other words, most or almost all activities concerning drugs are prohibited and states are obliged to implement domestic laws penalizing such illegal behaviour. One author also calls this approach the ‘moral’ or ‘criminal justice’ model because it presumes that illicit drug use is morally wrong and should thus be criminalized.⁴² The ultimate aim of this policy is the protection of the health and welfare of mankind against the evil of drugs, according to the Preamble of the 1961 Single Convention: “*Concerned with the health and welfare of mankind, Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and*

⁴¹ All three conventions are now ratified by 183 states.

⁴² Aoyagi, Melissa T., *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, International Law and Politics, Vol. 37:555, p. 560.

is fraught with social danger and economic danger to mankind, Conscious of their duty to prevent and combat this evil.”

A lot of problems associated with this drug policy which has resulted in discriminatory practices is the way in which society and more importantly policy makers perceive drugs and picture it as an ‘evil’ for society. This creates a situation in which people who are in any way associated with drugs are stigmatized and excluded from society. A global prohibition on the use of drugs with the aim of creating a ‘drug-free world’ is moreover a very unrealistic policy objective which has only lead to an exacerbation of the problems related to drug production and use. We will turn to these problems in the next chapter, to properly discuss those issues it is, however, necessary to describe the legal framework regulating drugs, the obligations imposed upon states and the working of the institutions which prescribe and monitor the international drug policy under the auspices of the UN.

§ 1. Core obligations upon states derived from the Conventions

Both the 1961 and the 1971 Convention prohibit the use of drugs except for medical or scientific purposes.⁴³ As mentioned in the preceding paragraph, the 1961 Convention is concerned with plant-based drugs and the 1971 Convention with chemical-based drugs. The Conventions mainly consist of administrative measures to establish an international control system for the legal production and trade in drugs.⁴⁴ Both these Conventions almost exclusively impose supply-side measures and do not deal with personal consumption or demand reduction.

1.1. Core obligation

The general or core obligation which states need to comply with follows from article 4 of the 1961 Single Convention:

The parties shall take such legislative and administrative measures as may be necessary:

(c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

The Conventions set out systems of Schedules of which each Schedule corresponds to differing control measures. The most important purpose of both the 1961 and the 1971 Convention was to codify internationally appropriate control measures to ensure the availability of narcotic drugs for medical and scientific purposes, while preventing leakage into illicit channels. The classification of drugs in the different Schedules is determined by dependence creating properties, the potential level

⁴³ Seeing that the obligations of the 1961 Single Convention and the 1971 Convention are so similar in nature and only differ in the substances under control of the specific Conventions reference will only be made to the provisions of the 1961 Single Convention.

⁴⁴ Krajewski, Krzysztof, *How flexible are the United Nations drug conventions?*, International Journal of Drug Policy 10 (1999), p. 331.

of abuse and the therapeutic value of the substances.⁴⁵ The CND decides which substances are classified in which schedule, however, because of the medical and scientific aspects the World Health Organization advises the Commission on this issue. As will be discussed later in more detail the classification of certain substances such as methadone and cannabis can result in human rights violations.

1.2. Crop cultivation

Because the 1961 Convention imposes supply-side measures on states concerning plant-based drugs, it also deals with the issue of cultivation. Article 22 on this issue:

1. Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation.

The 1961 Single Convention does not prescribe states to prohibit cultivation, it leaves this up to the discretion of the Parties. The 1988 Convention has however changed this situation and takes a much stronger stand on crop cultivation:

Article 14:

2. 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 in its illicit 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.

3.a. The Parties may co-operate to increase the effectiveness of eradication efforts. Such co-operation may, inter alia, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation

The 1988 Convention is the most punitive of the three Conventions which is also reflected in article 14. This is in line with the increased attention during the '70's and '80's on law enforcement aspects led by the US proclaiming its so-called 'War on Drugs'. It is interesting to note that this article does refer to human rights, the protection of the environment and furthermore sustainable development. These are exactly the problem area's which are in practice not sufficiently taken into account in the course of crop-eradication.

⁴⁵ Bewley-Taylor, David R., *Challenging the UN drug control conventions: problems and possibilities*, International Journal of Drug Policy 14 (2003), p. 172.

1.3. Personal consumption

The 1988 Convention is not concerned with the control of substances as such but with drug-related issues such as trafficking. In contrast to the other two Conventions it almost exclusively contains provisions of substantive and procedural criminal law concerning those drug-related matters. Article 3 is the basic provision criminalizing such behaviour:

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall 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 consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

There are differing views on the interpretation of this article concerning the reference to personal consumption, whether or not states are obliged to criminalize this as well. It has been argued that the term trafficking is intended to be broadly interpreted and include supply and demand which would lead to the conclusion that personal consumption should be criminalized as well. On the other hand a literal reading of article 3 (2) indicates that because of the fact that the other two Conventions do not criminalize personal consumption that the reference to these Conventions in article 3 also excludes personal consumption from the scope of the 1988 Convention. It has also been argued that states can decide to exclude personal consumption from its criminal laws on the ground that this would contravene their constitutional principles and the basic concepts of its legal system.⁴⁶ The reading that this provision does not oblige states to criminalize personal consumption seems most widely adhered to. However, the INCB has taken a very strong stand on for example the decriminalisation of cannabis in the Netherlands. It seems that the UN institutions do favour the application of criminal sanctions to personal consumption.

A more general conclusion can be drawn from this provision as well namely that the demand side now seems to be included into the international drug policy. This has been confirmed by the adoption of a declaration on demand reduction during the United Nations General Assembly Special Session on Drugs (UNGASS) in 1998.⁴⁷

1.4. Criminal sanctions

There is only one article in the 1961 Convention dealing with criminal measures which should be taken by states namely article 36:

⁴⁶ For discussion on this issue see also: Krajewski, Krzysztof, *How flexible are the United Nations drug conventions?*, International Journal of Drug Policy 10 (1999) and Bewley-Taylor, David R., *Challenging the UN drug control conventions: problems and possibilities*, International Journal of Drug Policy 14 (2003),

⁴⁷ General Assembly resolution S-20/3, 10 June 1998, A/RES/S-20/3.

1. a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that 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 contrary to the provisions of this Convention, and any 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 adequate punishment particularly by imprisonment or other penalties or deprivation of liberty.

b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

In relation to the punishment of drug users the Convention allows for the possibility of treatment and rehabilitation. How progressive this provision may seem at first sight it has significantly contributed to human rights abuses which will be discussed in the next chapter.

