

# **THE INTERNATIONAL NARCOTICS CONTROL BOARD ON HUMAN RIGHTS: A CRITIQUE OF THE REPORT FOR 2019**

**DECEMBER 2020**



# Executive Summary

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## Key Points

- Much has changed since 2008, when the international drug control system and the complex international system for human rights were described as behaving as if they existed in parallel universes. Yet, tensions and conflicts remain at the intersection of human rights and an assortment of drug policy approaches.
- While remaining very much a work in progress, from the drug control perspective the International Narcotics Control Board (INCB or Board) is playing an ever more important role in better integrating the two systems or regimes. Though arguably an inevitable part of a broader process to increase UN system-wide coherence, the INCB is today more engaged with the issue than at any point in its 52-year history.
- An analysis of INCB reports dating back over a decade shows that the Board's changing position on human rights can be viewed as an evolutionary – if not always linear – journey. The Report for 2019 offers an insight into its current stance and demonstrates noteworthy, if often complicated, progress. This includes direct reference to relevant human rights instruments, a more expansive discussion of human rights as they pertain to the right to health, and the naming of UN member states that favour use of the death penalty for drug-related offences and permit extrajudicial killings in the name of drug control. The publication, however, also reveals ongoing oversights and what can be called 'selective reticence' in relation to
  - among other things – militarised interventions and crop eradication.
- The Board's performance might be further improved through better cooperation with both NGOs and UN human rights bodies based in Geneva. Beyond structural adjustments, it is also likely that better human rights expertise among the Board's membership would enhance its engagement with, and nuanced understanding of, the issue.
- While welcoming a positive shift in stance, it must be acknowledged how inherent conflicts between drug policy and human rights within the UN system put very firm limits on Board's capacity for change. It is impossible to ignore the Board's resolute and problematic view that there is no divergence between the drug control conventions themselves (as opposed to the application of some domestic counter drug measures that operate beneath them) and human rights norms and obligations.
- As progressive and interpretively dynamic as the Board may become, it can only ever go so far. Whatever way they are framed, there will always be the inherent belief that the application of human rights principles and standards can make prohibition-based drug policy 'effective and sustainable'. Put simply, as a creature of the drug control regime, drug policy objectives will always remain paramount.

## Introduction

Recent years have seen the issue of human rights become an increasingly prominent feature of UN deliberations on drug-related matters. Much has changed since 2008, when the former United Nations Special Rapporteur on the right to the highest attainable standard of health described the disconnect between human rights and drug control within the UN system. In what has become the go-to phrase for any discussion of the issue, Paul Hunt stressed that it was ‘imperative that the international drug control system...and the complex international human rights system that has evolved since 1948, cease to behave as though they exist in parallel universes.’<sup>1</sup> A cursory glance at a range of outputs from both the drug policy apparatus in Vienna and parts of the human rights system in Geneva reveals the extent to which these universes have been shifting to align.<sup>2</sup> Recognition of the need to better integrate drug policy and ensure system-wide coherence can be identified in the positions of a range of bodies, including crucially the Secretary General’s Chief Executives Board, the highest level forum for coordination in the UN system, and the associated ‘United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration.’<sup>3</sup> As described by António Guterres, in November 2018 ‘the heads of the UN system came together to forge a common position on the question of global drug policy to advance security, development and human rights.’<sup>4</sup>

Today the international Narcotics Control Board (INCB or Board, see Box 1) plays an ever more important role in this integrative process. In performing its treaty mandated function as a monitoring body for the implementation of the UN drug control conventions, the Board occupies a critical vantagepoint within the UN system from which to observe and comment upon the often fraught interface between the United Nations based international regimes for drug control and human rights. As with a variety of monitoring bodies across the UN system, it possesses limited power to sanction what it perceives to be errant states. Yet, the INCB does have a noteworthy ability to ‘name and shame’;<sup>5</sup> a process to which its annual report is key. These documents contain ‘an analysis of the drug control situation world-wide so that Governments are kept aware of existing and potential situations that may endanger the objectives of the international drug control treaties’ and ‘draws the attention of Governments to gaps and

weakness in national control and treaty compliance.’<sup>6</sup> Pursuing a narrow interpretation of its remit as laid out within the Single Convention,<sup>7</sup> for many years the Board’s position on human rights could be described as a prominent example of selective reticence. In this way, and epitomizing Hunt’s parallel universes, the INCB typically displayed an unwillingness to comment on important issues that appeared to be within its purview and thus warranted its attention.<sup>8</sup> As is evident from the first few pages of the Report for 2019, however, its outlook has to some degree changed with the Board now choosing to highlight a range of human rights considerations within its annual publication.

Within this context, this IDPC-GDPO critique uses the Board’s most recent Report as an entry point to better understand the body’s current stance on human rights as they pertain to drug-related matters. Such an approach is underpinned by the view that the Reports can be seen to provide ‘valuable insight into the values and beliefs which underlie the Board’s approach to the problems with which it deals.’<sup>9</sup> In order to appreciate the broader institutional environment within which the INCB’s evolving position must be located, discussion begins with a brief overview of the origins and advancement of human rights within the UN system. A more detailed account can be found in the annex. It then moves onto an exploration of the structural determinants underpinning the often problematic relationship between the two regimes, associated norms, and obligations. With the aim of charting the Board’s evolutionary – if not always linear – journey, detailed content analysis of the Report for 2019 is complemented by a lighter touch examination of reports dating back to 2007.<sup>10</sup> The critique concludes that although progress has certainly been made, examples of selective reticence remain. Moreover, it is argued, while welcoming a positive shift in stance it must be acknowledged how inherent conflicts between drug policy and human rights within the UN system put very firm limits on the Board’s capacity for change.

## The human rights regime

Human rights sit at the very core of the United Nations. Since the Universal Declaration of Human Rights (UDHR) in 1948, the international community has gradually constructed what has been described as a ‘vast network of legal instruments’ designed to turn the Declaration’s goals into practice.<sup>11</sup> Of the ‘hundred or more treaties that address human

## Box 1 The INCB: Role and composition

The INCB is the 'independent, quasi-judicial expert body'<sup>12</sup> that monitors the implementation of the 1961 Single Convention on Narcotic Drugs (as amended by the 1972 Protocol), the 1971 Convention on Psychotropic Substances and the precursor control regime under the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The Board was created under the Single Convention and became operational in 1968. It is theoretically independent of governments, as well as of the UN, with its 13 individual members serving in their personal capacities. The World Health Organization (WHO) nominates a list of candidates from which three members of the INCB are chosen, with the remaining 10 selected from a list proposed by member states. They are elected by the Economic and Social Council and can call upon the expert advice of the WHO.

In addition to producing a stream of correspondence and detailed technical assessments arising from its country visits (all of which, like the minutes of INCB meetings, are never made publicly available), the INCB produces an annual report summarising its activities and views.

rights issues, broadly understood, seven are usually taken to provide the core of international human rights law'<sup>13</sup> (See Box 2). Moreover, considering not only wide-ranging international instruments, but also accompanying treaty bodies, it is legitimate to speak in terms of a UN-based and 'normatively robust global human rights regime'.<sup>14</sup> For some, the UDHR and the International Human Rights Covenants provide the overarching norms of the regime, beneath which operate a number of what have been referred to as single issue human rights regimes or '(sub)regimes'. These include those relating to minority rights, racial discrimination, torture, women's rights, children, and indigenous peoples.<sup>15</sup> Whatever formulation of the regime is preferred, unitary or 'nested' (sub)regimes, its contemporary significance is difficult to dispute.

As the rules-based international order has evolved, 'virtually all states' have 'felt the necessity to choose

to participate in international legal regimes that "enmeshed" the state in international governing arrangements. International arrangements concerning human rights constituted an important part of this trend'.<sup>16</sup> Indeed, as of August 2019, the core seven instruments had an average of 179 state parties,<sup>17</sup> which represents an impressive 93% ratification rate.<sup>18</sup> And it is these key treaties that are now frequently referred to in CND resolutions and significant soft law instruments like the UNGASS Outcome Document and the 2019 Political Declaration as 'other relevant instruments'. Although, as will be discussed, not without its problems, along with the drug control conventions they are seen to 'constitute the cornerstone of the international drug control system'.<sup>19</sup>

## International drug control and human rights

Much like the human rights regime, what has been usefully described as the Global Drug Prohibition Regime<sup>20</sup> is an almost universally accepted treaty-based system. More compact than its human rights counterpart, it is currently built on a suite of three UN treaties. Accompanied by a range of soft law instruments, these are relatively little-known examples of so-called 'suppression conventions' that underpin a range of prohibition regimes in international law.<sup>21</sup> The regime's overarching goal as expressed in the preamble of its bedrock instrument, the Single Convention, is to safeguard the 'health and welfare' of humankind. In so doing it applies a dual imperative: to ensure an adequate supply of pharmaceuticals for the licit market – including the WHO listed essential medicines – and at the same time prevent the non-scientific and non-medical production, supply and use of narcotic and psychotropic substances. Within this context, the system has been developed on two interconnected tenets. First, a deeply held belief that the best way to protect health and reduce what has become known simply and somewhat vaguely as the 'world drug problem' and the harms associated with it is to minimise the scale of – and ultimately eliminate – the illicit market. And second, that this can be achieved through a reliance on prohibition-oriented and supply-side dominated measures.<sup>22</sup> In this way, and while permitting some deviation – or 'wobble room' – from its authoritative norm, the regime has successfully generated a powerful prohibitionist expectancy in relation to how its members approach the non-medical and non-scientific use of substances scheduled in the UN drug control conventions.<sup>23</sup>

## Box 2 Core human rights instruments and their monitoring bodies<sup>24</sup>

- The 1965 Convention on the Elimination of All Forms of Racial Discrimination (ICERD) – Committee on the Elimination of Racial Discrimination
- The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) – Committee on Economic, Social and Cultural Rights
- The 1966 Covenant on Civil and Political Rights (CCPR) – Human Rights Committee
- The 1979 Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) – Committee on the Elimination of Discrimination Against Women
- The 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) – Committee Against Torture
- The 1989 Convention on the Rights of the Child (CRC) – Committee on the Rights of the Child
- The 2006 Convention on the Rights of persons with Disabilities (CRPD) – Committee on the Rights of Persons with Disabilities

In addition to the monitoring bodies created by human rights treaties, the Human Rights Council has instituted a large array of ‘special mandates’, that is independent experts that have the mandate to report back to the Council on specific human rights issues with a thematic or geographical scope. While the findings of special mandates are not binding, they have become central to the everyday functioning of the UN human rights system, and to interaction with governments and civil society, in good part thanks to their independence and flexibility. Some of these mandates, like the UN Special Rapporteur on right of everyone to the enjoyment of the highest attainable standard of physical and mental health, or the UN Working Group on Arbitrary Detention, have reported in issues closely related to drug policy. There is no parallel structure to the special mandates in the international drug control system.

