Drugs and the Convention on the Rights of the Child
Fragmentation, Contention and Structural Bias
Damon Barrett

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Abstract
Responding to the harms caused by drug use and the drug trade is one of the most pressing and interdisciplinary challenges of our time, within which the protection of children has become central. But there has been relatively little academic attention to the international legal dimensions of drug policy, despite the existence of a dedicated international legal framework on the issue and a range of other treaties that include drugs in some way. This has begun to change in recent years as attention to human rights in drug policy has increased, and as calls for reform to the extant international legal regime of drug control have grown. This thesis adds by focusing on the only core UN human rights treaty to refer to drugs – the Convention on the Rights of the Child (CRC). Based on archival research, extensive document analysis, participant observation at UN forums, and semi-structured interviews, the thesis explores how the child’s right to protection from drugs under Article 33 of the CRC has been understood, and what the relationship has been between the CRC and the UN drug control conventions. Adopting a critical approach to child rights studies, it offers a number of additions to the growing literature on international law and drug control:

• A detailed history of the parallel drafting of the international drug control and child rights legal regimes in the twentieth century, tracing their substantive detachment over time until their political convergence to the height of the ‘war on drugs’ in the late 1980s;
• A discussion of the CRC and the UN drugs conventions set against the background of the fragmentation of international law, highlighting a degree of surface level coherence yet important inconsistencies of background theory and ethos;
• An analysis of contemporary debates among scholars, activists, States and UN mechanisms on the relationship between human rights, child rights and drug control, demonstrating the potential for fragmentation playing out in real-world contentions;
• A comprehensive review and critique of the periodic reporting process to the Committee on the Rights of the Child from 1993-2015 through the theoretical lens of ‘structural bias’, showing that while the CRC may offer an alternative legal lens through which to approach drug policy, the process has tended to lean in favour of a restrictive and often punitive status quo.

Keywords: child rights, drug control, Convention on the Rights of the Child, structural bias, critical child rights studies.

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Department of Law
Stockholm University, 106 91 Stockholm
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D.

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1. Introduction

‘A treaty is a disagreement reduced to writing.’
Philip Allott\textsuperscript{1}

‘Ours is not an abstract place of enduring ethics, but a concrete place, in which particular people, regimes, and institutions contest what will be spoken, legitimated, and denounced.’
David Kennedy\textsuperscript{2}

1.1 Overview and Context

1.1.1 Human Rights and Drug Control

For many decades governments have struggled to respond to drug use, addiction and the drug trade. But despite considerable effort and expense it is repeatedly acknowledged in political consensus documents that international drug control has been beset by problem-solving deficits.\textsuperscript{3} Taking into account fluctuations between and within States over time, and between substances over time, the aggregate picture shows that drug use, production and trade have not decreased. A review conducted in advance a 2009 UN summit on drug policy, for example, found ‘no evidence that the global drug problem was

\textsuperscript{1} P. Allott, ‘The Concept of International Law’, 10 European Journal of International Law, 1999, pp. 31-50, at 43.


reduced during the period from 1998 to 2007. A similar study up to the present date has not yet been conducted, but global and national data on drug use and drug related harms indicate little change. Globally, approximately one in twenty people aged 16-64 use illicit drugs. Across Europe, a quarter of the population, approximately 80 million people, have used illicit drugs at some point. In the US, in 2012, 23.9% of 18 to 20 year olds reported using an illicit drug in the past month. Almost one in ten of the overall population used drugs in the past month. In Central and Eastern Europe and in parts of Asia, the sharing of contaminated needles is the primary driver of HIV transmission. At the time of writing North America is in the grips of an opioid crisis with considerable cost to human life. Almost two people per day die from overdose in Sweden. Meanwhile, opium cultivation and production in Afghanistan hit record highs in 2017. And it is estimated that 83% of the world’s population live in countries, overwhelmingly in the developing world, with low to non-existent access to controlled medicines (such as morphine) for

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moderate to severe pain.\textsuperscript{12} Ensuring such access, however, is one of the aims of the international drug control system.