Even though the measures and the regime set out by the conventions are already very strict, the Conventions allow states to impose measures which are more strict or severe according to article 39:

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.

The 1988 Convention contains an obligation very similar to this one. As will be discussed in the next chapter there are countries which have adopted very harsh and severe penalties in their domestic laws such as long-term incarceration for minor drug-related offences. The problem with this provision is that it creates an excuse or a justification for those states to apply these sanctions. And again the Commission does not give any policy guidance in this respect and seems to accept whatever laws states adopt as long as it takes place under the aim of protecting the public health and welfare.

§ 2. Institutional framework

The GA, and under its authority ECOSOC, is not only responsible for the promotion of human rights but economic, social, health and other related issues also fall within its mandate.⁴⁸ During the first

⁴⁸ Article 55 UN Charter:

With a view to the creation and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health and related problems; and international cultural and educational education; and

session of ECOSOC in 1946 it created the Commission on Narcotic Drugs as the central policy-making body of the UN dealing with all drug-related issues.⁴⁹ As was mentioned in the introduction, the Commission first succeeded the League of Nations in the tasks which were prescribed to it by the already existing international treaties relating to drugs. The Commission has been responsible for the drafting of the three Conventions which regulate the trade in drugs and subsequently in the supervision on the implementation of those treaties. The commission is furthermore responsible for the amendment of the Schedules in accordance with the provisions of the 1961 Convention and the 1971 Convention. The Commission also gives policy guidance to the United Nations International Drug Control Programme and monitors its activities. The work of the Commission can be divided in two segments: a normative segment consisting of their treaty-based activities and normative functions and; an operational segment in which the Commission functions as the governing body of UNDCP.⁵⁰ All decisions are taken and disputes within the Commission are settled based on consensus, as will be discussed later on in more detail, this of course has an impact on the outcome and the general policy as set out by the Commission

The other organ within this framework is the International Narcotics Control Board established by the 1961 Single Convention which started its work in 1968 simultaneously with the entering into force of the Convention. The INCB is an independent and quasi-judicial body responsible for monitoring the implementation of all three Conventions. The INCB first of all oversees and ensures that the contracting parties have sufficient supplies of drugs for medical and scientific purposes. The INCB secondly monitors the control systems implemented by governments to prevent the diversion of licit chemicals into illicit traffic. The main function of the INCB is “ensuring that leakages from licit sources to illicit traffic do not occur”.⁵¹ The INCB does not have the power to apply sanctions to non-compliant states, it can however issue direct warnings to countries and threaten to revoke its licenses.⁵² Even though there is not a real possibility of enforcement, exposure can already bring states back into compliance because they do not want to be exposed and viewed as non-compliant.⁵³

One of the main problems with the INCB is the fact that it is very rigid in its interpretation of the three Conventions. In its annual report it often condemns countries which have adopted a more lenient or pragmatic policy based on alternative interpretations of the Conventions, it could be argued

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 60 UN Charter:

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

⁴⁹ Economic and Social Council resolution 9 (I), 16 February 1946.

⁵⁰ www.unodc.org/unodc/commissions/CND/01-its-mandate-and-functions.html

⁵¹ www.incb.org/incb/mandate.html

⁵² Drug War Monitor, *Cracks in the Vienna Consensus: The UN Drug Control Debate*, January 2004, p. 5.

⁵³ Especially developing countries can face very negative consequences after such exposure. The US sometimes makes its foreign aid dependant on a drug control-linked sanction regime and sometimes withdraws foreign aid when a country violates its obligations under the drug regime.

that the INCB is acting *ultra vires* by doing this because policy guidance still falls within the competence of the CND.⁵⁴

Another institution within this framework is the United Nations Office on Drugs and Crime. The UNODC was created in September 2002 and is a merger of the UN Drug Control Programme and the Center for International Crime Prevention. The UNODC is a full department of the Secretariat of the UN and serves as the secretariat of the drug control system. The UNODC's mission is to 'contribute to the achievement of security and justice for all by making the world safer from drugs, crime and terrorism'.⁵⁵ It is highly likely that this merger of drug control and crime prevention negatively influences the international drug policy. The emphasis will probably be even more on criminal measures than on the public health aspect and resources will be spend accordingly.

Another issue concerning the operational structure of the UNDCP is the fact that it relies on both the UN and voluntary contributions of donors for its funding. It is estimated that 90% of the budget of the UNDCP comes from donors through the UN Fund for Drug Abuse Control which was created in 1971. Even though the Commission gives policy guidance to the UNODC and functions under its authority, the major donors have an enormous impact on the UNODC and the Commission through the Fund. Donors can contribute under three headings: general purpose, soft earmarking and hard earmarking. Hard earmarking indicates that funds are only intended to finance specific projects approved by the donor beforehand and unfortunately there is a tendency towards this hard earmarking by donors.⁵⁶ This creates a situation in which the donors actually set out policy and not the UNODC itself under the guidance of the CND, unfortunately the US is one of the largest contributors to the Fund.⁵⁷

§ 3. Divergent domestic policies

It is interesting to note some of the diverging domestic policies which have been adopted within the framework set out by the three Conventions and some of the responses thereto of the INCB. Especially Western European states have adopted less stringent and more liberal laws in relation to drugs, more specifically on cannabis and personal consumption. Another issue worth discussing is the adoption of harm reduction measures.

⁵⁴ Drug War Monitor, *Cracks in the Vienna Consensus: The UN Drug Control Debate*, January 2004, p. 7.

⁵⁵ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p.16.

⁵⁶ Fazy, Cindy S.J., *The Commission on Narcotic Drugs and the United Nations International Drug Control Programme: politics, policies and prospect for change*, International Journal of Drug Policy 14 (2003), p. 162.

⁵⁷ The US for example for a long time did not allow the UNDCP to fund needle exchange programs even if these projects would be financed by other donors. Most of the donations of the Fund are used for supply reduction and the suppression of illicit traffic.

Fazy, Cindy S.J., *The Commission on Narcotic Drugs and the United Nations International Drug Control Programme: politics, policies and prospect for change*, International Journal of Drug Policy 14 (2003), p. 163 and 165.