It currently seems popular in some quarters to dismiss the significance of these conventions.<sup>25</sup> Today the relationship between international law, associated norms and domestic policy positions is certainly more complex than it has been in the past. But a convincing case can be made that international obligations are still important considerations at the national level. Perhaps not always at the centre of what are invariably complex politicised decision-making processes, one way or another the conventions and related obligations tend to come into play at some stage within processes of policy-making, implementation, and review. In some instances, this includes their use to legitimise ideologically inspired policy options; a process that highlights the important role that the Board’s views and interpretative stance can play.

For instance, despite the evidence base supporting their effectiveness, for many years the Russian Federation justified its opposition to needle and syringe programmes and opioid substitution therapy on the grounds that the harm reduction approach ran counter to the provisions of the conventions. It is also noteworthy that Indonesia’s constitutional court referred to the 1988 Convention to reaffirm

the death penalty for drug-related offences.<sup>26</sup> Other times, in relation to regulated cannabis markets for example, considerable lawyering has been done to justify policy choices relative to obligations under the drug control conventions and reconcile legacy issues generated by participation in a regime that in its current form dates back more than half a century. While these are arguably outlier cases, the treaties’ non-self-executing nature means that most national drug control laws in states around the world are the product of moves to bring legislation into line with international treaty obligations. As the authors of the seminal *Drug Policy and the Public Good* point out, the drug treaties ‘hold substantial implications for domestic legislation.’<sup>27</sup>

Within this context, and nearly 60 years after the plenipotentiary conference for the Single Convention, drug control policies based predominantly on prohibition and what has been referred to as the ‘scorched-earth policy of criminalization’<sup>28</sup> have left a legacy of violence, disease, mass incarceration, suffering and abuses around the world. Prolonged and ultimately futile efforts to eliminate illicit markets have destroyed lives of people who use, produce and supply

drugs, their families and communities, with many inter-related human rights violations arising from or facilitated by punitive drug control policies. Prominent among these are use of the death penalty for drug-related offences, police abuses, discrimination, extrajudicial executions, torture and other ill-treatment, arbitrary detentions, inhumane conditions of detention, and violation of social and cultural rights, including of the right to health.

It is important to note that while the regime certainly privileges a punitive approach, the claim here is not that the drug control conventions *directly* result in human rights abuses. Nevertheless, they 'cannot be divorced from these and other violations, as their influence on domestic drug control policy and legislation is considerable.'<sup>29</sup> Moreover, 'Unlike human rights law, which focuses to a large extent on the protection of the most vulnerable, the drug conventions criminalise specifically vulnerable groups. They criminalise people who use drugs, known to be vulnerable to HIV, homelessness, discrimination, violence and premature death...'<sup>30</sup> A focus on such groups owes much to the way drugs are framed within the system as a threat to not just the individual, but the 'moral fabric' of society more broadly.<sup>31</sup> The genesis of this perspective – including the ongoing use of the term 'scourge' within CND debates – can be found in the preamble of the Single Convention and its reference to the 'evil' of addiction and the duty of states to 'combat this evil'.<sup>32</sup>

Within this context, the core objectives of the drug control regime can be seen to generate a range of 'human rights risks'. A feature common within other suppression regimes, in this instance these are 'manifested in documented human rights violations throughout the supply chain.'<sup>33</sup> Indeed, when the issue area is viewed through a human rights lens there is 'less concern, as a matter of priority, with reducing the overall scale of the drugs market, than with reducing violence associated with it and securing sustainable livelihoods for rural producers'. Similarly, 'there is less concern with population-wide reductions in rates of drug use than with the health and social harms for individuals and communities associated with such use'. Consequently, 'From this starting point, the human rights and drug control systems are seen, by definition, as being in "conflict" in the broad sense...because they are seen to come to different conclusions for law, policy and practice'. 'International human rights law', it can be argued, 'is therefore seen to operate as a "normative counterweight" to the drug control system and in any potential conflict or where there are tensions

between these systems, this must be resolved in favour of human rights'.<sup>34</sup>

Returning to Hunt's observation, this reflects the reality of the UN drug control system inasmuch as the 'conventions adopt a restrictive punitive approach to drug users with little acknowledgement of human rights obligations.'<sup>35</sup> It is telling that human rights are mentioned explicitly only once in the three treaties, article 14(2) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>36</sup> Here, in relation to 'Measures to eradicate illicit cultivation of narcotic plants and to eliminate demand for narcotic drugs and psychotropic substances', it is noted how among other things the 'measures adopted shall respect fundamental human rights'. A possible explanation for the absence of any reference to human rights within the Single Convention (including its 1972 Protocol), and its sister 1971 Convention, lies in the fact that, while introducing new features, the former drew together a series of treaties dating back to 1912.<sup>37</sup> This was a period when there was no real recognition of human rights at the international level. Nonetheless, that the 1988 Convention only includes a single reference indicates the persistent blind spot for the issue within Vienna, even as the human rights regime continued to expand. It should be recalled that the 1980s was a decade of significant activity within the UN more broadly, with the passage of conventions on women (1979), torture (1984) and children (1989). Indeed, it is worth noting that the Convention on the Rights of Child and the 1988 Convention developed in parallel. Beyond the development of hard law, the extent of ongoing separation is starkly illustrated by examination of activity within the CND. It was not until twenty years after the passage of the trafficking convention that a human rights resolution was adopted by that body. After heated deliberations, among other things around language concerning the death penalty and indigenous peoples' rights, this called for the drug control system to work more closely with that relating to human rights. That said, similarly little attention was being given to drugs by the human rights apparatus in Geneva. Indeed, prior to 2008, 'discussion of human rights were almost unthinkable within UN drug control fora, just as discussions of drugs were almost invisible in the UN human rights system.'<sup>38</sup> The first Human Rights Council resolution on the topic did not materialise until 2015, in the lead up to the 2016 UNGASS.<sup>39</sup>

Hunt's description of parallel universes thus spoke to the growing interest in and concern for the rapid

expansion of treaties and resultant tensions across a range of issue areas; a topic explored by the International Law Commission in its 2006 Report 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'.<sup>40</sup> It can be argued that UN-based systems around drugs and human rights provide a noteworthy example of a potentially conflictual regime complex whereby the intersection of the two systems can generate considerable friction and associated normative contestation amongst system actors.<sup>41</sup> Put another way, and as noted above, the fundamentally differing perspective of the two systems suggest, or in some instances even require, opposing solutions to the same 'problem'.<sup>42</sup> The resulting tensions and conflicts can be seen across an assortment of human rights and drug policy approaches (see Box 3), and it is within this context that the Board's shifting position on human rights and concomitant changes in its perceived scope and interpretative stance on the drug control conventions becomes increasingly important.

## The INCB and human rights: A tentative journey

While this is the case, as with other UN bodies within both regimes, the Board's engagement with human rights has been slow. No doubt related in some ways to the changing views of its members, including the President, the Board's journey can be seen as part of a broader and gradual growth in appreciation of the intersection between human rights violations and the application of punitive drug control policies. Indeed, while for many years overlooked not only within academic scholarship,<sup>46</sup> but also the research and activities of NGOs dealing with both drug policy and human rights, increased scrutiny of traditional law enforcement-dominated approaches has brought the strands together. It is possible to argue that, in a similar fashion to the issue of human rights within the organisation more generally, International NGOs have played a key role in raising awareness and encouraging UN bodies and member states to

### Box 3 Examples of drug policy and human rights tensions and conflicts<sup>43</sup>

<i>Specific human right &amp; relevant core instrument<sup>44</sup></i>	<i>Conflictual drug policy intervention and context</i>
Right to life – Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR)	Use and retention in law of the death penalty for drug related offences. Extrajudicial killings.
Right to health – Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 24 the Convention on the Rights of the Child (CRC)	Lack of access to internationally controlled drugs for medical purposes, substitution treatment, needle exchange programmes and other harm reduction interventions.
Right to liberty – Article 9 ICESCR	Use of compulsory treatment and of compulsory detention centres in the name of 'drug treatment'.
Freedom from cruel, inhumane, or degrading treatment or punishment – Article 7 ICCPR, Convention against Torture (CAT), Article 37 CRC.	Overcrowding within criminal justice system, lack of harm reduction in detention settings. Deliberate use of drug withdrawal as interrogation technique.
Freedom from forced labour – Article 8 ICCPR	Use of forced labour in compulsory drug treatment centres.
Right to due process and a fair trial – Article 9 ICCPR	Overloaded criminal justice systems resulting from large number of non-violent drug related arrests. Automatic entrance of people who use drugs into compulsory detention centres.
Right to be free from discrimination – International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and ICCPR	Social stigma associated with drug use generating discrimination in the workplace and community. Legal frameworks in some countries also cause discrimination against ethnic groups, indigenous people, and women.
Right to an adequate standard of living, and to the progressive realization of economic and social rights – ICCPR and ICERD	Prohibition of indigenous people to produce and consume traditional drug crops (E.g. coca in the Andes and opium in South East Asia) <sup>45</sup>
Rights of the Child – Article 33 CRC	Lack of access to treatment and harm reduction services for children that use drugs, lack of access to controlled medicines, enduring criminalization into adulthood, stigmatization (from own use and drug use of parents), death and family breakdown due to drug related market violence, family breakdown due to incarceration of parent/s.

consider the human rights implications of a wide range of drug policy approaches; particularly use of the death penalty for drug-related offences.<sup>47</sup> Addressing a catalogue of affected rights, the recently released *International Guidelines on Human Rights and Drug Policy* are critical to this process and provide an important example of non-state actors working to translate international law into concrete obligations.<sup>48</sup>

It is reasonable to suggest that it was with the issue of the death penalty that the Board truly began to conceive its role as one extending beyond the tight confines of drug control. As analyses of its annual reports, including those conducted by IDPC since 2007,<sup>49</sup> reveal, the Board traditionally chose to ignore a range of human rights violations in its 'analysis of the drug control situation world-wide' and typically engaged with the issue of human rights on a very limited basis. There is neither the space nor need to reprise these in detail here or indeed engage in forensic and systematic analysis of the Board's reports dating back to its creation in 1968. Nonetheless, a cursory review of reports from the last ten years or so is useful to provide the context within which the Report for 2019 must be understood.

While acknowledging, if often obliquely, the human rights dimension of access to controlled drugs for medical purposes and, more explicitly, the need for proportionality in law enforcement,<sup>50</sup> for many years the INCB chose to maintain a predominantly siloed approach that excluded consideration of issues beyond drug policy. It was, therefore, not uncommon for the Board to uncritically note the operation of compulsory drug detention centres, overlook market violence generated by tough law enforcement – sometimes military – interventions (including Thaksin Shinawatra's Thai 'War on Drugs' in 2003-4),<sup>51</sup> ignore the human rights implications of crop eradication, and adopt a hostile position towards harm reduction.<sup>52</sup> Comment on the death penalty for drug-related offences was non-existent.

