COMMENTARY

Children Who Use Drugs: The Need for More Clarity on State Obligations in International Law

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ABSTRACT

Drug use among children has two systems of international law that may be brought to bear to ensure that States take measures to protect children from drug related harms. Neither, however, appears to have been adequately applied to the issue. This commentary raises a number of questions related specifically to the UN drug conventions and the UN Convention on the Rights of the Child (CRC). Broadly – how 'up to date' are the UN drug control conventions in the 21st century, and in the light of drug use among children? How does the CRC (coming from the different tradition of international human rights conventions) fit in? What does the CRC add, including via its various other interconnected provisions? Finally, what is the relationship between these two branches of international law?

Introduction

Drug use among children and young people, including young children, has in recent decades become an increasing and global phenomenon. It is one which has, potentially, two systems of international law that may be brought to bear to ensure that States take measures to protect children from drug related harms. Neither, however, appears to have been adequately applied to the issue.

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Children Who Use Drugs: The Need for More Clarity on State Obligations in International Law

The 1961 Single Convention on Narcotic Drugs[1] is fifty years old this year. It codified treaties that were much older, dating back to 1912.[2] It was drafted during the 1940s and 1950s, reflecting the views and experiences of the time (as well as State interests at the time). The 1971 Convention on Psychotropic Substances is forty years old this year.[3] The 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is a youthful twenty-three.[4] The UN Convention on the Rights of the Child, meanwhile, is turning twenty-two. In all of their decades of existence there has been little in the way of analysis of international obligations towards drug using children, be they recreational users or those who have drug dependence problems.[5]

In the compartmentalised United Nations system,[6] the only human rights treaty that takes into account drugs is the UN Convention on the Rights of the Child, which was adopted in 1989.[7] Article 33 requires that

> *States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.*

For the most part, the focus has been on primary prevention (i.e. stopping children initiating drug use), focusing on article 38(1) of the 1961 Single Convention[8] and article 33 of the CRC.[9] However, since these articles were drafted we have learned to distinguish between programmes aimed at universal prevention (everyone in the population), selected programmes (members of at risk groups) and programmes for identified target populations ('at risk' individuals).[10]

While prevention is clearly an obligation on States parties to the Convention on the Rights

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1 Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515. [hereinafter '1961 Convention'].

2 International Opium Convention (23 January 1912) LNTS vol. 8 (1922), p. 197.

3 1971 Convention on Psychotropic Substances (21 February 1971) UNTS vol. 1019 no. 14956. [hereinafter '1971 Convention'].

4 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627. [hereinafter '1988 Convention']

5 A notable exception is Sofia Gruskin, Karen Plafker and Alison Smith-Estelle, 'Understanding and Responding to Youth Substance Use: The Contribution of a Health and Human Rights Framework', *American Journal of Public Health*, December 2001, vol. 91, no. 12, pp. 1954-1963.

6 Damon Barrett and Manfred Nowak, 'The United Nations and Drug Policy: Towards a Human Rights Based Approach' in*The Diversity of International Law, Essays in Honour of Professor Kalliopi K. Koufa*, eds. A Constantinides and N Zaikos, Brill/Martinus Nijhoff, Leiden, 2009.

7 Convention on the Rights of the Child (20 November 1989) UNTS 1577, p.3. [hereinafter 'CRC']

8 'The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends'; Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515, art. 38(1). [hereinafter '1961 Convention']

9 Article 33, however, is not limited to prevention, but is often equated with it. We explore this further below.

10 K. W. Grifin and G. J. Botvin, 'Evidence-Based Interventions for Preveting Substance Use Disorders in Adolescents', *Child and Adolescent Psychiatric Clinics of North America*, 2010, vol. 19, no. 3, pp. 505—526.

of the Child and the drug conventions, it is irrelevant for children and young people who currently use drugs. Access to treatment for children and adolescents who are drug dependent was not foremost in the minds of the drafters of the CRC, because it apparently did not fit with their image of childhood.[11] Under the terms of the Convention, a child was now, in international law, not only an object to be protected with prevention measures but also a subject of rights. That a child could also be using drugs or dependent on them, and also a subject of rights, was perhaps a bridge too far for the drafters.

Although not explicitly included in article 33 of the Convention on the Rights of the Child, it can be relatively easily argued that the right to treatment is nevertheless an obligation in protecting the child from the illicit use of narcotic drugs and psychotropic substances. If a child is already using drugs, what is needed to protect them? This raises at least two questions: What are the obligations of States in this respect, and what would child rights based treatment look like?; and What about the majority of young people who are experimenting with drugs or use drugs recreationally, and are not in need of treatment?

Drugs and children is an area requiring detailed study across a range of disciplines such as drug treatment, harm reduction, education, juvenile justice and, indeed, in relation to children involved in drug production and trafficking. The intention of this commentary is not to provide an overview of drug use among children and young people, as this information and discussions around data gaps and data collection methodologies are available elsewhere.[12] Instead, it aims to raise a number of questions related specifically to the drug conventions and the Convention on the Rights of the Child that require further study. In particular, how do the UN drug conventions apply to 21st century drug using children? How does the Convention on the Rights of the Child apply to them? And what is the relationship between these two branches of international law?