There are first of all many examples of countries which have decriminalised the possession of cannabis. Decriminalisation is a kind of *de facto* legalisation which involves either a practice of tolerant policing or non-enforcement of existing laws. At the time of writing an example cannot be found of a country where the possession of drugs has been legalised. The possession of cannabis is decriminalised in states such as Luxembourg, Belgium and Australia. Some other countries have decided to subject the possession of all types of drugs for personal consumption to administrative measures, such as Switzerland, Italy and Russia. And then there are examples of countries where the possession of drugs for personal consumption is completely decriminalised such as the Netherlands, Portugal and some South-American countries as Venezuela, Colombia and Brazil.⁵⁸

The argument used most often to fit these policies into the scope of the three Conventions is the interpretation of article 3 of the 1988 Convention as to only require criminalisation of the specified activities but not the actual enforcement of those laws. This might not be a very strong legal argument because it can make a lot of provisions which prescribe criminalisation of certain behaviour irrelevant and easy to circumvent those obligations, however, in this case it does seem the most sensible solution. The discussion on this issue has become completely polarized with on the one hand the hard-liners such as the US and Asian states such as Japan and Thailand and on the other hand the more liberal approach of Western European states, an amendment of the Convention does not seem possible in such a vacuum.

Most of the countries with a more liberal policy on drug consumption have also introduced harm reduction measures to reduce the negative impact of drugs on drug users' health. These examples include supervised injection rooms where people can take their drugs under supervision of medically trained personnel, this has been introduced in Germany, the Netherlands and Canada for example. Another example is free needle exchange programs introduced in the Netherlands, Canada and some Eastern European countries. Another harm reduction measure, arguably the most controversial measure, are heroin dispensing or providing programmes which have been introduced in Germany, Switzerland and the Netherlands, there are also programs which provide heroin addicts with methadone.⁵⁹ This last measure has been brought under the realm of the use of drugs for medical or scientific purposes. The Conventions do not contain a further definition of those terms so this interpretation is in my opinion consistent with the Conventions.

The INCB has taken a very rigid stand on the acceptability of these measures within the legal framework set out by the three Conventions. It has for example not accepted the Dutch policy on cannabis. In relation to the use of safe injection rooms the INCB stated the following: "*To permit drug*

⁵⁸ For more specific information on these domestic policies see Transform Drug Policy Foundation, *After the War on Drugs. Options for Control*, 2006, . 41 – 42.

⁵⁹ For more information on these measures see, Transform Drug Policy Foundation, *After the War on Drugs. Options for Control*, 2006, . 41 – 42 and Aoyagi, Melissa T., *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, International Law and Politics, Vol. 37:555, p. 574 – 575.

injection rooms could be considered in contravention of international drug control treaties by facilitating in, aiding and/or abetting the commission of crimes involving illegal drug possession and use, as well as other criminal offences, including drug trafficking.”

In the case of methadone prescription the INCB also seems unwilling to cooperate. Methadone is one of the substances classified under Schedule I subject to the strongest control measures. Even though the medical value of prescription methadone has been proven in dealing with heroin addictions the INCB does not seem to want to recognize this and will not facilitate the use of methadone for this purpose.

Chapter 3 Criticisms and human rights violations as a consequence of the three UN Conventions.

Introduction

The underlying approach of the international drug policy has always been prohibitionist. Beginning in the 70's there was an increased tendency to even more strict or rigid laws and much stronger enforcement practices. This movement was led by the U.S. under president Nixon, which had proclaimed this so-called 'War on Drugs' in an attempt to completely eradicate drugs from society. The 1988 Convention also reflects this being the most punitive of the three Conventions almost entirely based on the application of criminal sanctions.

During the last two decades the opposition to this 'War on Drugs' grew and awareness was being raised of the fact that the prohibitionist approach to our globalizing drug problem did not lead to the expected results. As opposed to a decrease in supply and demand of drugs it had only increased.⁶⁰ Not only did the global prohibition imposed by the three UN Conventions fail in its aim, people also increasingly became aware of the problems which directly arise from the punitive approach towards the drug problem. This went hand in hand with the ever growing HIV/AIDS epidemic. Most of the criticism on the international drug policy is centred around the health issues relating to drug use and the violations of civil and political rights of mainly drug users. One author summarizes the problems revolving around the global prohibition on drugs as follows: "*Punitive drug policies are expensive, ineffective at reducing drug use, take scarce resources away from other health and policing activities, and are often racially and ethnically discriminatory. Criminalised drug prohibition violates civil liberties, imprisons many nonviolent offenders, and worsens health problems like the AIDS epidemic.*"⁶¹

Advocates for a new approach were focused primarily on how to integrate harm reduction measures in the existing conventions. This resulted in extensive debate on how flexible the Conventions were and in what manner they could be interpreted as to integrate harm reduction measures within this framework. There has been a trend, especially within Western European states, to adopt less stringent laws mostly on the use of drugs for personal consumption. These policies are often categorised as either falling within the category of legalisation, depenalisation or decriminalisation.⁶² A few

⁶⁰ The World Drug Report of 2008 contains a statistical annex showing the global trends in drugs. Coca cultivation for example has been fairly constant during the last two decades and even increased again in 2007. The same can be said of cannabis and opium. For further information see the World Drug Report of 2008.

⁶¹ Levine, Harry G., *Global drug prohibition: its uses and crises*, International Journal of Drug Policy 14, 2003, p. 149.

⁶² The first of the three alternatives to prohibition namely legalisation does not need any further explanation, however, the differences between depenalisation and decriminalisation are very small and not so self-evident. In the case of depenalisation all the acts related to drug production, traffic and use remain theoretically illegal but are in practice not enforced. This is for example the case in the Netherlands regarding all acts related to cannabis use for personal consumption. The effect with decriminalisation is the same but in this case such acts formally no longer constitute criminal offences.

examples of these domestic policies have been discussed in chapter two together with the negative reactions and criticisms these states encountered by the UN institutions responsible for the implementation and monitoring of the three conventions.

This chapter will focus on the most important aspects of the international drug policy which have resulted in discriminatory practices and major human rights violations. To make it more comprehensible a distinction has been made between general issues arising from the international drug policy and specific problems arising on the supply side and on the demand side, i.e. production and consumption. When discussing the specific violations of international human rights law reference will only be made to the two Covenants because they are the most comprehensive and widely ratified instruments available.

The problems surrounding the international drug policy which are to be addressed are also of an institutional nature, namely the inconsistencies between the international drug policy and the responsibility for human rights within ECOSOC and the UN framework in general. It should be clear that the approach of the international drug policy resulting in major human rights violations under the auspices of the UN is in flagrant contradiction and in violation of one of the organization's main purposes, the promotion of human rights. Both policies fall within the competences of the GA and ECOSOC. Both these organs should have coordinated these policies in a conducive way from the outset. Moreover, the emphasis which has been placed in recent years on the integration of human rights into all the policies adopted within the UN framework should also take place in the context of the international drug policy.