By one view this is plainly a failure.\textsuperscript{13} By another, however, what could have been a problem of the magnitude of tobacco or alcohol has been ‘contained’.\textsuperscript{14} Far fewer people use illicit drugs than either alcohol or tobacco, with problematic drug use being estimated to affect only around 5% of the global population.\textsuperscript{15} That disagreement between failure and a form of success gets to the heart of the matter. Drug policy is an often heated debate about the appropriate legal and policy responses to a complex problem traversing health, crime, security and, of course, borders. These range from free market liberalisation at one end of a spectrum of options to stringent prohibitions at the other.\textsuperscript{16} In the past decade, moreover, the human rights issues raised by these debates have become more and more prominent. There is almost no area of the human rights framework that is unaffected, partially because of the breadth of issues raised by drug control, but also because of the expansive content and openness of human rights law. Access to essential medicines, for example, is a recognised core minimum requirement of the right to health, but is also seen by some as a component of protection against cruel, inhuman or degrading treatment.\textsuperscript{17}

\textsuperscript{13} Global Commission on Drug Policy, War on Drugs: Report of the Global Commission on Drug Policy, 2011 (the Commission includes the former Secretary-General of the United Nations, Kofi Annan, the former UN High Commissioner for Human Rights, Louise Arbour, and multiple former heads of state).
\textsuperscript{15} Ibid.
People with drug problems have the right to available, accessible, acceptable and sufficient quality health services. Alternative development programmes to help farmers move from illicit to licit crops is related to a host of rights, including to an adequate standard of living. Drug traffickers, of course, pose a considerable threat to human rights. But in responding to drug problems and the drug trade we see many other human rights concerns. Over incarceration is a considerable problem due to rates of imprisonment and the length of sentences for drug offences. Thirty-three States retain the death penalty for drug offences. Hundreds of thousands of people are detained in drug detention centres, without due process and subjected to a variety of abuses. At the most extreme end, by the end of 2017 more than 12,000 people had been killed in the drugs crackdown in the Philippines that began in mid 2016. There is, of course, also considerable stigma associated with drug use, with attendant problems for users. Religious and cultural production and uses of coca, opium and cannabis are banned, thereby engaging a range of rights. The human rights consequences of failure in controlling drugs and the drug trade are

24 This is recognised in the official commentary to the Convention on Psychotropic Substances, 1971, which recommends a ‘change of the environment’ to try to address this stigma for the ‘former abuser’ as part of a social reintegration process. It does not mention the legal environment, nor current users. Commentary on the Convention on Psychotropic Substances, UN Doc No E/CN.7/589, 1976, p. 333. On stigma and human rights, see chapter 4.
25 Relating to cannabis use among the Rastafari, for example, see Prince v President, Cape Law Society and Others [2002] 2 SA 794 (Supreme Court); Prince v South Africa, Communication No 1474/2006, UN Doc No CCPR/C/91/D/1474/2006, 14 November 2007.
therefore part of the discussion. But so too are the human rights costs of achieving success. What, in other words, is permissible or acceptable, from a human rights perspective, in pursuit of drug control objectives?

In 2016 a UN General Assembly Special Session on the World Drug Problem was held, the third Special Session on the topic. 26 Throughout the two-year preparatory period and during the event, a growing minority of States challenged international prohibitionist approaches to drug control on human rights grounds. In the words of New Zealand, progress had been ‘hamstrung by a grossly outdated and punitive approach’. 27 For Uruguay, the international community had ‘unleashed an absurd war against substances…to eradicate all crops and to establish the dystopia of a drug-free world’, with considerable human rights costs. 28 Submissions from some UN entities with human rights mandates were also critical. The UN Development Programme, in particular, issued a strong critique of drug control from a human rights and development perspective. 29 Another report from the High Commissioner for Human Rights recommended, alongside other issues, that indigenous people be permitted to practice their cultures with regard to illicit plants. This was a direct challenge to international drug control law, which had banned such practices in 1961. 30 Most, however, defended the existing approaches, and some even promoted repressive measures, in pursuit of health and wellbeing. 31 As the Philippines

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27 UNGASS OR 1 p. 5.
28 UNGASS OR 2, pp. 6 and 7.
29 UN Development Programme, Addressing the Development Dimensions of Drug Policy, UNDP, 2015. ‘Evidence shows that in many parts of the world, law enforcement responses to drug-related crime have created or exacerbated poverty, impeded sustainable development and public health and undermined human rights of the most marginalized people’ at 6.
30 See chapters 2 and 3 and Annex 1.
31 China’s statement promoting detention as forced treatment is a good example. ‘In the past decade…there has been a total of 950,000 cases of community-level treatment and rehabilitation and 1.21 million cases of compulsory isolation… We stand ready to work with the inter-
delegation announced, ‘our nation’s desire to win the war on illegal drugs is unwavering…we remain committed to waging that war’.\textsuperscript{32} Progress, it was claimed, was ‘a result of aggressive measures undertaken by our law enforcement agencies.’\textsuperscript{33} All of its efforts, it continued, were in full conformity with the UN drugs conventions.\textsuperscript{34}