Reflecting increasing isolation within the UN system, this was the case even though other agencies were beginning to call for the end to coerced treatment, and were openly supporting the harm reduction approach.<sup>53</sup> On one of the few occasions that human rights were given prominence before 2014, the INCB President chose to use the Foreword to the Report for 2011 to emphasise the view that the conventions recognise that 'being

free from addiction is a human right'.<sup>54</sup> Such a narrow outlook led IDPC's analysis of the Board's behaviour to conclude that, as the body responsible for monitoring the implementation of the UN drug control conventions, 'the INCB should not choose to ignore instances of where parties to those conventions contravene other UN instruments...Put simply the drug control conventions should not operate in a legal vacuum'.<sup>55</sup> The extent of the Board's rigidity and siloed outlook, however, was starkly illustrated in 2012. At a meeting with NGOs in the margins of the CND in March, the then President of the Board, Professor Hamid Ghodse, was asked 'Is there no atrocity large enough that you will not step outside your mandate to condemn it?' He replied, 'No. 100 per cent not'.<sup>56</sup> The INCB refused to take a position on not only the death penalty but on any human rights violation, arguing that criminal sanctions are the 'exclusive prerogative of states'.<sup>57</sup>

This stance began to change two years later. While not reflected in the text itself, at the London launch of the Report for 2013 the Board's President, Mr. Raymond Yans, made an unprecedented condemnation of the death penalty for drug-related offences. This was followed up more formally by his statement at the 2014 CND.<sup>58</sup> Building on this development, the following year the President's Foreword for the Report for 2014 included a call for the abolition of the death penalty for drug-related offences and stressed that 'drug control measures do not exist in a vacuum; in their implementation of these measures, States must comply with their human rights obligations'.<sup>59</sup> The Report's thematic chapter, 'Implementation of a comprehensive, integrated and balanced approach to addressing the world drug problem', also contained a strong human rights focus.

Reflecting a broadening of perspective, the subsequent Report encouragingly, if fleetingly, noted the human rights impacts of drug-related violence and corruption.<sup>60</sup> Yet, as Hannah and Lines point out, 'While it is significant to see the growing influence of human rights on the Board, its engagement with human rights principles remained complicated'. The INCB increasingly encouraged member states to integrate human rights throughout their drug policies, including in relation to the death penalty. This was given some attention in the Report for 2015, although while practices in Iran and India were noted, the Board did not directly urge abolition by these states.<sup>61</sup> Yet, as is clear in the previous report, most references to human

rights were made ‘in the context of encouraging governments to “make full use of the complex international legal framework in order to protect children from the illicit use of narcotic drugs and psychotropic substances”’.<sup>62</sup> ‘In effect, the primary objective of the INCB remained confined to drug prevention, rather than the promotion of human rights within the drug control context.’<sup>63</sup> Evidence for this view can also be drawn from the Report for 2015. Although once again mentioning that ‘Drug action must be consistent with national human rights standards’,<sup>64</sup> within the context of ‘improving the health and well-being of individuals and societies’, the Board’s view was that ‘the prevention of substance abuse in society in general, and in particular young people, should remain the primordial objective of government action’ (emphasis added).<sup>65</sup>

In the years that followed, and in line with increasing attention to the linkages between drug policy and human rights across the UN system, including crucially within the UNGASS Outcome Document, the Annual Reports gradually incorporated mention of a growing range of human rights-related issues. These were accompanied by increased and explicit specificity in terms of not only relevant instruments, but also the naming of infringing member states. For instance, the Report for 2016 incorporated references in the thematic chapter on women and drugs, including a recommendation for the elimination of compulsory drug detention centres,<sup>66</sup> and a ‘unequivocal condemnation’ of ‘extrajudicial targeting of persons suspected of illicit drug-related activity.’<sup>67</sup> In so doing, and unlike in many previous years where non-specific references are made in the text, the importance of both the UDHR and the ICCPR are explicitly noted. Moreover, picking up on a prominent mention of the death penalty within President Werner Sipp’s foreword, the Report not only calls for abolition in general terms, including in relation to states in South East Asia and in the overall recommendations, it also directs a comment to the authorities in Singapore.<sup>68</sup>

The next year, commemorating several anniversaries including the seventieth of the UDHR, President Viroj Sumyai used the foreword of the Report for 2017 to stress the importance of human rights to drug control efforts, especially in relation to the right to health. As such, within the thematic chapter ‘Treatment, rehabilitation and social reintegration for drug use disorders: essential components of

drug demand reduction’, mention is given to the significance of the ICESCR and the argument made that human rights law ‘can and should contribute to the object and purpose of international drug control.’<sup>69</sup> Human rights are also highlighted as a Special Topic, including in relation to extrajudicial killings and the death penalty, both of which are given prominence in the concluding recommendations.<sup>70</sup> Across the range of issues, in addition to the UDHR and the ICESCR,<sup>71</sup> the Board flags up the importance of the Convention on the Rights of Persons with Disabilities<sup>72</sup> and the Convention on Rights of the Child,<sup>73</sup> especially article 33 and, among other things, the ‘need to protect children from drug abuse’; a point to which we will return. Significantly, the Report also includes direct reference to the Philippines in relation to ‘extrajudicial actions.’<sup>74</sup> This was a development on the previous year. Then, although the issue was highlighted, no specific state was named.<sup>75</sup> Interestingly, in the reports for both 2016 and 2017, the Board chooses to name states operating drug consumption rooms (DCRs). In so doing, it urges operation within a framework of treatment and rehabilitation services and social reintegration measures ‘either directly or by active referral for access.’<sup>76</sup>

While devoting much attention to the issue of cannabis legalisation, for both medical and non-medical purposes, the Report for 2018 builds upon the previous years’ progress. For example, President Sumyai’s foreword states explicitly that ‘The fundamental goal of the three international drug control conventions, namely, to safeguard the health and welfare of humanity, includes ensuring the full enjoyment of human rights.’ And within that context, the main body of the Report mentions human rights concerns across a range of issues.<sup>77</sup> Significantly, once again the focus of a Special Topic, ‘Extrajudicial responses to suspected drug related offences’ are given attention. Moreover, here and in what appears to have become a welcome and permanent dedicated section on ‘International drug control conventions and human rights’ within the overall recommendations, the importance of the UDHR and the ICESCR are highlighted.<sup>78</sup> Perhaps demonstrating increasing confidence in its ability to comment beyond the rigid confines of drug policy, amidst discussion of proportionality and human rights the Board exploits its capacity to name and shame by singling out Cambodia, Indonesia and the Philippines regarding ‘extrajudicial action’ (emphasis added).<sup>79</sup> Similarly, it is also noteworthy that in addition to general recommendations regarding the abolition of

the death penalty, the Board explicitly calls upon China, India, Sri Lanka and Bangladesh to consider a change in policy.<sup>80</sup>

## The Report for 2019: An insight into the Board's position in 2020

As the previous section demonstrates, recent years have seen the Board, through its annual report, become progressively more engaged with the issue of human rights. Comments by a former INCB member in June 2020 confirm this view and narrow down the timeframe: '...in the last five years the INCB has evolved to a position that recognizes the complexity of today's drug problems and the need for drug policies to respect all human rights conventions'.<sup>81</sup> Previously incorporating relatively limited mention, and often then within footnotes, it is now commonplace for the centrality of the issue to drug control to be highlighted not only within the Presidents' forewords, but also in dedicated sections within the report proper, including the overall recommendations. With that in mind, a more granular reading of the Report for 2019 provides a useful snapshot of the INCB's current stance. As will be discussed, although there remain some important omissions, a close examination of the language used in places suggests more proactive engagement, including apparent acknowledgment of states' positive human rights obligations. That is to say, the commitment of State authorities to not simply refrain from certain actions but to take active steps 'to respect, to protect and to fulfil human rights'.<sup>82</sup> It also reveals, however, ongoing tensions.

To be sure, the distance travelled from its traditionally siloed position is immediately apparent within the president's foreword. Here, expressing concern over extrajudicial responses, capital punishment for drug-related offences and 'grave human rights violations perpetrated in the name of drug control', Cornelis P. de Joncheere, stresses that 'Human Rights are inalienable and can never be relinquished'.<sup>83</sup> Moreover, that the topic of choice for the thematic chapter, 'Improving substance use prevention and treatment services for young people', is inspired by the thirtieth anniversary of the Convention on the Rights of the Child in 2019 shows once again how the Board looks beyond Vienna in contextualising its work and the place of international drug control within the wider UN system. Continuing appreciation in the foreword for a system-wide

approach is also reflected by explicit reference to intersections between the 'health and welfare aims of the three drug control conventions' and Sustainable Development Goal 3, on health and wellbeing. The symmetries between the UN-wide Sustainable Development Agenda, its associated SDGs and human rights continues to ensure that the Board stays alert to holistic considerations. It is worth highlighting that in addition to retaining a dedicated section within the Report's overall recommendations, human rights receive attention as one of ten 'Global Issues'. Under the new title for 'Special Topics', the 'Respect for human rights in the elaboration and implementation of drug control policy' is accompanied by two inter-related themes; 'Linkages between the international drug control conventions and the Sustainable Development Goals' and 'Reducing the negative consequences of drug use through effective health policies'.

### Oversights remain

It is important to stress, however, that progress is accompanied by some substantial oversights. For example, the Board neglects several policy approaches within the Americas that have significant human rights implications. Reference is made to the Mexican government's intelligence activities and international cooperation regarding efforts to counter the operations of the 'Sinaloa cartel'.<sup>84</sup> Nevertheless, as in previous years, there is no mention of ongoing militarised interventions in the long-running 'war on drugs' within the country, its role in increasing the levels of market violence, and accompanying human rights violations.<sup>85</sup> This is unfortunate considering the growing understanding of the part played by enforcement operations in generating what has been called a 'self-reinforcing violent equilibrium' within Mexico.<sup>86</sup> The human rights dimensions of the similarly enduring issue of aerial fumigation of drug crops in Colombia also fails to get a mention.<sup>87</sup> Although confirmation of eradication plans, including – after apparently considerable pressure from the Trump administration<sup>88</sup> – a likely return to the practice came after the cut-off date for this year's Annual Report,<sup>89</sup> there was arguably enough debate within the country during the reporting period for the Board to have highlighted how it would impact Colombia's obligations under international human rights law. Among numerous omissions in past reports, this was a repeat of the position, or lack thereof, in the Report for 2018. Here the INCB noted the authorisation

by the Colombian Ministry of Health and Social Protection, and the Ministry of the Environment and Sustainable Development, to use drones for the airborne spraying of glyphosate;<sup>90</sup> perhaps a hint to a potentially problematic interface between technology, counternarcotic operations and human rights. Regarding a more traditional, and already very real, policy choice accompanied by a wide range of human rights consequences, this year's report also fails to comment on 'forced eradication' in Colombia.<sup>91</sup> On this issue, including aerial fumigation, the Board remains well behind other parts of the UN system.<sup>92</sup> Among other concerns, related issues regarding population displacement and the infringement of indigenous and children's rights has led to comment by bodies including the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights as well as the UN Special Rapporteurs on the Right to Health and on Indigenous Peoples' Rights.<sup>93</sup>

It is also worth noting that the issue of proportionality in sentencing is mentioned on a number of occasions, including in relation to Sri Lanka.<sup>94</sup> Yet, there are certainly other states where policy developments and high levels of incarceration of non-violent drug offenders over the Board's census period warrant attention.