Dated provisions – the need for a fresh look at children and drug use in international law

The four international treaties that form that basis of this commentary are all now decades old. Over that period, much has changed in relation to trends and patterns of drug use and drug dependence among children and young people. Added to this are decades of addictions research, scientific discoveries, research into recreational drug use and experience in drug education, harm reduction and dependence treatment. HIV/AIDS did not exist in 1961 or 1971. Nor did hepatitis C. Injecting drug use was not as prevalent at that time as it is today. Many drugs now used by children and young people did not exist in 1988. Far fewer children and young people were using drugs, and drugs had not become such a visible aspect of

11 Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff, Dordrecht, 1992.
12 See, for example, 'World Drug Report 2009', United Nations Office on Drugs and Crime, Vienna, 2009.

adolescents' lives. Today's world for children is very different in myriad ways. When the Convention on the Rights of the Child was adopted, the internet was still an experiment. Today various 'legal highs' may be purchased online. For the most part, however, the drug conventions and the Convention on the Rights of the Child remain stuck in the past, due to a lack of analysis of their meaning for children and young people who use drugs in the 21st Century.[13]

Children in the international drug conventions

A closer look at the texts of the drug conventions shows just how little of a focus there was on children during the drafting processes.[14] Only one of the three drug conventions specifically refers to children - the 1988 Convention Against the Illegal Traffic in Narcotic Drugs and Psychotropic Substances, which contains two mentions.[15] Neither paragraph refers to measures to address drug use among children. Instead, the provisions are indicative of the 'protection of children' as justification in drug law and policy making, while the rights and specific needs of children have been overlooked.[16]

In its preamble, the 1988 Convention expresses the drafters' deep concern about 'the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity'.[17] As a preambular paragraph with no legally binding status, this is merely a statement of concern. However, the role of the child in providing moral justification for the provisions that follow is clear. It should be borne in mind that because of the efforts of the drafters to deliver a blow to drug trafficking, this agreement became the most prescriptive and punitive of the three drug conventions.[18]

Article 3(5) of the same treaty, meanwhile, requires that,

> *The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the*

13 See Philip E. Veerman, 'The ageing of the Convention on the Rights of the Child', *International Journal of Children's Rights,* vol. 18, no. 4, 2010, pp. 585—618.
14 See generally, W. B. McAllister, *Drug diplomacy in the twentieth century: an international history*, Routledge, New York, 2000.
15 There are no mentions in any of adolescent, young people, youth or other terms. 'Minor' also appears once in the 1988 convention and is quoted here.
16 See Damon Barrett (ed), *Children of the Drug War*, New York, International Debate Education Association, iDebate Press, forthcoming 2011.
17 1988 Convention (n 4).
18 For an overview see Damon Barrett, Rick Lines, Rebecca Schleifer, Richard Elliott and David Bewley-Taylor, 'Recalibrating the Regime: The need for a human rights based approach to international drug policy', Beckley Foundation and International Harm Reduction Association, London, March 2008, pp. 18—19.

> *commission of the offences established in accordance with paragraph l*[19] *of this article particularly serious, such as:*
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> *...*
>
> *(f) The victimization or use of minors;*
>
> *(g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities*

Sub-paragraph (f) refers to the involvement of minors in the production or trafficking in drugs, while sub-paragraph (g) is related to prevention, aiming to deter sales to children. Again, there is no reference made to the situation of children who are in fact using drugs. The official commentary on the treaty sheds little further light.[20]

The fact that these are the only specific mentions of children in the drug treaties does not mean that their provisions do not apply to children. The question is *how* their provisions so apply. This is crucial given the ways in which the drug conventions have been used to justify draconian measures,[21] and the specific permission in the conventions, without explicit human rights safeguards, for States parties to take measures that are 'more strict or severe' than those described in the treaty itself.[22]

It must be borne in mind that the needs and rights of people who use drugs or are dependent on drugs were not a focus in the drafting of the drug conventions.[23] Regardless of age, the drug control conventions contain only limited provisions on treatment and

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19 'Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:
a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;
iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;':
1988 Convention (n 4) para. 3(1).

20 *Commentary on the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, United Nations, Vienna, 20 December 1988, pp. 15, 92, 93.

21 In 2007, the Constitutional Court of Indonesia used the wording of the 1988 Convention to equate drug trafficking to crimes against humanity and therefore to justify the death penalty for drug offences. Edith *Yunita Sianturi, Rani Andriani (Melisa Aprilia), Myuran Sukumaran, Andrew Chan, Scott Anthony Rush 2-3/PUU-V/2007* [2007] IDCC 16 (30 October 2007) pp. 100—101.

22 1961 Convention (n 1) art. 39.; 1971 Convention (n 3) art. 23.; 1988 Convention (n 4) art. 24.

23 McAllister (n 14) p. 5.

general requirements relating to prevention.[24] As noted by one commentator, '[T]he Single Convention of 1961 built on a trend of requiring Parties to develop increasingly punitive domestic criminal legislation' and that this 'prohibition focus of the Convention was emphasized by the minimal attention paid to the drug abuse problem'.[25]

According to article 38(1) of the 1961 Convention, States parties must take 'all practical measures' to prevent drug use and to realise the 'early identification, treatment, education, after-care, rehabilitation and social reintegration of persons involved'. However, in article 38(2) ('adequate facilities for effective treatment'), the Single Convention leaves it to the States parties themselves to develop how this treatment will be realised. These general terms are replicated word for word in article 20 of the 1971 Convention. But what would this obligation entail for children? In this respect, given the very general nature of the obligations towards people who use drugs in the drug conventions, the obligations under the Convention on the Rights of the Child, and the normative guidance from related human rights jurisprudence, are more helpful.

Drugs in the Convention on the Rights of the Child

The compartmentalisation of the United Nations is evident when it comes to the issue of human rights and drugs. In this context, it is interesting that neither the discussions at the Plenipotentiary Conference on Drug Abuse and Illicit Trafficking in Drugs in Vienna in 1987 [26] nor the 1988 UN Special General Assembly on Drugs[27] in New York were picked up in the meeting rooms of the Palais des Nations in Geneva during the drafting of the Convention on the Rights of the Child.