This divide was well demonstrated by the death penalty, which was by far the most prominent issue in the entire event and has become a centrepiece of human rights discussions in drug control (we return to it in chapters 4 and 6). While the final ‘Outcome Document’\textsuperscript{35} omitted any mention of capital punishment, many States issued strong condemnations of the practice when explaining their votes.\textsuperscript{36} States retaining the death penalty, however, robustly defended capital drug laws, with human rights being seen as the politicisation of the process and ‘unnecessary’ for collective decision-making.\textsuperscript{37} Alongside sovereignty arguments, they argued that it was drug traffickers (‘merchants of death’\textsuperscript{38}), not States, that ‘enforce the death penalty’ on their victims.\textsuperscript{39} Capital punishment was ‘proportionate to the crime because of the crime’s extremely devastating consequences.’\textsuperscript{40}

As these debates have proliferated within the UN, the suspicions of many Member States about the potential influence of human rights mechanisms on national community to build partnerships for mutual benefit, to advance the cause of drug control and to work tirelessly for the health, safety and well-being of mankind.’ UNGASS OR 1, pp. 21 and 22.
\textsuperscript{32} UNGASS OR 3, p. 6.
\textsuperscript{33} Ibid p. 7.
\textsuperscript{34} Ibid p. 6. This, however, predated the 2017 crackdown. On the conventions, see further below, chapters 2 and 3 and Annex 1.
\textsuperscript{36} The death penalty appeared across all plenary meetings of the Special Session. See UNGASS OR 1-6.
\textsuperscript{37} UNGASS OR 3, p. 11 (Iran)
\textsuperscript{38} Ibid, p. 10. (Iran)
\textsuperscript{39} UNGASS OR 1, pp. 14 and 15 (Indonesia).
\textsuperscript{40} UNGASS OR 6, p. 18 (Co-operation Council of the Arab States of the Gulf).
the traditionally self-contained drug control regime have become apparent. In 2008 the first human rights resolution ever adopted at the UN Commission on Narcotic Drugs was met with strong objections, with various delegations chal-

lenging the legitimacy of any role for the UN human rights system in drug policy.\(^{41}\) If their concern was that such mechanisms would pose a threat to the status quo, then these were not unfounded, as indicated by the UNDP and OHCHR reports above. Indeed, in 2010 the UN Special Rapporteur on the Right to Health issued a thematic report to the General Assembly calling for wide drug policy reforms, including to the UN drug control system and the treaties it oversees.\(^{42}\) Here we see evidence of the tensions between UN agen-
cies and offices with differing mandates. The UN Secretariat (UN Office on Drugs and Crime, UNODC) and the treaty body for the UN drugs conventions (the International Narcotics Control Board, INCB) issued a rebuttal to the Special Rapporteur, a rarity in the UN system. The statement asserted that ‘The aim of the UN drug control mechanisms is to protect the global population, and youth in particular, from becoming addicted to narcotic drugs - i.e. the protection of basic human health...’\(^{43}\) The Special Rapporteur, they said, had misunderstood and misinterpreted the treaties, which advanced rather than hindered human rights.\(^{44}\)

The INCB was not new to such disagreements.\(^{45}\) OHCHR’s view of indige-
nous uses of illicit plants, for example, was earlier expressed by the UN Per-
manent Forum on Indigenous Issues, which recommended amendments to international law to allow for traditional uses. The INCB had recommended instead the abolition of those practices. The UNODC, on the other hand, is conflicted internally on this matter. Its submission to the 2016 Special Session robustly defended the UN drug control system against human rights criticism on the basis that the system advances rather than hinders human rights. But in an earlier contribution report the UNODC had set out the ‘unintended negative consequences’ of that very system, including stigma and violence. Included among its recommendations was the need for greater attention to human rights to mitigate those consequences, much to the displeasure of some Member States. Human rights have therefore come to occupy an important role in international drug policy debates, central to an identifiable fracturing of consensus in which human rights can be deployed to challenge and defend the regime at the same time.