§ 1. General Issues

Drug users and people involved with drugs in other ways are often among the most marginalized and stigmatised groups in society. In large part this results from the underlying moralistic presumptions of the prohibitionist policy. The language which is very often used describing drugs as the 'evil' of society and the rejection and social exclusion of drug users seems to be a solid fundament of most societies by now.

The purpose of achieving a 'drug-free world' may seem to be a legitimate purpose but also a very unrealistic one. Drugs, as alcohol and tobacco is one of the vices of mankind and will most likely never disappear. When the demand for a specific substance is established a prohibition only creates more negative side-effects than the mere use of the substance itself does. Some examples of those negative side-effects are the creation of criminal markets which lead to a rise in prices which in turn leads to acquisitive crime by drug-users to be able to sustain their addiction. The global prohibition and especially the language used in the context of drugs have resulted in a very negative perception of drugs in general by society. Drugs have always been pictured as an evil of society which needs to be eradicated or in the words of an NGO involved with these problems: "*Prohibition has made drugs,*

drug users and drug dealers a convenient scapegoat for many of society's problems, providing a smokescreen for failures in other areas of social policy."⁶³ The underlying problems of drug use and addiction are not sufficiently addressed. It has furthermore led to drug users turning into outcasts of society, stigmatized and marginalized because of the fact that they use drugs. This only exacerbates the problems these people are most of the time already facing. So instead of addressing the underlying problems of drug use policymakers have only worsened the situation drug users find themselves in.

The impact of drug control is furthermore disproportionately focussed on vulnerable groups and marginalized societies leading to discriminatory practise. The US provides an excellent example of the impact of these discriminatory practices. The US has a prison population of over 460,000 people and of this number about a quarter is incarcerated for drug-related offences. Moreover about two thirds of these inmates are blacks even though the percentage of blacks using drugs is only one fifth of the entire group of drug users.⁶⁴

The victims of the human rights abuses are generally speaking not the people involved in organized crime who are earning large amounts of money on the prohibition, instead law enforcement is much more focused on peasant farmers, small drug dealers and drug users. The most serious criminals do not feel the impact of drug enforcement because they have the resources to evade legal consequences.

§ 2. Supply side:

The reduction in supply has dictated the adopted policies from the outset and the measures adopted under the three conventions. The conventions do not prescribe forced crop-eradication to reduce the supply of drugs, this does, however, take place on a large scale. If we talk about crop-based drugs almost the entire supply comes from a relatively small group of developing countries.⁶⁵ The situation in which those farmers live and grow their crops are very similar and are characterized by poor conditions for sustainable agricultural production of other crops, living conditions at barely a subsistence level and the farming of coca or poppy merely to generate some cash income for the purchase of food and basic supplies.⁶⁶ Both Colombia and Afghanistan provide good examples of human rights violations which can occur in the course of crop eradication. There are different aspects of crop eradication which negatively impact peasant farmers in those developing countries.

Forced crop-eradication first of all often, if not always, deprives crop farmers of their livelihoods. The World Bank warned that "*an abrupt shrinkage of the opium economy or falling*

⁶³ Transform Drug Policy Foundation, *After the War on Drugs. Options for Control*, March 2006, p. 17.

⁶⁴ Husak, Douglas, *Legalize This! The case for decriminalizing drugs*, Verso, 2003, p. 135.

⁶⁵ The coca plant is mostly grown in Colombia, Peru and Bolivia. The poppy plant which is the basis for heroin and opium is mostly grown in Afghanistan, some other countries also grow very small amounts of poppy such as Myanmar, Pakistan, Laos, Colombia and Mexico.

⁶⁶ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, Report 13, March 2008, p. 30.

*opium prices without new means of livelihood would significantly worsen rural poverty.*⁶⁷ Crop-eradication has too often taken place without supplying those farmers with another means of subsistence and even if it takes place within the context of sustainable development the alternatives to crop farming are often not sufficient.

The human rights standard which is violated in this context is article 11 of the ICESCR, the right to an adequate standard of living:

1. The States Parties to the present Covenant recognize 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This provision serves to address the rights of the most vulnerable members of society. The right to an adequate standard of living requires therefore that the basic needs required to live a life in dignity are met, not by charity but by right. It includes, but goes beyond, the basic necessities of food, clothing and housing, it refers to living conditions which enable everyone to participate in everyday life of a particular society. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution or bonded labour, or to depend on the charity of others.⁶⁸

There are three separate components of the right to an adequate standard of living: the right to adequate food, adequate housing and adequate care. If members are forcefully deprived of their means of subsistence without offering a sufficient alternative people are being forced into poverty and a retrogression of their right to an adequate standard of living takes place. The minimum obligation upon states is to protect this right of their citizens and retrogression as a result of governmental interference is definitely a violation.

One specific aspect of the right to an adequate standard of living is the right to food. This right encompasses the notion of food security which implies that food should be accessible for present and future generations, i.e. sustainability which incorporates the notions of availability and accessibility. Availability means the possibility to feed oneself from productive land or other natural resources.⁶⁹ One of the methods used to eradicate crops is the aerial spraying of crops with herbicides. The prime example of a country where this method has been used on a large scale is Colombia. The US has been heavily involved in these aerial spraying campaigns for political reasons but also for the simple reason to attempt to reduce the supply of drugs in the US. The aerial spraying has not only

⁶⁷ A World Bank Country report, *Afghanistan – State Building, Sustaining Growth and Reducing Poverty*, 2005, p. 118 – 119.

⁶⁸ Eide, Asbjørn, *Economic and Social Rights*, in Human Rights: Concepts and Standards, ed. Symonides, Janusz, UNESCO Publishing, 2000, p. 129.

⁶⁹ General Comment 12, The right to adequate food (Art. 11), Committee on Economic, Social and Cultural Rights, E/C.12/1999/5.

affected the coca plants but very often also other crops which are farmed in the vicinity. Ironically coca seems to be one of the strongest crops and is the least affected by the herbicides. Moreover the herbicides can have a long term effect on the soil making it impossible to grow other crops afterwards. The means of subsistence are not only taken away moreover, food security is jeopardised by the long-term effects of the herbicides.⁷⁰

These campaigns have also had adverse impacts on the health conditions of the communities living in the areas where the aerial spraying took place. It has been documented that coca farmers and their communities have suffered from skin diseases and other medical conditions which are linked to the herbicides used to eradicate the coca plants. The right to the highest attainable standard of health is also laid down in the ICESCR, namely article 12:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 12 imposes a positive obligation upon states to implement measures for the progressive realization of the highest attainable standard of health for all its citizens. In this case, government interference leads to a retrogression of the health of its citizens. One of the aspects of the right to health is the freedom to control one's own health and the right to be free from interference.⁷¹ The governmental measures in the form of aerial spraying campaigns not only interferes with people's health, it also negatively impacts it which violates article 12.