Drugs are explicitly mentioned only once in the Convention on the Rights of the Child. This inclusion was proposed initially by China in 1984 as an aspect of the right to health.[28] This is in itself unusual. The use of alcohol, which is a large problem among young people, did not make it into the Convention. The Convention is in fact the only core UN human rights treaty to specifically refer to drug use and the drug trade.[29]

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24 The UN Office on Drugs and Crime and the World Health Organization, among many others working professionally in the field, have developed guidance on these issues. We do not set them out here, however, as they are not focused on international legal obligations under the drug conventions or the Convention on the Rights of the Child.

25 Jay Sinha, 'The History and Development of the Leading Drug Control Conventions', Prepared For The Senate Special Committee On Illegal Drugs, Parliamentary Research Branch, Ottawa, 2001.

26 UN Department of Public Information, *Yearbook of the United Nations 1987*, Martinus Nijhoff, Dordrecht, 1992, chap. XXI.

27 United Nations General Assembly '20th Special Session, *Official Records*, 8-10 June 1998' UN Doc. No. A/S.20/PV.1-9.

28 The original formulation of the article, submitted by China in 1984, though not discussed due to lack of time, was "preventing and prohibiting the child from using drugs" discussed in the context of then article 12 on the right to health. In 1986 China suggested a new article "The States Parties to the present Convention shall take measures to prevent and prohibit children from taking drugs". United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, New York and Geneva, 2007, pp. 709 & 710.

29 See also Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000, art. 3(e); and African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, art. 28.

By placing the issue of drugs within the Convention, article 33 situates drug control, as it relates to children and young people, within a complex human rights framework. But as a provision of international law it has received little attention. It has appeared rarely in academic literature, and never (to date) has a study specifically analysed its content in detail.[30]

Within drug policy discussions, some tend to place article 33 alongside the drug conventions, as if it were part of the same system of control (an unusual role for a human rights treaty).[31] The International Narcotics Control Board, the independent treaty body for the drug conventions, refers to the article on rare occasions but equates it with prevention.[32] With the exception of some notable Concluding Observations, the Committee on the Rights of the Child has also failed to give proper focus to either the article itself or the phenomenon of drug use and dependence among children. Following a near absence of early commentaries on article 33,[33] the Committee now pays the provision greater attention. However, its Concluding Observations relating to drug use have typically been inconsistent. For the most part, the Committee's recommendations are very general, and frequently amount to mere restatements of article 33 itself.[34]

The Committee's General Comments do provide some useful guidance, the Comment on HIV/AIDS being the most useful among them in this context.[35] In it, the Committee drew attention to HIV prevention related to injecting drug use among children and young people, stating that

> *Injecting practices using unsterilized instruments further increase the risk of HIV transmission. The Committee notes that greater understanding of substance use behaviours among children is needed, including the impact that neglect and violation of the rights of the child has on these behaviours. In most countries, children have not benefited from pragmatic HIV prevention programmes related*

30 A commentary on the article by the authors is forthcoming. See also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, The Hague,1999.

31 See, for example, 'Declaration of the World Federation Against Drugs', 2008.

32 See, for example, International Narcotics Control Board, *Report of the International Narcotics Control Board for 2008*, UN Doc. No. E/INCB/2008/1, 2009, para. 35.

33 With some exceptions. See, for example, Committee on the Rights of the Child, 'Concluding Observations: Maladives' (25 May 1998) UN Doc. No. CRC/C/79/1998, para. 239.; Committee on the Rights of the Child, 'Concluding Observations: South Africa' (22 February 2000) UN Doc. No. CRC/ C/15/Add.122, para. 38).

34 See for, example the, Committee on the Rights of the Child, 'Concluding Observations: Georgia' (28 June 2000) UN Doc No CRC/C/15/ADD.124., para. 65.; Committee on the Rights of the Child, 'Concluding Observations: Surinam' (28 June 2000) UN Doc. No. CRC/C/15/ADD.130, para. 56.; Committee on the Rights of the Child, 'Concluding Observations: South Africa' (23 February 2000) UN Doc. No. CRC/C/15/ADD.122, para. 38.; Committee on the Rights of the Child, 'Concluding Observations: Grenada' (28 February 2000) UN Doc. No. CRC/C/15/ADD.121, para. 27. All state, 'In the light of article 33 of the Convention, the Committee recommends that the State party take all appropriate measures, including administrative, social and educational measures, to protect children from the illicit use of alcohol, narcotic drugs and psychotropic substances and to prevent the use of children in the illicit production and trafficking of such substances', adding general recommendations on rehabilitation and co-operation with international agencies.

35 Committee on the Rights of the Child, 'General Comment No. 3: HIV/AIDS and the Rights of the Child' (17 March 2003) UN Doc. No. CRC/GC/2003/1.

> *to substance use, which even when they do exist have largely targeted adults.*[36]

The Committee went on to provide some brief normative guidance.

> *The Committee wishes to emphasize that policies and programmes aimed at reducing substance use and HIV transmission must recognize the particular sensitivities and lifestyles of children, including adolescents, in the context of HIV/AIDS prevention. Consistent with the rights of children under articles 33 and 24 of the Convention, States parties are obligated to ensure the implementation of programmes which aim to reduce the factors that expose children to the use of substances, as well as those that provide treatment and support to children who are abusing substances.*[37]

The Committee's most detailed and forthright Concluding Observation on this issue arose out of the periodic review of Ukraine in February 2011. The Committee expressed its deep concern 'at the increasing practice of drug injection among children, affecting in particular children in prison, children left behind by migrating parents, children in street situations, and that drug use constitutes a main reason for HIV infection', the 'lack of specialized youth-friendly services aimed at treatment and rehabilitation for these at-risk children' and the 'legal and attitudinal barriers' that impede access to such services. It went on to recommend the development of 'specialised and youth-friendly drug dependence treatment and harm reduction services for children and young people' and the amendment of 'laws that criminalise children for possession or use of drugs'.[38]

Connecting article 33 to article 24 in General Comment No. 3 the Committee clearly emphasises that drug use among children is a (public) health matter, not one of criminal law enforcement. This is consistent with the Committee's various Concluding Observations which require that children who are drug dependent be seen as victims and not criminals.[39] But even this 'victim' status is misleading. The Committee has yet to properly consider the issue of recreational drug use, which constitutes the majority of drug use among children and young people. Bearing in mind the evolving capacities principle within the Convention, always seeing the young drug user as a 'victim' fails to acknowledge the reality on the ground for many.