UN Office on Drugs and Crime, Drug Policy Provisions from the International Drug Control Conventions, UN Doc No E/CN.7/2014/CRP.5, 10 February 2014.

UN Office on Drugs and Crime, Making Drug Control Fit for Purpose: Building on the UNGASS Decade. A Report by the Executive Director, UN Doc No E/CN.7/2008/CRP.17, 2008. The author was a civil society adviser on the UK Delegation to the UN Commission on Narcotic Drugs when the paper was released. Various delegations were not pleased by the identification of structural problems with the Vienna system (Hereafter: UNODC, Fit for Purpose).

See generally, Bewley-Taylor, Consensus Fractured.
1.1.2 Why Focus on Children?

Within these debates there are very good reasons to focus specifically on children and young people.\(^{51}\) At a basic level there are serious problem-solving deficits for this age group too. ‘Monitoring the Future’, for example, has been collecting data on drug use among 10\(^{th}\), 11\(^{th}\) and 12\(^{th}\) grade students in the US since 1975. Collated data show many fluctuations and differences between regions, substances and age groups, but relatively steady overall rates of use over the years.\(^{52}\) In Europe, one in four 15-16 year olds report lifetime use of illicit drugs (i.e. having used any illicit drug at least once).\(^{53}\) Problems of drug use among younger children are also evident, if less frequent.\(^{54}\) Again, we might see this as failure, or it could be seen as containment in the light of rates of tobacco and alcohol use among the same groups.

A problem, however, is that the overall picture is unclear. Apart from these regions and other high-income countries data tend to be poor or non-existent, meaning that the situation in highly populous low and middle income countries is not well understood. Where good data have been collected there have been reasons to worry. In Ukraine, for example, it is estimated that just over 50,000 young people under the age of 19 inject drugs, and like other countries

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\(^{51}\) For the purposes of this thesis ‘child’ means everyone below the age of 18 in keeping with the definition set out in article 1 of the Convention on the Rights of the Child. However, ‘children and young people’ is often used to recognise the differences between very young children and adolescents. Elsewhere in the thesis terms such as ‘minor’, ‘adolescent’, ‘youth’ and ‘juvenile’ appear, in particular where these terms are used in quoted material.


\(^{54}\) European Monitoring Centre on Drugs and Drug Addiction, Drug Use and Related Problems Among Very Young People (Under 15 Years Old), EMCDDA, 2007.
in the region the age of initiation seems to be going down.\textsuperscript{55} On a global level, drug use among street children is also known to be very high.\textsuperscript{56}

In addition to illicit use, the medicinal and scientific uses of certain substances also require a focus on children, given the added challenges of paediatric formulations and research around childhood illness. As noted above, access to essential medicines controlled under the international drug control system is very poor. Paediatric care, however, is especially challenging.\textsuperscript{57}

Responding to these problems entails practical and legal challenges distinct from adults. Practically, there is the need to take into account physical and emotional development, behaviours and youth cultures, and the specific dynamics of the child’s living conditions. Overall data on the extent of children’s involvement in the drug trade are unavailable. But from rapid assessments and qualitative studies it is known to be a complex mix of social exclusion, poverty, drug use and other factors, all demanding targeted responses.\textsuperscript{58} Initiation into drug use at a younger age is associated with longer term dependence and other health harms requiring a focus on prevention.\textsuperscript{59} Patterns of drug use among younger people can differ greatly to those of older counterparts, both in terms of the kinds of drugs used and the ways in which they are used.\textsuperscript{60} Certain services may not be safe places for younger people. There are, in sum,


\textsuperscript{57} With regard to palliative care, see C. Knapp et al (eds) \textit{Pediatric Palliative Care: Global Perspectives}, Springer, 2012 (case studies from around the world, within which morphine access is a consistent concern).


\textsuperscript{59} For a summary of the extensive literature on prevention of drug use, see T. Babor et al, \textit{Drug Policy and the Public Good}, Oxford University Press, 2010, pp. 105-121.

\textsuperscript{60} On injecting drug use among young people see D. Barrett et al, \textit{Injecting Drug Use Among Under 18s: A Snapshot of Available Data}, Harm Reduction International 2013.
different service needs between younger and older users. Schools, meanwhile, provide a forum for intervention that is simply not relevant to adults, while children and young people can be profoundly affected by parental drug dependence in ways that adults do not experience (though obviously such affects last into adulthood).