## The death penalty and 'extrajudicial responses': Progress with ongoing problems

These selected examples of ongoing selective reticence are countered to a certain degree by consideration of several familiar themes. Conscious of the growing attention to, and increasingly forthright position on, the issues shown in recent years, it is unsurprising that the Report for 2019 is very clear on the Board's stance on both the death penalty and 'extrajudicial responses'. Having described policy developments within the countries, including changes in laws relating to synthetics and stimulants, the INCB calls for an end to the use of the death penalty in Sri Lanka, Bangladesh and Egypt.<sup>95</sup> It also encourages 'all States that retain capital punishment for drug-related offences to commute death sentences that have already been handed down...'<sup>96</sup> Elsewhere the Report makes more general observations. For example, within the 'Global Issues' section it adds a functional element to the topic by noting how 'Protecting the rights and dignity of individuals suspected of having committed drug-related offences may

at times seem counter-intuitive, but drug control policies that protect all human rights principles and standards have proved to be the most effective and sustainable.'<sup>97</sup>

Moreover, while pointing out the importance of human rights norms in the pursuit of drug policy, it is interesting to read the view that, 'Together, States and civil society can embrace the core objectives of the international drug control treaties by designing drug policies that are harmonious with the human rights conventions and fully promote the health and welfare of humankind.'<sup>98</sup> Among other things, within the Recommendations the Board also 'appeals to all States parties to pursue control policies that respect and protect all human rights and are consistent with international human rights instruments'. It goes on to note that 'Drug abuse and drug-related activities cannot be lawfully addressed without ensuring the protection of human rights and compliance with the international drug control conventions' (emphasis added).<sup>99</sup> Such phrasing provides useful insight into the Board's stance and indeed reveals the tension inherent within it. Apparently deliberate use of the term 'lawfully' accurately describes the appropriate application of drug control within a human rights framework. Yet, there remains an implicit suggestion that compliance with the drug control conventions symbiotically ensures human rights protection. That is to say, it is only unlawful approaches pursued in the name of drug control that threaten human rights.

On a related point, equally appropriate attention is devoted to 'Extrajudicial responses to suspected drug-related activities', or what within the context of the Philippines more accurately should be called extrajudicial executions.<sup>100</sup> Again, these are condemned in general terms in both the 'Global Issues' section<sup>101</sup> and the Recommendations. In the latter, among other things the Board notes 'The fundamental goal of the international drug control conventions, to safeguard the health and welfare of humanity, *includes the full enjoyment of human rights*' (emphasis added). It goes on to stress that 'State actions that violate human rights in the name of drug control policy are inconsistent with the international drug control conventions', and that such action 'cannot be justified under international law, including under the international drug control conventions.'<sup>102</sup> Although, among other more specific references to international law,<sup>103</sup> a welcome sentiment, the relationship is more complex than suggested. For example, since China is

not bound by the ICCPR (signed but not ratified), its use of the death penalty is not in breach of that Covenant. Moreover, with the death penalty not mentioned in the drug control conventions, the claim that it violates them requires stronger and more elaborate argumentation. This one example indicates the complicated nature of the intersection between the two regimes with the lack of precision potentially weakening the Board's stance on other important issues.

Elsewhere, the Report is more precise. For example, selected as a country for review within the 'New developments with regard to overall treaty compliance in selected countries' section, detailed attention is given to the Philippines.<sup>104</sup> Deploying particularly strong language, the Board calls on the Government 'to issue an immediate and unequivocal con-demnation and denunciation of extrajudicial actions against individuals suspected of involvement in the illicit drug trade or of drug use, to put an immediate stop to such actions, and to ensure that the perpetrators of such acts are brought to justice in full observance of due process and the rule of law'.<sup>105</sup> Significantly, beyond general references to 'human rights instruments',<sup>106</sup> the Board's discussion of the Philippines also makes note of related events and responses in other parts of the UN system, including Geneva. For example, in addition to noting the country's withdrawal from the Statute of the International Criminal Court after the Court had decided to conduct an enquiry into its approach to drug control,<sup>107</sup> it also makes reference to Human Rights Council Resolution 41/2 of 11 July 2019 on the promotion and protection of human rights in the Philippines, specifically with respect to the country's campaign against drug trafficking and use.<sup>108</sup>

### Health-related issues: Constructive, yet complicated

On health-related issues, including the interconnected topics of treatment, harm reduction and availability of internationally controlled substances for medical and scientific use, the Report for 2019 takes a constructive – although still somewhat complicated – position. As has been the case in recent years, the Board explicitly 'discourages the use of compulsory detention for rehabilitation of people affected by drug use' in East and South-East Asia, encourages countries 'to implement voluntary, evidence-based treatment services with due respect for patients' rights', and in so doing

singles out the policy approach of Singapore.<sup>109</sup> As a welcome adjunct, when focusing on West Asia, it also 'notes with concern that in some countries of the region access to treatment for drug dependence is possible only upon registration as a drug user', and highlights the potential infringement of a range of rights, 'including serious social stigmatization that impedes recovery and social reintegration'.<sup>110</sup> All of this is welcome. However, among other legacy issues relating to the Board's previous stance, it is difficult to ignore the irony of its concern for stigmatisation. As discussed elsewhere, for many years the INCB's language concerning, among other things, people who use drugs and DCRs (what were referred to as 'shooting galleries') was highly stigmatising.

Although making no direct reference to the obvious core minimum requirement of the right to the highest attainable standard of health or specific associated instruments, including those relating to the protection against cruel, inhuman or degrading treatment,<sup>111</sup> much attention is once again given to ensuring availability of internationally controlled substances for medical and scientific use. This is particularly so in relation to disparities of access, including for palliative care, in different parts of the world. The topic is given prominence in both 'Global Issues' and the Recommendations sections, and is linked in places to SDG 3; ensuring healthy lives and promoting well-being for all at all ages.<sup>112</sup> Significantly, the Board points out that 'These challenges include the limited access to pain medication, including opioid analgesics and medicines used for substitution therapy',<sup>113</sup> with the latter providing a demonstration of the integration of harm reduction within the Board's analysis. Indeed, while it has had a long, complicated, and fluctuating, relationship with the approach, the latest Report seems to signify a more comfortable and supportive stance;<sup>114</sup> a position certainly enhanced by language within the UNGASS Outcome Document and the 2019 Ministerial Declaration. As is almost unavoidable in a snapshot of global drug policy developments, the INCB uses the term harm reduction in relation to programmes in several countries.<sup>115</sup> Elsewhere, the more politically acceptable proxy phrase, 'minimizing the adverse public health and social consequences of drug abuse',<sup>116</sup> or variations thereof, is deployed, including within the recommendations. Here it is noted how '...States parties are encouraged to implement measures that can minimise the adverse public health and social consequences of drug abuse, including

through appropriate medication-assisted therapy programmes.<sup>117</sup> Note is also made of specific interventions in a number of countries,<sup>118</sup> including DCRs in several European states.<sup>119</sup> Caution still clearly exists. Indeed, for example, while policy options are encouraged, opportunities to remind states of the duty to uphold the highest attainable standards of physical and mental health are missed. But gone is the hostility of previous years, with the Board showing support for a range of interventions, including DCRs, needle and syringe programmes and ‘opioid agonist therapies’, providing they are part of ‘an integrated approach for referral and improved access for under-served populations to treatment and support services.’<sup>120</sup>

A subtle connection between harm reduction and human rights can also be found within the thematic chapter, ‘Improving substance use prevention and treatment services for young people’. Here, amidst some useful links to the SDGs and structural determinants of drug use,<sup>121</sup> is what might be seen as a more nuanced position on states’ obligations under human rights instruments. As noted above, mindful of the inspiration for the choice of chapter topic, it is no surprise to read the Board’s view that ‘Apart from the international drug control conventions, the importance of protecting children from drug use and dependence is also reiterated in article 33 of the Convention on the Rights of the Child’. In this regard it goes on to quote verbatim the provision, stressing that States parties to the Convention on the Rights of the Child ‘undertake to “take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances”’.<sup>122</sup>

On the face of things, this appears to conform to the standard position on the relationship between the drug control conventions and the Convention on the Rights of the Child. Recall, for example, references in the Report for 2017 and use of the Convention on the Rights of the Child by some states to defend the current shape of the drug control regime.<sup>123</sup> Nonetheless, at various points within the chapter the Board’s position seems to hint at a more expansive view of article 33, particularly in relation to the right to health and a broader understanding of the concept of protection. Specifically, chapter 1 not only notes the need for ‘renewed

efforts to support the prevention of substance use and the treatment of drug use disorders, including services aimed at reducing the adverse health consequences of drug use’ (emphasis added),<sup>124</sup> but also highlights the importance of the United Nations Office on Drugs and Crime-WHO 2017 publication, *International Standards for the Treatment of Drug Use Disorders*.<sup>125</sup> This incorporates references to both opioid substitution therapy and needle and syringe programmes.<sup>126</sup> Of relevance here is the observation that beyond simply protecting children from the illicit use of narcotic drugs and psychotropic substances, as stated in article 33, children should also be protected from the ‘health harms associated with drug use for those who have already begun using’. This ‘acknowledges that many children use drugs, requiring treatment to assist’ and ‘recognises the value of harm reduction measures for young drug users’.<sup>127</sup> Consequently, the Board’s perspective is more in line with that of the Committee on the Rights of the Child. This now routinely recommends harm reduction alongside treatment and prevention. It might be argued then that the Board has tweaked its position relative to the ‘primordial objective of government action’ as expressed in its Report five years ago. Indeed, while there remain gaps in the INCB’s analysis, it is constructive – if still problematical – to read all references to human rights within this year’s publication within the context of an important paragraph within the ‘Global Issues’ section:

Ensuring the consistency of drug control policies and programmes with human rights obligations means accepting that the drug control treaties are not in conflict with human rights. *Rather, the three international drug control conventions ought to be read within the international human rights framework, including the protection of fundamental freedoms and due process rights, stemming from the inherent dignity of all people. Compliance with the drug conventions can therefore lead to the direct and positive fulfilment of human rights, especially the realization of our universal right to health, which includes access to treatment (emphasis added).*<sup>128</sup>

At one level, it can be argued that the Board has adjusted its position by emphasising that the drug conventions must be located within the more expansive body of international human rights law. This is not to suggest a hierarchical relationship in which, through virtue of inclusion in the UN

Charter, human rights automatically prevail over all other treaty obligations.<sup>129</sup> Nonetheless, this acknowledgement appears to soften somewhat the connection between human rights and the goal of market elimination. In moving to invert the traditional primacy of drug control we can arguably see encouraging steps towards the promotion of human rights within the drug control context. Nonetheless, it is impossible to ignore the Board's resolute and problematic view that there is no divergence between the drug control conventions themselves (as opposed to the application of some domestic counter drug measures that operate beneath them) and human rights norms and obligations. Though presented as complementary, in reality the relationship is sated with conflicts and tensions. As a consequence, while reference to positive human rights within the paragraph can be seen to elevate the obligations of states to proactively work towards the right to health, it is simultaneously undermined by the misleading inference towards the existence of the innate human rights credentials of the drug control conventions. To be sure, not only do many fundamental tensions remain, they may be irresolvable.