Some children may commit criminal acts, such as drug related acquisitive crime. Buying

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36 ibid, para. 39.
37 ibid.
38 Committee on the Rights of the Child, 'Concluding Observations: Ukraine' (3 February 2011) UN Doc. No. CRC/C/UKR/CO/4, paras. 59—60.
39 See for example, Committee on the Rights of the Child, 'Concluding Observations: Denmark' (23 November 2005) UN Doc. No. CRC/C/DNK/CO/3, para 55.; Committee on the Rights of the Child, 'Concluding Observations: Indonesia' (26 February 2004) UN Doc. No. CRC/C/15/Add. 223, para. 74.

and possessing controlled drugs may be a crime, but should we brand someone a 'criminal' for doing so? Some may be victims of neglect or exploitation, or suffering from drug dependence. Young children may be at particular risk. On the other hand, many young people are experimenting with drugs as an increasingly common aspect of adolescence. Are they 'victims'? Most young people who use drugs fall into neither (overly general) category.

Towards a contemporary view – a child rights interpretation of the drug conventions

The relationship between the drug conventions and the Convention on the Rights of the Child

The lack of attention to article 33 is especially unusual from an international law perspective as the article appears to directly refer to the international drug conventions. The relationship between the two branches of international law is therefore important and requires elaboration.

The first question that must be answered is whether the three international drug conventions are, indeed, 'relevant international treaties' for the purposes of article 33. The question is simply answered in the affirmative. During the drafting process the World Health Organization explicitly stated that the relevant international treaties were the 1961 Single Convention and the 1971 Psychotropics Convention.[40] These treaties schedule hundreds of 'narcotic drugs and psychotropic substances', for the purposes of article 33.[41]

These two treaties clearly qualify. The 1988 Convention had not been adopted when the CRC was being drafted, however, and the draft of the 1988 Convention was also never referred to, so the situation in this regard is not so clear cut. The 1988 Convention schedules precursor chemicals rather than narcotic drugs and psychotropic substances, although some such chemicals are also consumed.[42] It would appear to make sense that the 1988 Convention is now also a relevant international treaty, despite its adoption in the years after the drafting process (but just prior to the adoption of the CRC). Its inclusion in article 33 requires the recognition that the Convention on the Rights of the Child is open to changes in the international framework of drug control, through the creation of new treaties and through older ones being superseded. This is consistent with the wording which does not refer to any individual treaty explicitly.

The second question is what is the role of the drug conventions, as the relevant international

40 This was already in the period of the technical review of the Convention on the Rights of the Child in 1989, when the Working Group determined which recommendations to accept. See UN Doc. No. E/CN.4/1989/WG.1/CRP.1, p. 37). See also, *Legislative History of the Convention on the Rights of the Child* (n 28) pp.709—712.

41 For the lists of scheduled substances see (narcotic drugs) http://www.incb.org/pdf/forms/yellow_list/48thedYL_Dec_08E.pdf; and (psychotropic substances) http://www.incb.org/pdf/e/list/green.pdf (accessed 10 January 2011).

42 The full list is available at http://www.incb.org/pdf/e/list/red.pdf (accessed 10 January 2011).

treaties, within article 33? Looking at the provision, there are two potential roles for the drug conventions. The first is *normative* and indicates that the drug conventions set out the kinds of measures envisaged by the Convention on the Rights of the Child in order to protect children from drugs. Such a reading would be as follows:

> *States Parties shall 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.*

The second role may be termed *subjective* - identifying the subject matter from which the child should be protected. Here the drug conventions are the reference point for the substances that are being referred to, and what qualifies as an 'illicit use' of those substances. That reading would be:

> *States Parties shall 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.*

The latter reading is clearly the more logical in the context of the Convention on the Rights of the Child. Indeed, the former reading would have had the effect of binding States parties to the CRC to measures in unidentified drug treaties to which they may not have been parties. There remain today a number of States parties to the Convention on the Rights of the Child that have not yet ratified the one or more of the drug conventions.

This is an important clarification. It means that the provisions of the drug conventions are not the sole reference point for what are the 'appropriate measures' being referred to in article 33. This interpretation is supported by the fact that the Framework Convention on Tobacco Control (FCTC)[43] may now also be a 'relevant international treaty' under the terms of article 33. As the 1988 Convention demonstrates, the Convention on the Rights of the Child is open to the inclusion of new international instruments. This is supported by article 41 of the Convention on the Rights of the Child, which refers to other instruments of international law more conducive to the realisation of the rights of the child, and which envisages new agreements arising. At the time of drafting the Convention there was no international treaty on tobacco. However, since that time the FCTC has been adopted and

43 'Framework Convention on Tobacco Control' (21 May 2003) Adopted unanimously by the 56th World Health, resolution 56.1.

has amassed 172 States parties.[44]

It would appear that, like the 1988 drug convention, the Framework Convention is today a 'relevant international treaty' for the purposes of article 33, especially as it contains specific reference to the Convention on the Rights of the Child in its preamble. While this means tobacco is equated with other dangerous drugs in article 33, it is not controlled under the Framework Convention in the same way as those drugs scheduled under the 1961, 1971 and 1988 drug treaties. Rather, the Framework Convention adopts a public health-based approach to tobacco control, and does not prohibit its sale, transport or possession. Instead, the Framework Convention imposes a system of legal regulation and control with specific protections for children (or 'minors').