Legally, there is the critical issue of a young person’s status as a minor. This can affect access or consent to treatment or other services (for example, needle and syringe programmes) and the operation of the criminal justice system (for example, juvenile justice systems and the minimum age of criminal responsibility). Status as a minor also engages child protection laws that do not apply to adults, and which must be applied by public bodies, those working with minors, and by researchers, which adds a further challenge to better understanding patterns and behaviours. All of the human rights situations above, moreover, also affect children, either directly or indirectly. They may be subject to interventions that raise human rights questions, from random school drug testing and the right to privacy, to compulsory drug treatment and consent to medical intervention. They may also experience indirect effects through their parents or due to wider societal issues. For example, a child of a parent who experiences chronic pain and lacks access to appropriate medications will also be affected by this gap. A child whose parent is imprisoned for drug offences (or, indeed, executed) will also be affected. Thus, any of the

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64 In Sweden, for example, the age restriction on needle and syringe programmes was 20 until 2016, when it was reduced to 18. Lag (2006:323) om Utbyte av Sprutor och Kanyler.
above situations may be viewed through a more specific child rights lens. But there is a crucial difference between adults and children with regard to human rights and drug control. Under the Convention on the Rights of the Child (CRC), States have an explicit obligation to protect children from drugs and involvement in the drug trade. The CRC, moreover, is expressly coupled to the treaties that provide the legal framework for international drug control, and which are increasingly controversial.\footnote{Bewley-Taylor, Consensus Fractured.} This sets children apart in a fundamental way from more general discussions of human rights and drug control.

1.1.3 Drugs, International Law and the Convention on the Rights of the Child

Drug control has been the subject of international law-making since before the creation of the League of Nations. Today, international drug policy is governed primarily by three multilateral treaties: the Single Convention on Narcotic Drugs 1961, as amended by its 1972 Protocol (‘Single Convention’), the Convention on Psychotropic Substances 1971 (‘1971 Convention’), and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (‘Vienna Convention’).\footnote{Single Convention on Narcotic Drugs 1961, 520 UNTS 204 (as amended by the Protocol Amending the Single Convention on Narcotic Drugs 1972, 976 UNTS 3); Convention on Psychotropic Substances 1971,1019 UNTS 175; Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, UN Doc No E/CONF.82/15, reprinted in 28 ILM 493.} Overall the treaties put in place a system of strict regulation of controlled substances for medical and scientific purposes alongside broad prohibitions on recreational and traditional uses, buttressed by the criminalisation of the entire supply chain.\footnote{See chapters 2 and 3.} National laws can vary from the most excessively punitive to those that more liberal, as we shall see in later chapters. There are, moreover, various flexibilities and amendment processes built into the system allowing for change. But while there are limits
on liberal reforms within the drugs conventions, there are none on taking more stringent measures.

Many other areas of international law are inevitably engaged. Drug trafficking, for example, closely relates to the Convention on Transnational Organised Crime.\(^{68}\) It is included in the Convention on the Law of the Sea\(^{69}\) and is similarly relevant to international civil aviation\(^{70}\) and conventions of the Universal Postal Union.\(^{71}\) With various efforts to eradicate illicit crops, and the environmental costs of illicit production, it also engages environmental law.\(^{72}\)

Drug policy further intersects with human rights law in many ways, as we have seen. It is specifically mentioned in the European Convention on Human Rights,\(^{73}\) potentially affects the status of refugees,\(^{74}\) and affects a variety indigenous rights.\(^{75}\) For some States and commentators, moreover, drug trafficking should be included among crimes against humanity.\(^{76}\) Our focus, however, is on the child’s right to protection from drugs.

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\(^{71}\) Article 18(1), Vienna Convention.


The UN Convention on the Rights of the Child (‘CRC’) stands alone among the core UN human rights treaties in including an explicit right to protection from drugs.\textsuperscript{77} Article 33 provides that:

‘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.’\textsuperscript{78}

This broadly framed provision was later followed by International Labour Organization Convention No 182 on the Worst Forms of Child Labour (which includes involvement in drug trade) and a regional counterpart in the form of African Children’s Charter (Article 28).\textsuperscript{79} Critically, through Article 33, the CRC is explicitly connected to the three UN drug control conventions, which are the ‘relevant international treaties’ referred to. In turn, the preamble of the Vienna Convention mirrors Article 33 by setting out States parties’ deep concern at:

‘…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.’