## Concluding discussion

As the preceding discussion demonstrates, the Board continues to engage in the practice of selective reticence where human rights are concerned. There is no escaping the fact that the Report for 2019 overlooks domestic policy choices with worrying implications for a range of fundamental rights, including those relating to indigenous peoples and other economic, social, and cultural rights. That said, it is also important to stress that the INCB is today more engaged with the issue than at any point in its 52-year history. Though arguably an inevitable part of a broader process to increase system-wide coherence, for this it should be commended. References to a range of human rights obligations of states can be found throughout the Report for 2019, with the publication revealing an increased awareness of – or willingness to acknowledge – the manifold points of contact between the UN-based regimes for drug control and human rights. The Board now not only makes explicit reference to specific human rights instruments that need to be considered alongside implementation of the drug control conventions, but also effectively uses the Report to shine a light on individual states that favour use of the death penalty for drug-related offences and tolerate

extrajudicial measures against drug traffickers and people who use drugs. This is clearly a significant development relative to its position little more than a decade ago, although use of the term 'extrajudicial action/s' remains curious. Moreover, when considering the scope of infringements often generated in the pursuit of drug control, such negative duties set the bar for expected standards of behaviour very low.

As such, it is important also to highlight the Board's more expansive discussion of human rights as they pertain to the right to health. This includes the subtle reference in this year's Report to states' positive obligations, including in relation to access to treatment. Once again, however, this is for several reasons not without its problems. First, as noted above, the reference misleadingly suggests that the drug control conventions are innately human rights compliant. Second, while devoting considerable – and welcome – attention to harm reduction ('reducing the adverse public health and social consequences of drug abuse') and 'Availability and access to narcotic drugs and psychotropic substances' it is possible to argue that there remains an imbalance in the Board's approach. Where the positive obligations relating to the right to health are concerned, there is an ongoing reluctance to name states that could be doing more to ensure compliance. This is particularly in relation to the provision of scientifically proven harm reduction interventions in countries in what might be referred to as the 'Global North'. Contrast this to not only 'naming and shaming' of states' failures concerning negative obligations in relation to the death penalty and 'extrajudicial responses', which is clearly welcome, but also those engaged with cannabis market regulation. Progress has clearly been made. But work remains to be done.

Indeed, just as the development of the concept of human rights within the UN system more broadly must be understood as a gradual iterative process, so the Report for 2019 represents the latest manifestation of an evolving interpretative perspective. This is certainly what is necessary. As Lines cogently argues, 'international drug control law must be interpreted in an evolutive or dynamic fashion that considers treaty obligations in light of present-day conditions and developments in international law'.<sup>130</sup> This is particularly pressing during a time when – moving well beyond observations concerning states' 'management of contradictions' – the post-1945 rules-based international

order of which both regimes are a part is in an unprecedented state of crisis.<sup>131</sup> To be sure, it is vital that international monitoring bodies like the INCB do more to highlight a host of human rights violations. President Trump's apparent approval of President Duterte's anti-drug crackdown in the Philippines starkly illustrates how sole reliance on member states to sustain normative expectations at the intersection of drug policy and human rights is complicated and prone to fluctuation.<sup>132</sup> Further, it cannot be ignored how a rise in nationalism and an associated disregard for multilateral institutions has only been accelerated by COVID-19.<sup>133</sup>

Within this context, it is particularly timely to highlight the INCB's view that member states and civil society can work together more closely in the pursuit of human rights compliant drug policies. In discussions of human rights more generally, David Forsythe noted in 2006 that 'For the foreseeable future, the primary issue about human rights in international relations is not whether we should acknowledge them as fundamental norms.' 'Rather', he continues, 'the primary issue is when and how to implement human rights in particular situations.'<sup>134</sup> Fourteen years on, this view is more relevant than ever and one with increasing salience for drug policy. With a view to improving system-wide coherence, negotiating the interface between the regimes for drug control and human rights stands as a key challenge for both. And it is a boundary where, as in other issue areas, NGOs are well placed to make a significant contribution. This should extend beyond limited meetings with the Board during its country missions to include a range of systematic activities relating to human rights monitoring and data sharing, a process that could include both best and worst practices. In this vein, and while not a new idea in terms of improving a system-wide approach,<sup>135</sup> it is also not unreasonable to suggest that the Board enhances cooperation and openness with human rights bodies in Geneva, particularly in relation to states' positive obligations. This might include, among other things, engagement with the UN Special Rapporteur on the right to health, formal incorporation into its work of human rights guidelines, notably the *International Guidelines on Human Rights and Drug Policy*,<sup>136</sup> and frameworks to assess human rights risk environments.<sup>137</sup> In this way, there could be mutual gains in terms of both monitoring and reporting and ultimately the leverage of all bodies concerned.

Moreover, beyond structural adjustments, the composition of the Board remains an important

consideration. Writing on 'The evolution towards a humanist perspective on UN drug policy', a former Board member recently noted that 'the interpretation of the drug conventions depends on who the members of the INCB are, which in its history has had very few international lawyers who are experts in the interpretation of the conventions.'<sup>138</sup> A review of the Board's membership over the years reveals a change in this regard, with the INCB currently including one member with a human rights background.<sup>139</sup> Differing perspectives on the relationship between human rights and drug policy does not of course guarantee progressive positions of an individual or the body more broadly. Yet, at the very least, consideration for appropriate legal experience on the Board must surely be a constant consideration. Indeed, perhaps the time is right to consider formally re-visiting the composition of the Board as laid out in the Single Convention. Would, for example, it make sense to move beyond WHO nominations to include those also made by the OHCHR? Alternatively, efforts could be made to explore how, one way or another, the Special Rapporteur on the right to health might be brought into the Board's deliberations.

All that said, fundamental and irresolvable tensions remain. As progressive and interpretively dynamic as the Board may become, it can only ever go so far. Whatever way they are framed, there will always be the inherent belief that the application of human rights principles and standards can make prohibition-based drug policy 'effective and sustainable'. This remains the case even though by their very nature the drug control conventions must be seen as part of structural human rights risk. Further, as has been noted 'The drug conventions and *drug control institutions* have an indirect but influential relationship with human rights abuses; while they do not prescribe them, they do structure the system that employs them at the national level' (emphasis added).<sup>140</sup> This essential reality remains despite the Board's insistence that the regimes for drug control and human rights are complementary; a view that arguably contributes to, and builds from, language in soft law instruments like the UNGASS Outcome Document.

The adoption of a broader interpretive reading of the drug control conventions certainly creates welcome space to accommodate a health and human rights-oriented approach like harm reduction, and while not mentioned in the Report, policies decriminalising drug possession for personal use. Ultimately, however, in fulfilling its

mandate under the Single Convention the Board must maintain the view that the best way to safeguard the health and welfare of humankind is to 'limit the use of narcotic drugs and psychotropic substances exclusively to medical and scientific purposes'. Put simply, as a creature of the drug control regime, drug policy objectives will always remain paramount.

And, beyond reoccurring flashpoints around issues like the death penalty and harm reduction, it is here that diverging views of human rights generate arguably the Board's most pressing challenge. The INCB describes in considerable detail in this year's Report how some sovereign states have engaged in, or are considering, the implementation of legally regulated markets for adult non-medical cannabis use. This is a policy shift quite rightly deemed, and noted frequently by the Board, to be outside the confines of the conventions. What it does not mention is that in some jurisdictions concern for human rights has been a driver for policy shifts or debates around them. Paradoxically, a convincing legal case has also been made

that 'there is a strong, and indeed the strongest, case to be made for regulated permission of cannabis to qualify as a positive human rights obligation under certain conditions'.<sup>141</sup> Indeed, in 2016 the UN Special Rapporteur on the right to health welcomed states to 'seek alternatives to punitive or repressive drug control policies, including decriminalization and legal regulation and control and nurture the international debate on these issues, within which the right to health must remain central'.<sup>142</sup> It would appear then that while Hunt's parallel universes are undoubtedly moving closer together, where the INCB is concerned there will never be a full and satisfactory convergence.

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# Annex

## The Evolution of the human rights regime

Concepts of human dignity and rights have a long history with their recognition as issues of transnational concern dating back to the Westphalia Treaties of 1648. Yet, it was only with the end of the Second World War and the establishment of the UN that they began to ‘take on an internationally obligatory nature.’<sup>143</sup> Some even go as far as to argue that prior to this ‘there was near universal agreement that human rights were not a legitimate concern for international relations’ (original emphasis).<sup>144</sup> That said, it is clear that state sovereignty and the associated concept of non-intervention in the internal affairs of other nations remained core principles around which inter-state engagement took place; a structural tension that remains evident today within the realm of international drug policy. Nonetheless, a combination of the abuse of rights perpetrated by some states in the years before 1939, the horrors of the conflict itself and the collapse of the international order ensured that proposals for the protection of fundamental rights became a central focus for the emerging post-war international institutions. This was manifest in their incorporation into the Charter of the United Nations. Adopted in San Francisco in the summer of 1945, this is generally regarded to be built upon three pillars: human rights, peace and security, and development.

More specifically, the preamble of the Charter lists as two of the organisation’s four principal objectives<sup>145</sup> the determination ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’ and ‘to promote social progress and better standards of life in larger freedom’. Outlining the UN’s four purposes, Article 1 also explicitly highlights the achievement of ‘international cooperation 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, or religion’.