For the purpose of discussion the right to development, which is not universally recognized, will also be touched upon. The right to development can be jeopardised by forced crop-eradication. Even though it has not developed into an actual legal entitlement, it should be take into account by governments during the adoption of policies. The right to development has been defined by the GA as follows:

⁷⁰ See also Husak, Douglas, *Legalize This! The case for decriminalizing drugs*, Verso, 2003, p. 141.

⁷¹ General Comment No. 14, The right to the highest attainable standard of health (article 12), Committee on Economic and Social Rights, E/C.12/2000/4, p. 3.

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁷²

By depriving people of their means of livelihood, which is one of the basic necessities to live a life in human dignity, this will force them into poverty which makes the enjoyment of other human rights and fundamental freedoms very difficult as well.

§ 3. Consumption side

The debate concerning the negative impacts of the international drug policy has mainly focused on the problems on the demand side. Public health concerns are the primary concern of the harm reduction movement. The rise in HIV/AIDS infections among drug users gave an enormous impetus to this movement. However, the health of drug users is not the only concern. The treatment of drug users in the course of law enforcement practices also results in a wide range of human rights violations. Most of these violations concern civil rights which are laid down in the ICCPR. This paragraph will highlight and discuss some of the most frequent and basic human rights violations which drug users and traffickers encounter.

The most basic or supreme human right is the right to life which is protected by article 6 of the ICCPR:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. 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 and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

The obligations which follow from this article are multiple, there are, however, two aspects interesting for the purpose of this paper. First of all, the application of the death penalty: the ICCPR does not abolish the death penalty, the Human Rights Committee has, however, on multiple occasions stated that abolishment is preferable. The use of the death penalty must be restricted to the ‘most serious crimes’ and it is highly questionable whether non-violent drug-trafficking offences fall within this category. In Asia the application of the death penalty for drug-related offences very often takes place and is even increasing. Even though there has been a decrease in the number of countries who actually carry out the death penalty there has been an expansion of death penalty legislation to include drug-

⁷² General Assembly resolution 41/128, 4 December 1986.

related offences.⁷³ Tragically, Thailand has used the International Day for Drugs to execute drug offenders who were sentenced to the death penalty.

Another aspect of the right to life concerns the elimination of epidemics. The Human Rights Committee has stated that the right to life can also oblige states to take positive measures to eliminate epidemics, in this case obviously the HIV/AIDS epidemic.⁷⁴ We will return to this topic later on in this paragraph.

The way drug users are sometimes treated during detention and pre-trial detention can violate the prohibition on torture which is laid down in article 7 of the ICCPR:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 7 imposes a total ban on torture or other cruel, inhumane or degrading treatment, hence under no circumstances is derogation from this article allowed. Article 7 does not only concern physical pain but also mental pain and suffering.⁷⁵ The fact that a lot of drug addicts have to undergo forced withdrawal and rehabilitation can lead to mental suffering arguably meeting the threshold of article 7. The ICCPR also explicitly protects people in detention, article 10 protects the right to humane treatment during detention.

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

According to the Human Rights Committee, article 10 is intended to complement the prohibition imposed by article 7 and imposes a positive obligation upon states towards persons who are particularly vulnerable because they are detained.⁷⁶ It can be argued that states are under the obligation to ensure a higher standard of care to prisoners than they may have access to outside prison where they are not wholly dependent upon the state for the protection of their health and welfare.⁷⁷ In the case of drug users this could imply the availability of drug dependence treatment in prison or access to HIV/AIDS medication.

In the course of this so-called ‘War on Drugs’ and the law enforcement practices resulting from it, the right to liberty and security of the person protected by article 9 of the ICCPR has also been violated.

⁷³ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, Report 13, March 2008, p. 12.

⁷⁴ General Comment No. 6: The right to life (art. 6), Human Rights Committee, 30/04/82, p. 1 – 2.

⁷⁵ General Comment No. 20: Prohibition of torture and cruel treatment or punishment (Art. 7), Human Rights Committee, 10/03/92, p. 1.

⁷⁶ General Comment No. 21: Humane treatment of persons deprived of liberty (Art. 10), Human Rights Committee, 10/04/92, p. 1.

⁷⁷ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, Report 13, March 2008, p. 36.

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds in accordance with such procedures as are established by law.

The most important protection this article offers is the prohibition on arbitrary arrest and detention and this is exactly what has occurred in countries such as Thailand for example. It has also been documented that these arbitrary arrests have resulted in arbitrary killings.

Another human right which is under pressure in the case of drug users is the right to a fair trial, more specifically the presumption of innocence and the prohibition on self-incrimination which is protected by article 14 of the ICCPR:

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. (g) Not to be compelled to testify against himself or to confess guilt.

Law enforcement practices in the Ukraine have led to violations of article 14 of the ICCPR. It has been documented that law enforcement agents have used drug addiction to coerce incriminating evidence from drug users. Police have used withdrawal as an investigative tool to obtain incriminating evidence. The domestic laws of the United Kingdom allows compulsory drug testing after arrest for all types of offences, for example theft and robbery. This not only violates the protection against self-incrimination but also the right to privacy.⁷⁸

Another more principle argument against the prohibitionist approach lies within the right to privacy which is laid down in article 17 of the ICCPR:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

Manifested in the right to privacy is the core of the liberal concept of freedom centred around the human being as an autonomous subject; that is, the individual who is sovereign over himself or herself and all of his or her actions which do not interfere with others. There are two aspects of the right to privacy: right to individual existence and autonomy. The protection of a person's individual existence includes identity, integrity and intimacy. Interference with a person's autonomy includes the prohibition or penalization of acts, that in principle, only concern himself or herself, such as committing suicide, taking drugs or refusing to wear safety helmets or seat belts hence the right to

⁷⁸ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, Report 13, March 2008, p. 26 – 27.

personal self-determination.⁷⁹ It could be argued that people have a right to take drugs as long as it does not harm others or create hazards for society because something which does not harm others should not be deemed criminal.