This illustrates that the framework of the drug conventions does not represent the only way to protect children from harmful drugs, but rather reflects the current international consensus around specific substances. As such, no specific paradigmatic approach to drugs adopted in other treaties is explicitly enshrined in the Convention on the Rights of the Child, which is appropriate, as it leaves room for changes to the international drug control framework and developing scientific evidence. Indeed, the Convention on the Rights of the Child does not appear to preclude a move away from the current prohibitionist paradigm entirely, and towards one of legal regulation and control. If the three drug treaties were to be replaced in future by a new system of legal regulation and control of currently illicit drugs, then any new treaties adopted would replace the old ones as the 'relevant international treaties', with the drugs under international control and the concept of 'illicit use' developing concurrently. What would not change is the over-riding paradigm of child rights.

Introducing a child's rights approach to the interpretation of the drug conventions

The drug treaties and the Convention on the Rights of the Child operate concurrently, not in a vacuum from each other.[45] The drug conventions represent the current consensus on the broad controls to be adopted over certain substances, are binding of themselves and enjoy near universal ratification. This has relevance for the reading of article 33. But the drug conventions are not self-executing and many of their provisions are very broad. Some issues of relevance to children and drug use are not covered. In addition, each of the drug conventions permits States parties to take measures more strict or severe than those described within the relevant instrument.

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44 World Health Organization, 'Parties to the WHO Framework Convention on Tobacco Control' http://www.who.int/fctc/signatories_parties/en/index.html (accessed 10 December 2010).

45 International Law Commission 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi' (13 April 2006) UN Doc. No. A/CN.4/L.682, para. 120.

When it comes to children and young people who use drugs, the Convention on the Rights of the Child must be considered *lex specialis* for determining what are 'appropriate measures'. This requires an interpretation of the drug conventions in line with concurrent Convention obligations. This is consistent with the role of international human rights law as a check and balance against state law and policy, the status of human rights in the UN Charter (articles 1 and 55), and the fact that the Convention on the Rights of the Child contains *jus cogens* norms such as freedom from torture. The alternative would mean that child rights must be read so as to comply with drug control obligations, which would appear wholly contrary to the human rights framework. It would seem to be the case, therefore, that in the relationship between the children's right convention and the drug conventions, the role of the Convention on the Rights of the Child is considerably stronger.[46]

Below are three examples whereby provisions or aspects of the drug conventions relating to drug use must be read in the light of the Convention on the Rights of the Child.

Drug dependence treatment - As noted above, articles 38 of the 1961 Convention and 20 of the 1971 Convention require States parties to put in place drug dependence treatment for those in need.[47] If this obligation is to have relevance to children, and if their rights are to be respected, protected and fulfilled, it must be read in the light of the Convention on the Rights of the Child.

Early efforts of treatment of adolescents relied on adult models.[48] In this field some modest progress can be reported.[49] But as stated by Trivedi, in a statement intended for a North American audience but which might also be valid for other parts of the world, 'What is most amazing about the issue of substance abuse in kids is how little is done, at the level of training programs as well as in treatment programs, to help diagnose and treat this population…The remarkable lack of appropriate treatment programs…is shocking.'[50]

The Convention on the Rights of the Child imposes both positive and negative obligations on States parties. Looking at positive obligations, for example, article 24 (the right to health) would require that any such treatment measures be available, accessible, acceptable

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46 It could be argued that the drug conventions are 'more conducive to the realization of the rights of the child' for the purposes of article 41 of the Convention on the Rights of the Child. However, this seems a difficult case to make given the sheer absence of human rights norms within the drug conventions and the lack of attention to children and young people.

47 The then outgoing Executive Director of the UN Office on Drugs and Crime, Antonio Maria Costa, stressed this in his foreword to the *World Drug Report 2010* . See UN Office on Drugs and Crime, *World Drug Report 2010*, UN Office On Drugs and Crime, Vienna, p. 4.

48 Randolph Muck, Kristin A. Zempolich, Janet C. Titus, Marc Fishman, Mark D. Godley And Robert Schwebel, 'An Overview of the Effectiveness of Adolescent Substance Abuse Treatment Models', *Youth and Society*, 2001.; M. L. Dennis, et al., 'The Need for Developing Adolescent Treatment Models' in *Adolescent Substance Abuse Treatment in the United States: Exemplary Models from a National Evaluation Study*, eds. S. J. Stevens and A. R. Morral, Hawthorn Press, New York, 2003.

49 Yifrah Kaminer, 'Alcohol and Drug Abuse: Adolescent Substance Abuse Treatment: Where DoWe Go From Here?', *Psychitatric Services*, vol. 52, 2001, pp. 147—149.