Marking a departure from previous conceptualizations, such statements were regarded at the time

as revolutionary, as was the creation in 1946 of the Commission on Human Rights. Like the Commission on Narcotic Drugs (CND), which was created in the same year, this was established under the auspices of the Economic and Social Council (ECOSOC), although it was to be replaced by the Human Rights Council in 2006. While the CND was, and remains, the UN’s central policy making body on the issue of drugs, the Commission on Human Rights was established to ‘weave the international legal fabric that protects our fundamental rights and freedoms.’<sup>146</sup> Within this context one of its first responsibilities was to draft not only an ‘international bill of rights’ that would include a declaration of principles and a legally binding human rights convention, but also establish institutions and procedures for their enforcement. It was this work stream that led in December 1948 to the UN General Assembly’s proclamation of the Universal Declaration of Human Rights (UDHR or Declaration). Again, representing what at the time was – and arguably today remains – widely seen as a ‘radical’ statement,<sup>147</sup> article 1 of the Declaration states that ‘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’. Importantly for the discussion here, this is complemented by article 28: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’, with articles in between laying out a comprehensive set of rights, including civil and political rights and economic, social and cultural rights.<sup>148</sup>

While certainly a milestone document in the history of universal human rights, the UDHR is not legally binding. Consequently, the late 1940s saw the Commission set to work drafting a treaty to give ‘binding international legal force to international human rights norms.’<sup>149</sup> Disagreements within the Commission and the embryonic organisation more broadly, including between liberal and socialist oriented states concerning the indivisibility of human rights, eventually resulted in the drafting of two separate instruments; a covenant on civil and political rights and another on economic, social and cultural rights. A combination of the increasingly chilly geo-political climate within the UN generated by the Cold War and – crucially – states’ circumspection

regarding legally binding international instruments on human rights meant that progress on the covenants was slow, with the issue losing momentum within the organisation for a decade or so. Adoption in 1963 of the Declaration on the Elimination of All Forms of Racial Discrimination, and a legally binding convention to accompany it two years later, reflected renewed attention. Indeed, after many years in the making, in December 1966 the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted by most UN member states. In combination with the UN Charter's human rights provisions and the Declaration, the Covenants are often referred to collectively as the 'International Bill of Human Rights'. This is seen to express the 'minimum social and political guarantees recognized by the international community as necessary for a life of dignity in the contemporary world'.<sup>150</sup>

Though characterised by fluctuating progress, the following 20 years saw the emergence of not only other core human rights instruments across a range of issues, but also accompanying UN bodies and monitoring mechanisms, including in some cases independent experts. Prominent among them are the Committee on Economic, Social and Cultural Rights (CESCR), established by ECOSOC in 1985 to monitor the implementation of ICESCR,<sup>151</sup> and the Human Rights Committee, which is a 'body of independent experts that monitors implementation of the ICCPR by its states parties'.<sup>152</sup> Demonstrating the advancement of the UN's attention to human rights, in the years after 1966 the Commission on Human Rights began to undertake a series of thematic initiatives on issues including disappearance, torture, and summary or arbitrary execution.

Another important development since the passage of the Covenants that has growing salience to discussions of drug policy concerns the evolution of positive human rights.<sup>153</sup> These move beyond the duty of states to merely not act in certain ways; that is to say to passively refrain from action that would hinder human rights. In contrast to these more traditional negative duties, positive human rights place a duty on State authorities to take active steps 'to respect, to protect and to fulfil human rights'.<sup>154</sup> The relationship between the two forms is complex, with all human rights 'requiring both positive action and restraint on the part of the state'. It can certainly be argued that 'whether a right is relatively positive or negative usually depends on historically contingent circumstances'.<sup>155</sup>

Nevertheless, despite ongoing legal debates, it is fair to conclude that positive human rights are 'permeating political culture more generally, influencing decision-making in a proactive sense, and guiding behaviour'.<sup>156</sup> Among a range of issue areas where this increasingly applies is the right to health.

Key to this evolution of human rights within the UN system has been the role of NGOs, especially of the international variety, in what might be called norm entrepreneurship and associated transnational human rights advocacy.<sup>157</sup> Although influential for several reasons, including efforts to develop international standards, this is particularly so in relation to the monitoring of treaty implementation. With periodic reviews undertaken by the human rights treaty bodies relying to a large extent upon reports submitted by states parties themselves, supplementary information collected by NGOs helps ensure that nations are not the sole arbiters of their own performance. States' practical application within their borders of the principles embodied within human rights instruments which they have committed to tends to oscillate. Yet, states have traditionally sought to avoid reputational damage associated with poor reviews and as such are often incentivised to generate favourable, if not always entirely accurate, data. Reflecting synergies across the UN system, this is also a dynamic that pertains to the work of the Board.

As noted in the main body of this report, the core UN human rights instruments retain an impressively high ratification rate. Like all issues of transnational concern, however, regime effectiveness cannot be measured solely in terms of treaty ratifications.<sup>158</sup> Despite high levels of adherence, the pursuit of universal human rights begun in 1945 remains very much a work in progress. It is legitimate to argue that the passage of a range of human rights treaties led to what has been called a 'normative revolution'. Yet, as has also been pointed out, this 'has not, in general, been accompanied by a complete behavioral and policy revolution' (original emphasis).<sup>159</sup> Though often supportive of the high order, and, to ensure state buy-in, necessarily vague language agreed within UN fora, genuine state commitment to the principles and obligations of the human rights regime fluctuates. This depends upon a complex and fluid set of factors, including the intersection between domestic and transnational politics as well as fundamental debates concerning universalism and cultural relativism.<sup>160</sup> State hypocrisy is, consequently, not

unknown; again, a reality common across a range of issue areas. As noted in the late 1970s, 'Foreign policy is inescapably about the management of contradiction'.<sup>161</sup> Consequently, as in many matters addressed by the UN, where human rights are concerned there often remains a gap between international law on the books and law in action.

All that said, the 'normative revolution' has certainly made some difference to international relations, with the 'political game' not being 'played the same way as before 1945'.<sup>162</sup> Crucially, the existence and operation of the human rights regime not only affects inter-state relations, but also attitudes and practices within the domestic realm. As one expert observes, 'Treaties signal a seriousness of intent that is difficult to replicate in other ways. They reflect politics, but they also shape political behaviour, setting the state for new political alliances, empowering new political actors, and heightening public scrutiny'.<sup>163</sup> And it is the idea that treaties influence state behaviour in complex but concrete ways that highlights the ever more pressing intersection between human rights and drug policy and the INCB's increasingly important role within this space.

## Endnotes

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- See for example, Hannah, J. & Lines, R., 'Drug control and human rights: parallel universes, universal parallels' in Bewley-Taylor, D. & Tinasti, K. (Eds.) (2020), *Research Handbook on International Drug Policy* (Cheltenham: Edward Elgar Publishing), pp. 225-47.
- United Nations Chief Executives Board for Coordination (2018), *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, UN Doc. CEB/2018/2, <https://undocs.org/en/CEB/2018/2>
- UN System coordination Task Team on the Implementation of the UN system Common Position on drug-related matters (2019), *What we have learned over the last ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters*, p. 4, [https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN\\_Entities/What\\_we\\_have\\_learned\\_over\\_the\\_last\\_ten\\_years\\_-\\_14\\_March\\_2019\\_-\\_w\\_signature.pdf](https://www.unodc.org/documents/commissions/CND/2019/Contributions/UN_Entities/What_we_have_learned_over_the_last_ten_years_-_14_March_2019_-_w_signature.pdf). It is also worth noting that in the UN System Common Position the Chief Executives Board has also made a 'call for changes in laws, policies and practices that threaten the health and human rights of people' (see p. 14). For further discussion on human rights and drug policy see: Bridge, J. et al (2017), *Edging Forward: How the UN's language on drugs has advanced since 1990* (International Drug Policy Consortium, Transnational Institute & Global Drug Policy Observatory), <https://idpc.net/publications/2017/09/edging-forward-how-the-un-s-language-on-drugs-has-advanced-since-1990>; and Jelsma, M. (2019), *UN Common Position on Drug Policy – Consolidating system-wide coherence*, (International Drug Policy Consortium & Transnational Institute), <https://www.tni.org/en/publication/>

[un-common-position-on-drug-policy-consolidating-system-wide-coherence](#)

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- Bruun, K., Pan, L., & Rexed, I. (1975), *The Gentlemen's Club. International Control of Alcohol and Drugs* (Chicago: University of Chicago Press), p. 84.
- This is the year that IDPC began its annual analysis of the Board's reports.
- Hafner-Burton, E. (2012), 'International Regimes for Human Rights', *Annual Review of Political Science* **15**:256-285, p. 266.
- International Narcotic Control Board (Website), *The International Narcotics Control Board*, <https://www.incb.org/incb/en/about.html> (Accessed: 22 November 2020).
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- Ibid. See also Council on Foreign Relations (2012), *The Global Human Rights Regime*, <https://www.cfr.org/report/global-human-rights-regime>
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- See Nadelmann (1990), op. cit. Nadelmann uses the term 'global prohibition regime' to describe the various regimes that have been developed to prohibit certain activities globally. On 'suppression conventions' see Boister, N. (2001) *Penal Aspects of the UN Drug Conventions* (Alphen aan der Rijn: Kluwer Law International), p. 3; and Boister, N. (2002), 'Human Rights Protec-

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22. See 'General Obligations' of the UN Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961, Article 4: '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'.
  23. See generally Bewley-Taylor (2012), op. cit.
  24. See: United Nations Office of the High Commissioner for Human Rights (Website), *The Core International Human Rights Instruments and their monitoring bodies*, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (Accessed: 22 November 2020).
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  26. See Lynch, C. (2009), 'Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and the Bali Mice Case', *Columbia Human Rights Law Review* **40**: 523.
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  30. Ibid.
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  36. It should be noted that the provisions about certain measures being subject to constitutional norms and basic principles of the legal system implicitly refer to rights protections.
  37. See Bewley-Taylor, D. & Jelsma, M. (2012), 'Regime change: Revisiting the 1961 Single Convention on Narcotic Drugs', *International Journal of Drug Policy* **23**:72-81.
  38. Hannah & Lines (2020), op. cit., p. 229.
  39. United Nations Human Rights Council (2015), *Contribution of the Human Rights Council to the special session of the General Assembly on the world drug problem of 2016*, UN Doc. A/HRC/28/L.22, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/28/L.22](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/L.22)
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  42. See Barrett (2012), op. cit., pp. 76-77.
  43. This draws on the work done by the Transnational Institute's Drugs and Democracy programme. Also see: Barrett, D., Lines, R., Schleifer, R., Elliot, R., & Bewley-Taylor, D. (2008), *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy* (Beckley Foundation Drug Policy Programme), <https://www.hr-dp.org/files/2013/09/23/BarrettRecalibratingTheRegime.pdf>; Lines, R. (2017), *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press), pp. 86-107; International Drug Policy Consortium, *Drug Policy Guide*, pp. 11-12, [http://fileserver.idpc.net/library/IDPC-drug-policy-guide\\_3-edition\\_FINAL.pdf](http://fileserver.idpc.net/library/IDPC-drug-policy-guide_3-edition_FINAL.pdf)
  44. The obligations within a range of other instruments can also be applied.
  45. These also pertain to the Declaration on the Rights of Indigenous Peoples. See: United Nations General Assembly (2007), *United Nations Declaration on the Rights of Indigenous Peoples*, <https://www.un.org/development/desa/indigenouspeoples/news/2020/09/undrip13/>
  46. For many years human rights and drug policy overlooked in both fields. As Norbert Gilmore noted in 1996 '...little has been written about drug use and human rights. Human rights are rarely mentioned expressly in drug literature and drug use rarely mentioned in human rights literature'. See: Gilmore, N. (1996), 'Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements', *Journal of Contemporary Health Law and Policy* **12**:355-6. Since then there has been a growing body of research, bot academic and grey literature. See for instance Bewley-Taylor, D. (2005), 'Emerging Policy contradictions between the United Nations drug control system and the core values of the United Nations', *International Journal of Drug Policy* **16(6)**: 423-31; Barrett, D., Lines, R., Schleifer, R., Elliot, R., & Bewley-Taylor, D. (2008), *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy* (Beckley Foundation Drug Policy Programme), <https://www.hr-dp.org/files/2013/09/23/BarrettRecalibratingTheRegime.pdf>; and Lines, R. & Elliot, R. (2007), 'Injecting Drugs into Human Rights Advocacy', *International Journal of Drug Policy* **18**:453. More recently see, Lines, R. (2017), *Drug Control and Human Rights in International Law* (Cambridge: Cambridge University Press); Barrett, D. (2020), *Child Rights and Drug Control in International Law* (Leiden: Brill Nijhoff); and Bone, M (2020), *Human Rights and Drug Control: A New Perspective* (Abingdon: Routledge). Some work within the growing field argues that connection between drug policy and human rights is a false dichotomy. See Takahashi, S. (2016), *Human Rights and Drug Control. The False Dichotomy* (Oxford: Hart). It might be argued