The right to highest attainable standard of health has already been partly discussed in relation to the supply side measures. This right is, however, also very often violated in the case of drug users. The right to health has two major dimensions: it is first of all a right to access to health services and secondly it is a right to a social order which includes obligations of the state to take specific measures for the purpose of safeguarding public health (these measures must be taken in a way as to provide equal protection to all).⁸⁰ Some of the essential elements are: availability, accessibility (non-discrimination, affordability), acceptability and quality. There are examples of countries where drug users will not seek treatment because they fear that information of their drug addiction will be shared with the police and will result in arrest. It has been documented in Russia that public hospitals have explicitly rejected drug users from AIDS treatment programs. Moreover, the possession of needles and other injection equipment is in some countries enough evidence to get convicted and sentenced to jail.⁸¹ All these law enforcement practices result in a retrogression of the health condition of drug users and thereby violates their right to the highest attainable standard of health.

Article 12 of the ICESCR furthermore explicitly refers to the obligation of states to prevent the spread of endemics such as the HIV/AIDS virus. In the case of drug addiction this could mean that there is an obligation upon states to distribute clean needles. Unfortunately, the INCB has condemned the policy of providing needles.

§ 4. Inconsistencies of two policies under the auspices of the United Nations

As has been discussed in the preceding paragraph the international drug policy conducted under the three Conventions have resulted in a wide range of human right violations in the past and will continue to do so in the future if this policy is not changed. The fact that the drug policy is conducted in a way which seems to be oblivious and completely ignorant of the human rights of those affected, can no longer take place within an organization of which one of the main purposes is the promotion of human rights. It might even be argued that the UN organs administering this drug policy, or the organization as a whole, is complicit in these human rights violations. According to the OHCHR “*an organisation may be complicit in violations of human rights if it tolerates, or knowingly ignores*” those abuses.

On the highest level of policy making, hence the GA, human rights have been put on the

⁷⁹ Nowak, Manfred, *Civil and Political Rights*, in Human Rights: Concepts and Standards, ed. Symonides, Janusz, UNESCO Publishing, 2000, p. 88.

⁸⁰ Eide, Asbjørn, *Economic and Social Rights*, in Human Rights: Concepts and Standards, ed. Symonides, Janusz, UNESCO Publishing, 2000, p. 152.

⁸¹ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, Report 13, March 2008, p. 33.

agenda when discussing the international drug policy. The GA has adopted several resolutions stressing the importance of the observance of human rights obligations in the context of drugs. In last year's resolution entitled '*International co-operation against the world drug problem*' it made the following remark: "*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.*"⁸²

Another issue on which the GA has made some critical remarks in connection to drugs is the HIV/AIDS epidemic. The GA first of all stressed the importance of the observance of human rights in fighting this epidemic, and that addressing the stigma and discrimination of those infected is of the utmost importance. It furthermore stressed that the access to medication is a fundamental element of the right to the highest attainable standard of health. Moreover, the supply of sterile injection equipment and harm reduction efforts related to drug abuse should be part of international and national strategies to combat HIV/AIDS.⁸³

The Secretary General made the following remark during the International Day against Drugs on the 26th of June 2008: "*As we mark the 60th anniversary of the Universal Declaration of Human Rights, I remind all Member States of their responsibility to fully respect the rights of prisoners who are drug dependent or are in custody for drug-related crimes, especially their rights to life and a fair trial. I also call on Member States to ensure that people who are struggling with drug addiction be given equal access to health and social services. No one should be stigmatized or discriminated against because of their dependence on drugs.*"

The connection between the international drug policy and human rights has finally been recognized within the UN. However, the statements mentioned above are not sufficient to solve these problems. It seems clear that within ECOSOC there is a lack of effective coordination of the different policies conducted under its responsibility. The report of the Secretary General, A Programme for Reform, also singled out some institutional problems which ECOSOC is facing: "*An immediate priority is to enhance the essential policy management and coordinating roles of the Economic and Social Council and to equip it to fulfil better its role in the macroeconomic policy coordination dialogue [...] The general segment of the Council where the reports of its subsidiary bodies are reviewed should also be more focused. The reports of the subsidiary bodies are now taken up sequentially without sufficient attention to the linkages between them. Furthermore, the consideration by the council of the reports of the subsidiary bodies is largely procedural, rather than policy-oriented. There is also a clear need to*

⁸² General Assembly resolution 61/183, 13 March 2007, A/RES/61/183.

⁸³ General Assembly resolution 60/262, 15 June 2006, A/RES/60/262.

enhance the Council's capacity to manage ex ante rather than ex post the work programme of its functional commissions.”⁸⁴

The functional commissions have too long functioned independently from each other without clear policy guidance of ECOSOC. This has resulted in an international drug policy promoting the public health and welfare but actually violating human rights and measures attempting to eradicate drugs from society which are counteractive to sustainable development policies. All of these policies are conducted under the responsibility of ECOSOC. It is clear that ECOSOC has to assume a much more pro-active attitude in policy guidance and coordination.

⁸⁴ Report Secretary General, *Renewing the United Nations: A Programme for Reform*, 14 July 1997, A/51/950 pars. 130 and 133.

Chapter 4 Applying a human rights-based approach to international drug policy

Introduction

The framework of the international drug policy and human rights have both been set out in the preceding chapters. The discussion which followed in chapter 3 has clarified the inconsistencies between those policies and the gross human rights violations resulting from the international drug policy. This can only lead to the conclusion that the manner in which illicit drugs are regulated, i.e. by a complete prohibition, does not create the expected results and furthermore contradicts one of the main purposes of the UN, the promotion of human rights. The development within the human rights movement has already led to the conclusion that human rights can no longer be seen as a separate field of international law but human rights principles should govern all other policies because they are the fundamental principles protecting human dignity. After this has seem to become more widely recognized, attempts have been taking place to pro-actively incorporate human rights into policies and not merely monitor compliance with human rights obligations and address any violations which might occur. This is the basis of a human rights-based approach, which is sometimes also described as looking at a specific policy through the lens of human rights, in other words *“human rights must be seen not simply as a tool to redress specific abuses, but as a lens through which all drug control efforts must be filtered.”*⁸⁵

The basic principles governing a rights-based approach have been discussed in the first chapter and will now be applied to the international drug policy. The main focus will be on the problems and violations which have been highlighted in the third chapter.