50 H. K. Trivedi, 'The Elephant in the Room', *Child and Adolescent Psychatric Clinics of North America*, vol. 19, no. 3, 2010, pp. xiii—xiv.

and of sufficient quality.[51] This, in turn, would demand that they be suited to the specific needs of children and young people and based on scientific evidence and best practice. As drug dependence does not often exist in isolation from other issues, including mental health (co-morbidity), the Convention's emphasis on the child's sense of dignity and worth offers a framework for comprehensive child policy in a manner that is consistent with the promotion of mental health.[52]

When engaging the negative obligations, the treatment must not result in abuses of the rights of the child. This should go without saying, but there are in fact many examples of children being abused in the name of drug treatment, being detained arbitrarily, forced to work and subjected to various forms of cruel inhuman and degrading treatment.[53] These measures would of course violate numerous articles in the Convention, but are not necessarily prohibited by the drug treaties if read in isolation due to the absence of human rights norms within their provisions. Article 25 (child's right to periodic review of treatment[54]) aims to address this type of situation by preventing the continuation of an undesired situation, while article 37 (reflecting a norm of *jus cogens*) strictly prohibits torture or cruel inhuman or degrading treatment or punishment.

Harm reduction - Harm reduction is an area of practice, science and policy that has been proven to reduce the health and social harms of drug use. However, harm reduction has until recently received little attention in international law, or in the recommendations of the Committee on the Rights of the Child (as it relates to children and young people).

Both the drug conventions and the children's rights convention are silent on harm reduction.[55] This is inevitable, as harm reduction as policy and practice has really only emerged in the last two decades, mostly in the field of HIV prevention.

Whether harm reduction is permitted under the drug conventions remains contested, albeit by a small minority.[56] The International Narcotics Control Board weakly supports aspects of harm reduction such as needle and syringe exchange and opioid substitution therapy,[57] but

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51 UN Committee on Economic Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc. No. E/C.12/2000/4, para. 12.

52 Gary B. Melton, 'In Search of the Highest Attainable Standard of Mental Health for Children,' *Child Welfare*, vol. 89, no.5, 2010.

53 See, for example, Human Rights Watch, *Skin on the Cable: The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia*, Human Rights Watch, New York, 2010.

54 Which itself should now be read in conjunction with the 'Principles for the protection of persons with mental illness and the improvement of mental health care' adopted by the General Assembly, 17 December 1991, UN Doc. No. GA/RES/46/119.

55 'Harm Reduction' refers to policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of licit and illicit psychoactive drugs without necessarily requiring cessation. The harm reduction approach to drugs is based on a strong commitment to public health and human rights.

56 See Alison Crocket, 'The Function and Relevance of the Commission in Narcotic Drugs in the pursuit of Humane Drug Policy (or the ramblings of a bewildered diplomat', *International Journal on Human Rights and Drug Policy*, vol. 1, 2010.

57 See, for example, International Narcotics Control Board, *Report of the International Narcotics Control Board for 1993*, UN Doc. No. E/INCB/1993/1, chap. 1

is antagonistic towards others such as safer crack kits and safe consumption rooms.[58] The Board considers the latter two to be in breach the drug conventions, although there is little in the way of legal argument to support this.[59]

Russia claims that opioid substitution therapy is not permitted under the drug conventions, and has banned such treatment until 2020. Medical uses of controlled drugs, however, are not only permitted but protected under the drug conventions. The best that can be said is that harm reduction is discretionary under the drug conventions. Banning harm reduction is not prohibited.

Conversely, that harm reduction is now a recognised requirement of the right to health of people who use drugs is clear. This has been supported by the current and former Special Rapporteurs on the right to health,[60] by the Human Rights Council[61] and consistently by the UN Committee on Economic Social and Cultural Rights.[62] In 2010, that Committee explicitly called for youth focused harm reduction, and connected it also to the right to benefit from scientific progress and its applications. The Committee called on the Mauritius to, 'Remove age barriers to accessing opioid substitution therapy and develop youth-friendly harm reduction services tailored to the specific needs of young people who use drugs.'[63]

In its General Comment on HIV/AIDS cited above, the Committee on the Rights of the Child appears to support this conclusion. In 2009, the Committee also recommended that Sweden ensure 'the provision of necessary evidence-based support, recovery and reintegration services to all children affected by substance abuse...aimed at effectively reducing the harmful consequences of such abuse'.[64] Most recently, the Committee in 2011 explicitly called for 'specialised and youth-friendly drug dependence treatment and harm reduction services for children and young people'.[65] It is therefore clear that while the harm reduction for children and young people may be optional under the drug conventions, it is an obligation under the Convention on the Rights of the Child and Covenant on Economic,

58 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2009*, UN Doc. No. E/INCB/2009/1, para. 278.
59 See UN Drug Control Programme Legal Affairs Section, 'Flexibility of Treaty Provisions as Regards Harm Reduction Approaches'(30 September 2002) UN Doc. No. E/INCB/2002/W.13/SS.5 (Restricted). This advice was requested by the INCB but aspects of it ignored. See paras. 21—28 on safe injection rooms.
60 Human Rights Council, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Mission to Sweden' (28 February 2007) UN Doc. No. A/HRC/4/28/Add.2, para. 60.; Human Rights Council, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover' (6 August 2010) UN Doc. No. A/65/255, paras. 50—61.
61 Human Rights Council, 'The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)' (22 October 2009) UN Doc. No. A/HRC/RES/12/27, para. 5.
62 Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Tajikistan' (4 November 2006) UN Doc. No. E/C.12/TJK/CO/1, para. 70.; Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Ukraine' (4 January 2008) UN Doc. No. E/C.12/UKR/CO/5, paras. 28, 51.; Committee on Economic, Social and Cultural Rights, 'Concluding Observations: Poland' (2 December 2009) UN Doc. No. E/C.12/POL/CO/5, para. 26.
63 Committee on Economic Social and Cultural Rights, 'Concluding Observations: Mauritius' (21 May 2010) UN Doc. No. E/C.12/MUS/CO/4, para. 27(c).
64 Committee on the Rights of the Child, 'Concluding Observations: Sweden' (12 June 2009) UN Doc. No. CRC/C/SWE/CO/4, para. 49.
65 Committee on the Rights of the Child (n 38) para. 60(a).