Both the Vienna Convention and the CRC are nearly universally ratified or acceded to, and there are no reservations on Article 33.

\textsuperscript{77} In the ECHR drug addiction is a limitation on the right to liberty of the person.
Article 33 is therefore an important human rights provision. It has no equivalent in wider human rights law. It explicitly engages and spans the relationship between human rights and drug control that has become so fraught. And the provision has taken on increased importance in contemporary drugs diplomacy. At the 61st Session of the Commission on Narcotic Drugs (CND) in March 2018, for example, the Russian Federation presented a draft resolution rooted in the CRC entitled ‘Protecting children from the illicit drugs threat’. It was by far the most lengthy and detailed resolution rooted in the CRC presented to date at the CND. The resolution explicitly raised concerns about cannabis reforms, in response to which it linked the best interests of the child (Article 3 of the CRC) and Article 33 with the extant drug control system. It was very controversial, however, and was second to last of the eleven resolutions that year to reach the negotiating floor. Negotiations at the Committee of the Whole came only after a week’s informal negotiations behind closed doors. A considerably watered-down resolution as ultimately adopted, and an informal NGO record indicates some of the controversy in the final stages. Given the closed nature of the discussions assessment is difficult. But what we can certainly take from the experience is the importance ascribed to Article 33 by some States that see it as a bulwark against building reforms, and their willingness to deploy it in this fashion. But for other States the simple association of the CRC with the existing drug control framework is unpopular in the light of contemporary policy shifts. It exemplifies the regime tensions above, but in this case a specific human rights provision is at the core.

Article 33, however, has rarely been the subject of detailed analysis. There is no General Comment from the Committee on the Rights of the Child on the

81 The author attended the 61st Session of the Commission and followed the resolution.
topic or this provision specifically (see further chapter 5). Its content remains unclear, and the relationship between the CRC and the drugs conventions has not been studied in detail by either child rights or drug policy scholars. Against the background of the wider tensions between human rights and drug control discussed above, and the specificities of issue facing children, these important gaps are the main points of departure for this thesis.

1.2 Theoretical Framework, Research Questions and Methods

1.2.1 A Critical Approach to Child Rights

Writing in 1998, in her seminal commentary on the CRC, Geraldine Van Bueren asserted that Article 33 ‘does not add significantly’\(^\text{83}\) to the UN drugs conventions. It was, however, something of a throwaway remark, conducted without much scrutiny of the content of the drugs conventions, or their relationship to the CRC. Complementarity between the two regimes was assumed and the right itself went unquestioned. Moreover, being a doctrinal work, the book did not address the possibility that the inclusion of protection from drugs in a human rights treaty might ‘add’ in some way that is not clear from the face of the text.\(^\text{84}\) Van Bueren’s remark is symptomatic of the fact that, like many other areas of child rights, Article 33 is ‘barely contested terrain’.\(^\text{85}\) Perhaps this is because protecting children from drugs and involvement in the drug trade is, on the face of it, incontestable. To be sure, at all stages of the

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\(^{84}\) As Anne Orford said of her work on the responsibility to protect ‘while lawyers were right to say that the concept did not impose any new duties or obligations upon states or the international community, it could still be seen to have normative significance in a public-law sense’. A. Orford, ‘In Praise of Description’, 25 *Leiden Journal of International Law*, 2012, pp. 609-625, at 612.

drug supply chain, from production to use, there is no denying that the situation is very serious for many children. But as Simon Flacks observes, reflecting recently on the role of childhood in drug policy, ‘it is often the most self-evident of truths that demand the most focused critical attention’. Three initial observations may be made with regard to Article 33. First, even if protecting children is incontestable, drug control is deeply political and subject to heated debate. Second, implementing drug laws is not risk free, however strong the health or other rationales for doing so. Nor is implementing human rights laws, however strong the surface justification for the right in question or benevolent the regime. And third, to say that children have the right to protection from drugs is, without more, meaningless. What matters is how States understand that right, how it is implemented, and how this is responded to by the relevant monitoring mechanisms.

With these observations in mind, a recent criticism of child rights scholarship and activism in general relates to its perceived preoccupation with the ‘implementation gap’, or, as Wouter Vandenhole puts it, the ‘understanding of many practitioners and scholars that the main challenge for children’s rights is implementation’. The focus is rarely on the quality of the norm to be implemented, but on a perceived gap between the norm and a reality that does not yet match up to it. By this reasoning if only we implemented child rights properly, or better, children would be better protected and provided for.