- that this perspective confuses the protection of human rights with a human right to take drugs. Interestingly, the author is a former Drug Control Officer at the Secretariat of the INCB. For a critique on Takahashi see: Lines, R. (2017), op. cit., p. 9.
47. Harm Reduction International, Transform Drug Policy Foundation, the Transnational Institute and International Drug Policy Consortium and others. For a discussion on the role of NGOs, including on human rights, see: Fordham, A. & Haase, H. (2018), 'The 2016 UNGASS on Drugs: A Catalyst for the Drug Policy Reform Movement' in Klein, A. & Stothard, B. (Eds.) (2018), *Collapse of the Global Order on Drugs. From UNGASS 2016 to Review 2019* (Bingley: Emerald Publishing), pp. 21-47.
  48. International Centre on Human Rights and Drug Policy et al. (2019), *International Guidelines on Human Rights and Drug Policy*, <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/international-guidelines-on-human-rights-and-drug-policy.html>. Also see: Barrett, B., Hannah, J., & Lines, R. (2020), 'What Does it Mean to Adopt a Human Rights-based Approach to Drug Policy', *Health and Human Rights Journal*.
  49. See the International Drug Policy Consortium's 'INCB Watch' website for critiques of all INCB annual reports since 2007, as well as other relevant comment: <https://idpc.net/incb-watch>. Also see Hannah & Lines, (2020), op. cit., and Bone (2020), op. cit., p. 84 and passim.
  50. Notably see, International Narcotics Control Board (INCB) (2008), *Report of the International Narcotics Control Board for 2007*, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2007.html>
  51. International Drug Policy Consortium (IDPC) (2008), *Response to the 2007 Annual Report of the International Narcotics Control Board*, p. 5, <https://idpc.net/publications/2008/03/idpc-response-to-2007-annual-report-of-international-narcotics-control-board>
  52. For example, see: Csete, J., & Wolfe, D. (2007), *Closed to Reason: The International Narcotics Control Board and HIV/AIDS* (Canadian HIV/AIDS Legal Network & Open Society Institute), <https://www.tni.org/en/un-drug-control/incb/item/2274-closed-to-reason>; Csete, J. (2010), 'Overhauling Oversight: Human Rights at the INCB', in Collins, J. (Ed.) (2010), *Governing the Global Drug Wars*, LSE Ideas Special Report, pp. 63-68.
  53. See for example the UNAIDS feature story, cosponsored by UNODC, available in: UNAIDS (2014), *Harm reduction works*, <https://www.unaids.org/en/resources/presscentre/featurestories/2014/march/20140318harmreduction>
  54. INCB (2012), *Report of the International Narcotics Control Board for 2011*, p. iii, [https://www.incb.org/documents/Publications/AnnualReports/AR2011/AR\\_2011\\_English.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2011/AR_2011_English.pdf)
  55. IDPC (2010), *A Call on the Secretary of the International Narcotics Control Board: Ongoing challenges*, p. 6, [http://fileserver.idpc.net/library/IDPC\\_Advocacy\\_Note\\_A\\_Call\\_to\\_new\\_Secretary\\_Challenges%20\(1\).pdf](http://fileserver.idpc.net/library/IDPC_Advocacy_Note_A_Call_to_new_Secretary_Challenges%20(1).pdf)
  56. IDPC (2012), *The 2012 Commission on Narcotic Drugs: Report of Proceedings*, p. 22, <https://idpc.net/publications/2012/04/2012-commission-on-narcotic-drugs-report-of-proceedings-idpc-report>
  57. IDPC (2014), *IDPC response to the 2013 Annual Report of the International Narcotics Control Board*, p. 3, <https://idpc.net/publications/2014/08/idpc-response-to-the-2013-annual-report-of-the-international-narcotics-control-board>
  58. INCB (Website), *Statements by the International Narcotics Control Board at official conferences and meetings*, <https://www.incb.org/incb/en/news/speeches/speeches.html> (Accessed: 22 November 2020).
  59. INCB (2015), *Report of the International Narcotics Control Board for 2014*, p.iii, [https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR\\_2014.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR_2014.pdf).
  60. INCB (2016), *Report of the International Narcotics Control Board for 2015*, paras. 36-37, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2015.html>.
  61. Ibid.
  62. INCB (2015), *Report of the International Narcotics Control Board for 2014*, p.iii, [https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR\\_2014.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR_2014.pdf).
  63. Hannah & Lines (2020), op.cit.
  64. INCB (2016), *Report of the International Narcotics Control Board for 2015*, para. 36, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2015.html>
  65. Ibid, para. 44; also see: Hannah & Lines (2020), op. cit.
  66. INCB (2017), *Report of the International Narcotics Control Board for 2016*, para. 55, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2016.html>
  67. Ibid, paras. 31- 318.
  68. INCB (2017), *Report of the International Narcotics Control Board for 2016*, paras. 271, 315, 282, 579, recommendation 5 and para. 809.
  69. Ibid, paras. 30, 32 and 34. See also: Hannah and Lines (2020), op. cit., p. 242.
  70. INCB (2018), *Report of the International Narcotics Control Board for 2017*, paras. 249-258 and 841, 842, recommendations 5-8, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2017.html>
  71. Ibid, see paras. 249 & 252.
  72. Ibid, see Special Topics, para. 253.
  73. Ibid, see Special Topics para. 253 and recommendation 6.
  74. Ibid, see para. 583.
  75. INCB (2017), *Report of the International Narcotics Control Board for 2016*, paras. 316-318, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2016.html>.
  76. Ibid, see para. 720.
  77. INCB (2019), *Report of the International Narcotics Control Board for 2018*, para 165, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2018.html>.
  78. Ibid, see paras. 325, 327, recommendations 5-7, and para. 856.
  79. Ibid, see paras. 578, 579, 580, and 581.
  80. Ibid, see paras. 272, 282, 689, 583, and 618. For critical comment on India, Sri Lanka, and Bangladesh see para. 627. And see recommendations 5 and 6, and related paragraphs.
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  82. See annex of this report for a further discussion of positive human rights.
  83. INCB (2020), *Report of the International Narcotics Control Board for 2019*, p. iv, <https://www.incb.org/incb/en/publications/annual-reports/annual-report-2019.html>.
  84. Ibid, para. 527.
  85. See: Villegas, P. (6 January 2020), 'A New Toll in Mexico's Drug War: More Than 61,000 Vanished', *The New York Times*, <https://www.nytimes.com/2020/01/06/world/americas/mexico-drug-war-death-toll.html>. And for a critique of decapitation strategy and human rights impacts, see: Lee, B., Renwick, D., & Labrador, R. (2019), *Mexico's Drug War* (Council on Foreign Relations), <https://www.cfr.org/background/mexicos-drug-war>
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  88. See Power, M. (21 January 2020), 'Colombia: We'll Spray Toxic