Social and Cultural Rights.

But the above relates primarily to problematic drug use and HIV prevention. The drug conventions require the limitation of drug use to solely medical and scientific purposes. For the most part, the response to this has been to criminalise drug use or possession for personal use. Most young people who use drugs are not problematic users, but experimental or recreational, as noted above. The majority of young people transition out of these behaviours and most without significant health harms. The International Narcotics Control Board sees no room for tolerance on this, and the Committee on the Rights of the Child has yet to address recreational drug use, such as club drug use, and the various harm reduction measures that can mitigate the risks associated with it. Taking into account articles 13 and 17 of the Convention on the Rights of the Child, children and young people at the very least have the right to appropriate, confidential information (for example via telephone help lines and e-health projects) on what drugs they may be using, and what the risks are in order to help protect them from drug related harms.

Would the Committee on the Rights of the Child encourage a more tolerant approach if this is conducive to the fulfilment of the right to health? It appears so. In its Concluding Observations on Ukraine, the Committee explicitly called for the decriminalisation of children who use or possess drugs.[66] But far more discussion must be had by the Committee on this topic.

Access to essential controlled medicines – Some drug use is beneficial. The drug conventions contain dual obligations to reduce supply and demand for illicit purposes and to ensure access to drugs for medical and scientific purposes.

The International Narcotics Control Board operates an estimates system under the 1961 Convention whereby States parties must report on controlled drugs required for medical and scientific purposes to ensure that adequate quantities are imported.[67] This is vital given that the 1961 convention covers drugs such as morphine.

It is clear, however, that the latter obligation is considerably weaker. Its strongest affirmation found in the 1961 Convention is in the preamble, and therefore not binding (although it does provide important context for the purpose and importance of the estimates system and the protection of medical uses).[68] The 1971 Convention merely states that access to psychotropic

66 ibid, para. 60(b)
67 See Single Convention (n 1) arts, 12, 19.
68 ibid, preamble. 'Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs
for such purposes'

substances for medical purposes should not be unduly restricted.[69] This is an issue the INCB has taken up, however, reasserting this obligation.[70] Nonetheless, overly restrictive narcotics laws and 'scare messages' about these drugs are known to contribute to the lack of access to such medicines for children in need.[71]

Approximately 80% of the world's population has insufficient access, or no access at all, to opiates for pain relief.[72] This includes millions of children in need of palliative care. A child rights-based analysis, taking into account the best interests of the child (in this case children in need of such medicines), the right to life survival and development, the right to health, and freedom from cruel, inhuman and degrading treatment would serve to strengthen this latter obligation.[73] Indeed, in 2011, the Committee on the Rights of the Child recognised that palliative care for children is related to articles 6 and 24 of the Convention, and recommended that Belarus 'establish a funding mechanism for the provision of palliative care for children and support the palliative care services provided by non-governmental organizations'.[74] While the Committee has yet to address the issue of access to essential medicines for palliative care specifically, it would appear sensible that the Convention requires that laws and policies aimed at addressing recreational use and drug trafficking do not impede access to essential medicines for children.

Each of these areas requires further study, as do others not covered here relating to other aspects of drug control. In particular, what do article 40 of the Convention on the Rights of the Child and juvenile justice standards have to say about the penal provisions of the drug conventions relating to children who are drug dependent? Article 3 of the 1988 Convention requires the criminalisation of possession of controlled drugs for personal use subject to constitutional limitations. What does this mean for countries where the Convention on the Rights of the Child or child rights provisions based on it have been incorporated into the national constitution or those in monist systems whereby international treaties are incorporated into national law? Is the criminal law an appropriate basis for addressing drug use among children? There is room for decriminalisation in the drug conventions. The INCB has been inconsistent in its view on this, accepting it in Portugal but criticising constitutional decisions elsewhere.[75] This is a very important discussion given the number

69 1971 Convention (n 3) preamble.
70 International Narcotics Control Board, *Report of the International Narcotics Control Board for 1999*, UN Doc. No. E/INCB/1999/1, 1999, chap. I.
71 For example, Human Rights Watch, *Needless pain: Government failure to provide palliative care for children in Kenya*, Human Rights Watch, New York, 2010, which includes a description of the impact of narcotics laws on access to controlled medicines for pain relief.
72 Mary Ann Overland, 'Morphine Remains Scarce for pain Sufferers Worldwide', *Time*, 7 June 2010.
73 Diederik Lohman, Rebecca Schleifer and Joseph Amon, 'Access to pain treatment as a human right' *BMC Medicine*, vol. 8:8, 20 January 2010.
74 Committee on the Rights of the Child, *Concluding Observations: Belarus*, UN Doc No CRC/C/DNK/4, 4 February 2011, para 56.
75 Contrast the Board's view on Portugal (International Narcotics Control Board, *Report of the International Narcotics Control Board for 2004*, UN Doc. No. E/INCB/2004/1, 2005, para. 538) with its views on Argentina, Brazil and Mexico (International Narcotics Control Board, *Report of the International Narcotics Control Board for 2009*, UN Doc. No. E/INCB/2009/1, 2010, para. 453.)

of children who come in contact with the criminal justice system due to drug use and drug related crime.[76]

Conclusion: Towards a child rights based approach

The child's rights based approach aims to integrate human rights mandates for children with ideas about child wellbeing. In the context of drugs and drug use, a child rights approach must:

- apply human rights standards, that is, holding States parties accountable, including for adequate budgetary allocation
- respect the right to accurate and objective information
- empower children 'who are capable of forming his or her own views' and encourage participation (taking into account the evolving capacities of the child)
- ensure non-discrimination
- take the best interests of the child as a primary consideration,[77] meaning that 'whatever decisions are taken that affect children's lives the impact of that decision must be assessed...that the interests of others – such as parents, the community or the State – should not be an overriding concern, although they may have an influence on the final outcome of the decision'.[78]

Depending on their circumstances, some children have the right to special care and assistance. Adolescence in general is a period of vulnerability. Among children and young people, it is essential to also know which children are especially at risk.[79] Adequately disaggregated data and high quality studies are an important part of identifying these individuals and groups.