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89 As Van Buuren has argued, poverty statistics show that ‘this Convention has still not been used to its full potential or fully enforced’. G. Van Buuren ‘The Committee on the Rights of the
Thus, if we only implemented Article 33 properly, or better, children would be protected from drugs. The standards themselves, however, are ‘seldom called into question.’ Concerned about this tendency in child rights scholarship, there have been recent calls for a critical approach to child rights, including towards the rights themselves. This thesis may be located within this emerging field.

Initially this research began with two questions: What is the content of the child’s right to protection from drugs? And what is the relationship between the CRC and the drugs conventions? These are typical doctrinal problem-solving questions. It would be entirely valid to argue for a certain interpretation of Article 33 of the CRC, relying on Articles 31 and 32 of the Vienna Convention.

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Child: Overcoming Intertia in this Time of No Alternatives’ in M. Langford (ed), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge University Press, 2008, pp. 569–87 at 570. See further the various contributions looking at implementation gaps in O. Cvejic Jancic, The Rights of the Child in a Changing World: 25 Years After the UN Convention on the Rights of the Child, Springer/International Academy of Comparative Law, 2016; See also, B. Milne, Rights of the Child: 25 Years After the Adoption of the UN Convention, Springer, 2015 (Arguing that the treaty has been signed and ratified but not understood or implemented, and setting out many of the economic and other reasons for this); A. Parkes Children and International Human Rights Law: The Right of the Child to be Heard, Routledge, 2015 (Making a solid case for the content of the right based on State practice, but without challenging the notion of this right from any theoretical perspective); R. B Howe and K. Covell, Education in the Best Interests of the Child: A Children’s Rights Perspective on Closing the Achievement Gap, University of Toronto Press, 2013 (A good study aimed at addressing social inequities in education. Though rooted in article 3 of the CRC, however, it does not critique the provision or the concept beyond a brief note about its vague framing).


4 To which there are of course exceptions. See, for example, B. Goldson and U. Kilkelly, International Human Rights Standards and Child Imprisonment: Potentialities and Limitations’, 21 International Journal of Children’s Rights 2, 2013 pp. 345-371 (arguing that child rights standards on this topic may legitimise the imprisonment of children).

on the Law of Treaties. One could also apply conflict rules such as *lex specialis* to come to a conclusion as to how the CRC and international drug control law should relate to each other, or to use the ‘skeleton key’ of systemic integration. 93 This, in effect, is the job of doctrinal research, for which a main goal is to achieve coherence and retain systemic order. As Malcolm Shaw puts it, ‘international law aims for harmony’. 94 This was my original intention. To harmonise. But as Eva-Maria Svensson warns, ‘the desire for coherence can also be a hindrance when dealing with problems of inequality and the practical effects of law’. 95 When the human rights effects of drug control are considered, this cannot be overlooked. In its search for coherence positivist doctrinal work may mask conceptual inconsistencies, the drivers of particular outcomes, and the political biases undergirding the status quo. In so masking contradictions, it becomes ‘apologetic’ because it ‘mediates with a bias towards the existing social or economic order’. 96 A deeper analysis of legal arguments, practices and procedures is therefore necessary, to expose inconsistencies and political biases with a view to more transformative goals. Rather than setting out an idea of the content of a right and for implementation on that basis, then, we might critique the right, its origins, how it has been understood and what, if anything, it has produced or reproduced.

96 D. Kennedy, ‘The Structure of Blackstone’s Commentaries’, 28 Buffalo Law Review, 1979, pp. 209-382, at 217. Kennedy demonstrates this with regard to the fundamentals of Blackstone’s thinking, beginning with his distinctions between basic ‘rights’ and ‘wrongs’, and how this served to ‘legitimate’ the legal system at the time. See pp. 234-255.
1.2.2 The Right to Protection from Drugs as Argumentation