§ 1. Clear policy guidance

To gain acceptance for a new approach to the international drug policy which incorporates the principles of human rights, policy guidance from the highest levels is imperative. The institutions administering the drug policy have for a very long time turned a blind eye to these human rights violations and other problems arising from the prohibition and the way the policy is administered. As was mentioned in the preceding chapter, the GA has, since several years, emphasized the compliance with human rights when conducting the international drug policy. In all of the recent resolutions adopted by the GA on the issue of drugs, reference has been made to human rights. It seems that this has finally had some effect on the lower level. The preface to the World Drug Report of 2008, the annual report of the CND, singles out three issues which need to be addressed, two of which deal with the topic of this paper namely increased attention to the public health dimension of drugs and the observance of human rights:

⁸⁵ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p. 43.

“First, public health – the first principle of drug control – should be brought back to centre stage. Currently, the amount of resources and political support for public security and law enforcement far outweigh those devoted to public health. This must be re-balanced. Drug dependence is an illness that should be treated like any other [...] Third, protecting public security and safeguarding public health should be done in a way that upholds human rights and human dignity. Although drugs kill, we should not kill because of drugs. As we move forward, human rights should be a part of drug control.”⁸⁶

The fact that these issues are finally explicitly recognized by the CND is an important step forward and should be built upon. The GA, and under its responsibility ECOSOC, should enhance the coordination of the different policies conducted under its auspices, most importantly the drug policy, the promotion of human rights and sustainable development strategies. These policies should be conducted in a way as to enhance their effectiveness and reflect the fact that they are mutually reinforcing. This means that there should be enhanced cooperation between UNODC and UNDP. If the GA and ECOSOC would take a hard stand on this issue, this should have a trickle-down effect on the CND and the INCB. This is particularly important in the case of the CND because it is the policy-making organ and guides the UNODC in its work.

There are two institutional problems standing in the way of the adoption of a new rights-based policy by the CND. First of all, the CND’s decision-making process which currently takes place on the basis of consensus. Decision-making by consensus seems at first sight a fair and democratic process, in practice however, it often obstructs any real and effective change in policies. Any powerful state having a seat in the CND can easily veto a new policy direction. This means that the decisions taken often boil down to the ‘lowest common denominator’ which in the case of the CND has meant the continuance of the same prohibitionist policy. The CND should return to its initial decision-making process, which is the same for all the functional commissions of ECOSOC, namely by majority voting.

The second problem is of a budgetary nature. As explained in the second chapter, the CND is dependent on the Fund to cover almost 90% of its budget. The Fund derives its money from voluntary contributions by states who can decide beforehand through hard earmarking which projects they want to finance with their donations. Again, the powerful states which make the largest contributions to the Fund can in fact dictate the policy of the CND. The US for example has not allowed the financing of any projects which would introduce harm reduction measures. The CND should no longer allow states to earmark their donations and regain its control on the financing of projects and thus effectively decide which policy direction to take.

⁸⁶ United Nations Office on Drugs and Crime, 2008 World Drug Report, p. 1.

§ 2. Aspects of a new policy based on human rights

The main principles of a rights-based approach and their content have been briefly discussed in the first chapter. These principles now need to be integrated into a sustainable policy on drugs. What first of all needs to be adjusted is the objective the policy is set out to achieve. The ultimate aim of the international drug policy is the protection of the public health. The predominant opinion on how to protect the public health seems to be by completely eradicating drugs from society, hence the imposition of the global prohibition. However, the evidence has shown that the international drug policy has failed to achieve its aim. Drugs are still widely available and demand has not been reduced as well. Moreover, the health of some groups in society has only been negatively affected by the three conventions and the adopted policies conducted under them. In other words, the protection of the public health by attempting to eradicate illicit drugs has failed and more importantly led to a retrogression of the right to the highest attainable standard of health. Infringements of human rights can be necessary and are allowed when they meet certain conditions which are governed by the principle of proportionality, i.e. the measure adopted must have a legitimate aim and be necessary and the least intrusive to meet its aim. The conclusion must be drawn that when measures fail to achieve their aim, how legitimate this aim may be, and more importantly result in human rights violations the measures in question cannot be considered proportionate.⁸⁷ Even in the hypothetical situation that the ‘global prohibition’ on drugs would have had positive results, it is still questionable whether the measures which are currently part of this policy are proportionate. It is hard to imagine that there are not more sustainable and less intrusive ways to achieve the same result.

The institutions of the UN and the most important states driving this policy, such as the US and most Asian countries, have to let go of the idea that illicit drugs can be completely eradicated from society. The experience has proven that it is an unrealistic prospect which will never be achieved. The CND should adopt a policy which is more realistic in its aim and actually assists people struggling with an addiction or farmers dependent for their livelihoods on growing the illicit crops and attempts to prevent the further spread of the HIV/AIDS epidemic among drug users. Such a new policy has to accept the reality of drug use amongst consenting adults and emphasise the individual rights and responsibilities of those affected and harm minimisation.⁸⁸ This means that the CND should adopt a policy based on human rights and direct the UNODC to apply it to all the projects it carries out. And again the rationale for adopting such an approach is because people have the right to and not out of charity.

⁸⁷ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p. 42.

⁸⁸ Transform Drug Policy Foundation, *After the War on Drugs. Options for Control*, March 2006, p. 22.

2.1. Stigmatising language

One of the first items on the agenda of the CND should be the rejection of the stigmatizing language which has been used to describe the international drug problem. This language is not only used in the three conventions but is too often reiterated in reports and discussions on the issue. Especially the INCB has often used expressions such as the ‘evil of drugs and drug abusers’. This language has resulted in all kinds of discriminatory practices, as discussed in the third chapter. Non-discrimination and equality for all are the bedrock principles of human rights. A new policy integrating human rights standards cannot be described in a manner which of itself results in discrimination.

2.2. Integration of specific human rights standards

A wide range of human rights violations resulting from the international drug policy have been identified and discussed in the third chapter. A rights-based approach to drugs requires the incorporation of these violated standards into a new policy. Reference to these standards is not sufficient, the new policy must be drafted in a way as to enhance or contribute to the observance of these human rights by states. This would for example mean that the adoption of harm reduction measures by states would become an obligation. In the case of the HIV/AIDS epidemic treatment should not only be equally accessible for drug users as for all others, states should explicitly focus on assuring treatment for drug users because they are more vulnerable to infection. Another example is to oblige states to ensure adequate means of existence for the peasant farmers who lose their livelihoods in the case of crop-eradication.