- Chemicals to Keep Americans from Doing Drugs', *Vice*, [https://www.vice.com/en\\_us/article/3a8bg5/colombia-will-tackle-cocaine-with-a-cancer-causing-chemical-only-problem-is-it-wont-work](https://www.vice.com/en_us/article/3a8bg5/colombia-will-tackle-cocaine-with-a-cancer-causing-chemical-only-problem-is-it-wont-work). Reuters (2 March 2020), *Colombia will have to restart aerial spraying to destroy coca – Trump*, <https://uk.reuters.com/article/uk-colombia-drugs/colombia-will-have-to-restart-aerial-spraying-to-destroy-coca-trump-idUKKBN-20P2XP>.
89. Isaacson, A. (11 February 2020), 'The Costs of Restarting Aerial Coca Spraying in Colombia', *Washington Office on Latin America Commentary*, <https://www.wola.org/analysis/costs-restarting-aerial-spraying-coca-colombia/>; Collins, J. (16 June 2020), 'Colombia to Resume Fumigating Its Coca Fields with Glyphosate: It's happening under the cover of strict coronavirus lockdown measures', *Sierra*, <https://www.sierraclub.org/sierra/colombia-resume-fumigating-its-coca-fields-glyphosate>
  90. INCB (2019), op. cit., para. 543. Mindful of the potential impact of the policy shift, it is worth quoting the full paragraph: 'In 2017, cocaine seizures in Colombia increased by 20 per cent, compared with 2016. On 26 June 2018, the outgoing President of Colombia announced that, after a series of pilot tests, the Ministry of Health and Social Protection and the Ministry of Environment and Sustainable Development had authorized the use of drones for the spraying of glyphosate at a concentration level 50 per cent lower than that used previously; aerial spraying of glyphosate on coca crops had been suspended since October 2015. According to the Presidential statement, drones flying at low altitude were akin to the current practice in which ground-based eradication crews sprayed glyphosate herbicide from tanks mounted on their backs'.
  91. *Ibid.*, para 576.
  92. See for example: United Nations Development Programme (2019), *Development Dimensions of Drug Policy: Innovative Approaches*, <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/development-dimensions-of-drug-policy.html>; and United Nations Development Programme (2015), *Addressing the Development Dimensions of Drug Policy*, <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/addressing-the-development-dimensions-of-drug-policy.html>
  93. See: Transnational Institute, Drugs and Democracy Programme (2018), *Human Rights and Drug Policy*, <https://www.tni.org/en/briefing/human-rights-and-drug-policy>
  94. INCB (2020), op. cit., see paras. 80, 306, recommendations section, and para. 800.
  95. *Ibid.*, see paras. 255-57, 453 and 454, 629 and 630.
  96. *Ibid.*, see paras. 257-306.
  97. *Ibid.*, see para. 372.
  98. *Ibid.*, see para. 373.
  99. *Ibid.*, see para. 800 and recommendations 4-6.
  100. It is worth noting how it is possible to argue that many extrajudicial responses to drug related issues are acceptable, or even preferable to judicial responses. For example, a needle exchange programme may be extrajudicial, while judicial sanctioned drug treatment is often highly problematic.
  101. INCB (2020), op. cit., paras. 369-70 and 382.
  102. *Ibid.*, para. 799. Also see para. 602.
  103. E.g. Reference to the Universal Declaration of Human Rights in: INCB (2020), op. cit., para. 370.
  104. INCB (2020), op. cit., paras. 249-254.
  105. *Ibid.*, para. 253.
  106. *Ibid.*, paras. 250 & 602.
  107. *Ibid.*, paras. 252 & 600.
  108. 'In its decision, the Council urged the Government of the Philippines to take all necessary measures to prevent extrajudicial killings and enforced disappearances, to carry out impartial investigations and to hold perpetrators accountable, in accordance with international norms and standards, including on due process and the rule of law' (See INCB (2020), op. cit., para. 251), and 'In its resolution, the Council called on the Government of the Philippines to cooperate with the Office of the United Nations High Commissioner for Human Rights and requested the High Commissioner to prepare a comprehensive report on the situation of human rights in the country' (See INCB (2020), op. cit., para 601).
  109. INCB (2020), op. cit., para 603.
  110. *Ibid.*, para. 701.
  111. Barrett (2020), op. cit., p. 4.
  112. See INCB (2020), op. cit., paras. 140, 141, 142, 147, 152, 218, and 379.
  113. *Ibid.*, para. 377.
  114. *Ibid.*, para. 386.
  115. That is to say Mauritius and Tonga. *Ibid.*, para 464 & 763.
  116. See Bewley-Taylor (2012), op. cit. passim.
  117. INCB (2020), op. cit., paras. 335, 386, 387, 389 and recommendation 9.
  118. *Ibid.* Regarding Senegal and opioid substitution treatment and injection, see para. 339.
  119. *Ibid.* 'In March 2019, Greece became the most recent European country to provide a legal framework for "drug consumption rooms" or supervised drug use areas to operate on its territory. To access such areas, which are to be authorized by the Ministry of Health, and to make use of the care and services provided in those areas, inclusion in the government-maintained register of recipients of such services will be a prerequisite. "Drug consumption rooms" are already operating, on a trial or permanent basis, in Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Portugal, Spain and Switzerland, while a legal basis for their operation exists in Ireland (since 2017), and governmental initiatives seeking to introduce supervised drug injection facilities are under way in several other European countries, including Finland and Iceland.' (See INCB (2020), op. cit., para. 732).
  120. *Ibid.*, paras. 388 and 733 and recommendation 9.
  121. *Ibid.*, paras. 1 and 14.
  122. *Ibid.*, para 6.
  123. See for example the Russian Federation CND resolution in March 2018. This explicitly cites the CRC in opposition to liberalising approaches towards cannabis. See against: Barrett (2020), op. cit., p. 9; and IDPC (2019), *The 2018 Commission on Narcotic Drugs: Report of Proceedings*, <https://idpc.net/publications/2018/06/the-2018-commission-on-narcotic-drugs-report-of-proceedings>.
  124. See: INCB (2020), op. cit., para 1. That said, later in the chapter the approach is less clear cut. Specifically, 'Key treatment components that have been found to contribute to positive outcomes for adolescents include the following: involvement, whenever safe, of the adolescent's family in the treatment process, even in therapeutic communities; use of a motivational approach that focuses on minimizing the adverse public health and social consequences of drug abuse; psychosocial treatment approaches combined with individualized treatment approaches to address special needs such as mental health issues; life skills training and cognitive behavioural interventions; motivational enhancement therapy; family-based therapies, from brief strategic family therapy to multi-systemic family therapy; and basic education (emphasis added) (para. 55).
  125. *Ibid.*, paras. 59, 75, and 793. Also see mention of the 2016 UN-GASS Outcome Document at para. 793.
  126. *Ibid.*, OST at para. 46, and needle exchange at para. 18.
  127. Barrett (2020), op. cit., p. 106.

128. INCB (2020), op. cit., para 371.
129. United Nations (1945), *United Nations Charter*, Article 103 <https://www.un.org/en/sections/un-charter/un-charter-full-text/>
130. Lines (2017), op. cit., p. 13.
131. Hoffmann, S. (1977), 'The Hell of Good Intentions', *Foreign Policy* **29**:3-26.
132. See Cooley, A., & Nexon, D. (2020), *Exit from Hegemony: The Unravelling of the American Global Order*, (Oxford: Oxford University Press), p. 136. As Cooley notes, 'In both Turkey and the Philippines, the Trump administration appeared ready to put its military cooperation and basing access on a purely transactional footing and de-emphasize concerns about democratic backsliding and human rights violations. Not only did the Trump administration refrain from criticizing Duterte's drug policy, but the US president approvingly cited the Philippine leader's crackdown as a model that the US should emulate – contradicting his own State Department's Human Rights report that expressed concern about the Philippine president's violations of human rights and due process'.
133. Patrick, S. (2020), 'When the System Fails. COVID-19 and the Costs of Global Dysfunction', *Foreign Affairs*, <https://www.foreignaffairs.com/articles/world/2020-06-09/when-system-fails>.
134. Forsythe (2006), op. cit., p. 12.
135. See for example: UN Commission on Narcotic Drugs (2008), *Strengthening cooperation between the United Nations Office on Drugs and Crime and other United Nations entities for the promotion of human rights in the implementation of the international drug control treaties*, Resolution 52/12, [https://www.unodc.org/documents/commissions/CND/Drug\\_Resolutions/2000-2009/2008/CND\\_Res-2008-12e.pdf](https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2000-2009/2008/CND_Res-2008-12e.pdf)
136. Also see: UNODC (2012), *UNODC and the Promotion and Protection of Human Rights*, Position Paper, [http://www.unodc.org/documents/justice-andprison-reform/HR\\_paper\\_UNODC.pdf](http://www.unodc.org/documents/justice-andprison-reform/HR_paper_UNODC.pdf)
137. See, for example, Gallahue, P. & Barrett, D. (Date unknown), *Human Rights Impact Assessments: Due Diligence for Drug Control*, [https://www.hri.global/files/2012/06/01/Barrett\\_-\\_Human\\_Rights\\_Impact\\_Assessments.pdf](https://www.hri.global/files/2012/06/01/Barrett_-_Human_Rights_Impact_Assessments.pdf)
138. Thoumi (30 June 2020), op. cit.
139. See reference to Luis Alberto Otárola Peñaranda (Peru) in: INCB (Website), Luis Alberto Otárola Peñaranda, [https://www.incb.org/incb/en/about/members/luis\\_otarola.html](https://www.incb.org/incb/en/about/members/luis_otarola.html) (Accessed: 22 November 2020).
140. Boister, N. (2016), 'Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs', *Leiden Journal of International Law* **29**(2):397.
141. See van Kempen, P., and Fedorova, M. (2018), 'Regulated Legalization of Cannabis through Positive Human Rights Obligations and *Inter se* Treaty Modification', *International Community Law Review* **20**:493-526. Also see Bone (2020), op. cit., p. 106.
142. See Bone (2020), op. cit. p. 110.
143. Donnelly and Whelan (2020), op. cit., p. 5
144. *Ibid.* It can be argued, however, that this view is too sweeping. See, for example, International Labour Organisation Conventions on Labour Rights. and the 1924 League Declaration of the Rights of the Child.
145. The other principles are 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind' and 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.
146. See: United Nations Office of the High Commissioner for Human Rights (Website), *Introduction*, <https://www.ohchr.org/en/hrbodies/chr/pages/commissiononhumanrights.aspx> (Accessed: 22 November 2020).
147. Hafner-Burton, E. (2012), 'International Regimes for Human Rights', *Annual Review of Political Science*, **15**:266.
148. See: United Nations (1948), *Universal Declaration of Human Rights*, <https://www.un.org/en/universal-declaration-human-rights/>
149. Donnelly and Whelan (2020), op. cit., p. 8.
150. *Ibid.*, p. 9.
151. This includes 18 independent experts. See: United Nations Office of the High Commissioner for Human Rights (Website), *Committee on Economic, Social and Cultural Rights*, <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (Accessed: 22 November 2020).
152. See: United Nations Office of the High Commissioner for Human Rights (Website), *Committee on Economic, Social and Cultural Rights*, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (Accessed: 22 November 2020).
153. Some analysts see positive human rights as being linked closely to the so-called 3<sup>rd</sup> generation of human rights. In this context, the generations can be seen as follows: First generation - civil and political rights; Second – economic, social and cultural rights; Third – solidarity or emerging rights. That said, it can be argued that first and second generation included positive obligations, for example, ensuring fair trial or social security. For discussion of clusters of generations and work of Karel Vasak, see: Tomuschat, C. (2003), *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press); Macklem, P. (2015), 'Human rights in international law: three generations or one?', *London Review of International Law* **3**(1):61-92; Domaradzki, S. Khvostova, M, & Pupovac, D. (2019), 'Karel Vasak's Generations of Rights and Contemporary Human Rights Discourse', *Human Rights Review* **20**:423-443.
154. See, for example, the UN Office of the High Commissioner for Human Rights (Website), *International Human Rights Law*, <https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx#:~:text=International%20human%20rights%20law%20lays,States%20are%20bound%20to%20respect.&text=The%20obligation%20to%20protect%20requires,enjoyment%20of%20basic%20human%20rights> (Accessed: 22 November 2020).
155. Donnelly, J. (2013), *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press), p. 43.
156. Fredman, S. (2008), *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press), p. 90.
157. See for example Baehr, P. (2009), *Non-governmental Human Rights Organizations in International Relations*, (New York: Palgrave Macmillian); and Smith, J., Pagnucco, R., & Lopez, G. (1998), 'Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s', *Human Rights Quarterly* **20**(2):379-412. And as part of a broader study, see the excellent Keck, M. & Sikkink, K. (1998), *Activist Beyond Border. Advocacy Networks in International Politics* (Ithaca: Cornell University Press).
158. See Bewley-Taylor (2020), op. cit.
159. Forsythe, D. in Weiss, T. & Wilkinson, R. (2018), *International Organization and Global Governance*, (Abingdon: Routledge), p. 512. For a rebuttal of pessimistic accounts of human rights laws and institutions see Sikkink, K. (2017), *Evidence for Hope: Making Human Rights Work in the 21<sup>st</sup> Century* (Princeton: Princeton University Press).
160. See Donnelly (2020), op.cit., pp. 93-15. Donnelly resolves the apparent dichotomy by taking of internationally recognized human rights being 'relatively universal' in the contemporary world. For discussions within UN system, also see: Lakatos, I. (2018), 'Thoughts on Universalism versus Cultural Relativism, with special attention to Women's Rights', *Pecs Journal of International and European Law*.
161. Hoffmann, S. (1977), 'The Hell of Good Intentions', *Foreign Policy* **29**:3-26.
162. Forsythe in Weiss & Wilkinson (2018), op. cit., p. 512.
163. Simmons, B. (2019), *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge: Cambridge University Press), p. 5.

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In this report, IDPC provides a critique of the INCB's discussion on Human Rights in its Annual Report for 2019.