Promoting the values of the Convention on the Rights of the Child can help public health, mental health, drug dependence treatment and harm reduction professionals, as well as young people, to advocate for necessary policy changes. Based on the content of most of its Concluding Observations, however, the Committee on the Rights of the Child is not

76 See, for example, Eurasian Harm Reduction Network, *Young people and injecting drug use in selected countries of Central and Eastern Europe*, Eurasian Harm Reduction Network, Vilnius, 2009.
77 See UN Committee on the Rights of the Child, 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child' (1 July 2003) UN Doc. No. CRC/GC/2003/4.
78 Save the Children Sweden, *Child Rights Programming, How to Apply Rights-Based Approaches to Programming: A Handbook for International Save the Children Alliance Members*, Stockholm/Lima, Rädda Barnen, 2005.
79 N. Z. Weinberg and M. D. Glantz, 'Child Psychopathology Risk Factors for Drug Abuse: An Overview', *Journal of Clinical Child Psychology* , vol. 28, no. 3, 1999, pp. 290—297.

sufficiently up to date with the state of the art of treatment methods,[80] or principles of harm reduction.[81] On the other side of the equation, the members of the International Narcotics Control Board, given their backgrounds,[82] may well be up to date on such methods, but are not experienced in human rights or child rights based approaches.

The views of the drafters of the children's rights convention and the drug conventions, meanwhile, may be persuasive, but are always over-ridden by the treaties as drafted. In the context of drug use among children and young people, this is crucial. From an epidemiological and public health perspective, what was known the those drafting the 1961, 1971 and 1988 drug conventions and those drafting the children's rights convention during the 1980s is largely irrelevant now, apart from the degree to which that knowledge may help un to understand the what the drafters wanted to achieve with these legal instruments. These are contemporary instruments of international law requiring application to drug use among today's children and young people. In order for this to happen, however, much work is required to clarify the obligations of State parties. Aside from the need for academic attention, we offer three recommendations.

First, it is now certainly time for a General Comment from the Committee on the Rights of the Child on article 33 in order to clarify state obligations under the Convention in the light of 21st century circumstances. But the knowledge and expertise of the Committee in this field would first have to be developed. A broadly collaborative day of general discussion preceding the adoption of such a comment, and, in the interim, increased, accurate information from civil society during periodic reporting would assist.

Second, a supplementary commentary on the drug conventions read in the light of the Convention on the Rights of the Child could be drafted under the auspices of the International Narcotics Control Board, the Committee on the Rights of the Child, the UN Office on Drugs and Crime, UNICEF, UNESCO, UNAIDS, the Office of the High Commissioner for Human Rights, the World Health Organization and the International Labor Organization. This close collaboration is required given the varying mandates of these agencies, the breadth of issues involved (extending beyond drug use to the involvement of children in production and trafficking), the lack of expertise in international law within

80 See for example, Y. Kaminer, et al., 'Psychotherapies for Adolescent Substance Abusers – Treatment Outcome', *Journal of Nervous and Mental Disease* , no. 186, 1998, pp. 684—690.; H. A. Liddle, 'Multidimensional Family Therapy for Adolescent Substance Abuse: Results of a Randomized Clinical Trial', *American Journal of Drug and Alcohol Abuse*, vol. 27, 2001, pp. 651—689.; H. Sumnall et al., *Fieldwork Report – Community Based Interventions for the Reduction of Substance Misue Among Vulnerable and Disadvantaged Young People*, London, Liverpool, National Collaborating Center Drug Prevention and Liverpool JMU, Centre for Public Health, 2006.

81 We refer here to the Committee as a whole. Individual members may (and some do) have this experience, which should more and more be reflected in Concluding Observations. See for example D. Puras, 'UN Committee on the Rights of the Child on quality and direction of investments in child and youth health development', presentation delivered at the 20th International Harm Reduction Conference, Bangkok, April 2009. http://www.ihra.net/files/2010/05/02/Presentation_21st_P2_Puras.pdf (accessed 20 November 2010)

82 For the Members' CVs, see http://www.incb.org/incb/en/membership_actual.html (accessed 20 November 2010).

the INCB and recent questions arising about the quality of legal advice emanating from the Office on Drugs and Crime.[83] The experiences of civil society organisations are of course vital in making any such normative guidance relevant and applicable to the realities on the ground. It should go without saying also that children and young people themselves must have a place at the table if the guidance is to be truly rights based.

Third, an interagency group at the UN could be formed around children and drugs. A model for this might be the Interagency Panel on Juvenile Justice, formerly known as the Inter-Agency Coordination Panel on Juvenile Justice, which was established by ECOSOC[84] to act as a 'coordination panel on technical advice and assistance in juvenile justice.' The work of the Panel is guided by the Convention on the Rights of the Child, by international standards and norms on juvenile justice and by other relevant instruments. The objective of this Panel is to facilitate and enhance country and global level coordination on technical advice and assistance in juvenile justice. While it is not even in discussion as yet, such a panel on children and drugs could contribute greatly to our understanding to child rights based approaches to this complex issue of global concern.

83 'New drug law under fire', *Phnom Penh Post*, 21 December 2010.
84 Economic and Social Council of the United Nations, 'Administration of Juvenile Justice' (21 July 1997) res. 1997/30.