2.3. Clear policy targets and accountable institutions

As was discussed in the first chapter, empowerment first of all takes place by introducing a rights-based approach into the international drug discourse. If people’s needs are being translated into rights this creates legal entitlements on the one hand and duty-bearers on the other hand. One of the elements which need to be integrated into a new policy are human rights impact assessments, this measure will ensure that activities or programmes do not contribute to human rights violations but that they are actually enhancing human rights protection.⁸⁹

These impact assessments take place beforehand, this is however not sufficient of itself. After the adoption of a policy, the implementation and impact must constantly be monitored. To effectively monitor a policy it is necessary to include clear policy targets. Only then will people be able to hold the institutions responsible and accountable. The institutions should administer the policy in compliance with the principles of good governance, i.e. transparency, predictability, observance of the rule of law and engagement with civil society. Accountability of these institutions is imperative and to

⁸⁹ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p. 44.

ensure these possibilities of redress must be incorporated into those policies, on the international as well as on the domestic level.

2.4. Principle of participatory decision-making

“Active participation in political decision-making, as well as in the broader social and cultural life of their communities, plays a role in expanding political freedoms and in empowering people, which in turn contributes towards combating social exclusion and political marginalization.”⁹⁰

The OHCHR has recognized the importance of participatory decision-making in the development of a new policy. Another important advantage of participation is the fact that the people affected by a policy are the ones who can most clearly determine what their specific needs are and in what way these can be translated into a sustainable policy. I.e. programme development and implementation must take place in a way as to empower people to make decisions about issues that affect them as opposed to treating them as passive objects of decisions made by policy-makers. One important means to achieve this participation is the engagement with civil society. NGO's and other advocacy groups are very effective in raising awareness of specific problems and speaking on behalf of affected communities. ECOSOC actually requires its functional commissions to engage with civil society thus recognizing the important role which NGO's and affected communities have in achieving its mandates.⁹¹ The INCB on the other hand stated that “it will not engage with civil society”, this is no longer acceptable in a civilized world. The CND, being a functional commission of ECOSOC must ensure the participation of NGO's and direct the INCB to do the same.

2.5. Principles of non-discrimination and equality

“The idea of human rights assumes that all human beings have some basic, commonly shared characteristics, and that as a result they should be viewed and judged as members of the human race rather than as members of a particular group. The recognition of these shared qualities gives rise to a principle of equality which requires that all persons be treated with equal respect.”⁹²

The principle of non-discrimination prohibits any distinction made on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It has been widely recognized and accepted that ‘other status’ includes ‘health status’ which in turn includes HIV/AIDS status. The term ‘other status’ can also be interpreted in a way as to include drug addiction. There have been numerous examples mentioned in the third chapter where the mere fact that

⁹⁰ *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Office of the United Nations High Commissioner. HR/PUB/06/12, p. 46.

⁹¹ The Beckley Foundation Drug Policy Programme, *Recalibrating the Regime. The Need for a Human Rights-Based Approach to International Drug Policy*, p. 46.

⁹² Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, p. 154.

people use drugs have led to discriminatory practices. On the international level, most importantly the policy-making level, these domestic practices have hardly encountered any form of criticism.

The right to equality guarantees that all persons are equal before the law and secondly, that all persons are entitled to equal protection under these laws.⁹³ The principle of equality requires both *de jure* and *de facto* equality. This requires the adoption of positive measures by states to eliminate discrimination against these groups and afford them protection against governmental authorities as well as private entities. The rejection of stigmatizing language, which has been discussed earlier, contributes towards achieving this aim. For the elimination of discriminatory practices of governmental agents it is of the utmost importance that states effectively monitor their law enforcement practices. Education is an important tool to eliminate discrimination by private entities. The CND has to take a leading role in this respect, it must emphasise the underlying problems of drug use for example or the fact that peasant farmers do not have any alternatives than to grow illicit crops. If awareness of these issues is being raised, it contributes to a better understanding of these particular problems and leads to reducing the discrimination those people encounter. The CND has to direct states and the INCB to do the same and strongly condemn any discriminatory practices.

2.6. Protecting the most vulnerable groups in society

As opposed to creating a group of vulnerable people or exacerbating the situation of people which are already in a vulnerable position, the policy must be set out as to protect those vulnerable groups in society. This has to be the top priority of a new policy. The ultimate aim of human rights is to protect especially those groups of people and enable them to live a life in dignity. Obviously, this must be preceded by the identification of those groups. However, this has already taken place in the course of the years through the identification of the human rights violations which result from the drug policy. The importance of the interdependence and interrelation of human rights must not be underestimated in the prioritization of the needs of the most vulnerable groups in society. At first sight it might seem that the people being affected by the international drug policy are most in need of the adequate fulfilment of their economic and social rights. If they lack the basic necessities to live a life in dignity what is the purpose of having political rights? However, when discussing the principle of participatory decision-making the exercise of those political rights by these marginalized groups is an important aspect of setting out a sustainable policy. Hence, the exercise of political rights is important to create a policy which can fulfil the enjoyment of other human rights such as social and economic rights.

⁹³ *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Office of the United Nations High Commissioner. HR/PUB/06/12, p. 9.

§ 3. Conclusion

The most important conclusion which can be drawn is that the international drug policy has failed and is in urgent need of change. The ‘global prohibition’ on drugs has resulted in an increase of drug production and consumption and the ‘War on Drugs’ has led to more casualties than the use of drugs ever will. The underlying idea of the protection of public health is in principle a very legitimate one. However, policy-makers seem to have lost sight of the rationale of the prohibition and actually impeded the public health and welfare of its citizens. It is inconceivable that drugs will ever be completely eradicated from society so why continue to pursue such an unrealistic aim?

A new policy should be pragmatic and realistic in its aims. This means that it should factor in the fact that people will use drugs whether it is prohibited or not. In setting out a new policy the protection of public health should be one of the underlying principles, however, not the only one. There are other important principles which must be taken into account, most importantly the basic standards protected by international human rights law. The stigma surrounding drugs which results in the social exclusion of particular groups needs to be addressed. The emphasis on law enforcement needs to be reduced and replaced by a true emphasis on public health issues and the compliance with human rights. A sustainable international drug policy should address the underlying causes of drug use especially in the case of drug dependents. It should use education as a tool to reduce the use of drugs and even then accept the fact that drugs are a part of our society and continue to be.

A new policy based on human rights will be an important step towards achieving this aim. The advantages of such an approach have been accepted on the highest level of policy-making and now needs to find its way into the international drug policy.

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