For Martti Koskenniemi, the textual ambiguity with which lawyers are often so energised, and so obvious in human rights law, sits atop a far deeper level of indeterminacy that has to do with justifications for legal authority. The point of law, he argues, is that it ‘keeps in check our subjectivities while providing justification for solving social problems’. 97 This necessitates the coexistence of the demands of ‘concreteness’ (the substantive verifiability of law with reference to actions) and ‘normativity’ (the formal adherence to the law to justify actions). Both aspects, normative and concreteness, are necessary for the appearance of the law’s objectivity in taking into account ‘facts’ (what is happening on the ground/in practice) and ‘ideas’ (or principles/norms) for the determination of outcomes. 98 Concreteness (apology) conforms to an ‘ascending’ justification that begins with State interests, will and behaviours. By way of justification for legal authority it traces legal arguments ‘up’ to norms from there. In other words, it rests on State practice. Normativity (utopia) adopts a ‘descending’ argument, tracing ‘down’ to policy or practice from higher principles as its justifications. It rests on the norm in question. 99

By necessity international legal argument takes the form of oscillations between the two as positions are put forward and responded to. A concrete argument is open to attack for being no more than ‘apology’ for State prefer-

97 M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Reissue with New Epilogue) Cambridge University Press, 2005, pp. 24 & 25. (Hereafter: Koskenniemi, From Apology to Utopia). Onuma has identified the dilemma in similar terms; ‘Law is a tool of politics’, he argues, ‘but at the same time politics is expected to be conducted within the framework of law’. Y. Onuma, ‘International Law in and with International Politics: The Functions of International Law in International Society’, 14 European Journal of International Law 1, 2003, pp. 105-139, at 108.

98 Koskenniemi notes that the tension between ‘facts’ and ‘ideas’ is a ‘fundamental dilemma’. From Apology to Utopia p. 516.

99 Lasswell and McDougal identified a similar problem many decades earlier. ‘From any relatively specific statements of social goal…can be elaborated an infinite series of normative propositions of ever increasing generality’. At the same time they noted that ‘normative statements of high-level abstraction can be manipulated to support any specific social goal.’ H.D. Lasswell and M.S. McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’, 52 Yale Law Journal, 1943, pp. 203-295, at 213.
ences or actions, while normative arguments are in turn open to claims of being no more than ‘utopian’ ideals. Thus, a concrete argument is used to temper the charge of utopia, and vice versa. These positions, however, are ‘mutually exclusive’ because a descending argument is premised on a norm taking precedence over State behaviour, while an ascending argument suggests that the actions of States ultimately justifies the content of the law. One privileges normativity and the other concreteness. Thus, one is restraining (utopia) and the other is essentially freeing or permissive (apology).\textsuperscript{100} International legal doctrine has therefore enabled ‘the taking of any conceivable position in regard to a dispute of a problem’.\textsuperscript{101} But at the same time the discourse this produces ‘gives rise to conflicting legal arguments and the inability to prefer any of them.’\textsuperscript{102}

It may be argued that this is overstated, however, and that there are certain ‘easy cases’ for which the understanding of legal rules is widely shared and sufficiently clear.\textsuperscript{103} But as Koskenniemi observes, sovereignty can render any case a ‘hard case’. States can, through sovereignty, attempt to justify their actions, against which a descending/normative counter-claim must be made, or one sovereign over another must be chosen.\textsuperscript{104} This, in fact, was central to recent debates at the UN about proportionality of sentencing for drug offences. On the one hand there was the descending normative argument that the punishment should fit the crime (and therefore the death penalty was wrong). On

\textsuperscript{100} It is worth noting that while descending arguments may appear to be the less subjective, being based on agreed (perhaps ‘universal’) norms, Koskenniemi argues that each side is equally political and subjective. A descending argument is political and subjective because of its assumption of the existence of an objective or natural morality. But an ascending argument is political and subjective too because it cannot restrain State behaviour. Koskenniemi, \textit{From Apology to Utopia}, p. 64

\textsuperscript{101} Koskenniemi, \textit{From Apology to Utopia}, p. 565

\textsuperscript{102} Ibid p. 63.

\textsuperscript{103} K. Kress ‘Legal Indeterminacy’ \textit{77 California Law Review} 2, 1989, pp. 283-337. Koskenniemi, however, responded that this misunderstood the book as a being focused merely on the ‘semantic open-endedness or ambiguity’ of words. Koskenniemi, \textit{From Apology to Utopia} p. 590.

\textsuperscript{104} Koskenniemi, \textit{From Apology to Utopia} p. 43.
the other hand there was sovereignty, and the ascending view of the discretion of States to determine subjectively what is or is not a serious crime, and therefore what is or is not a proportionate punishment. 105

Ultimately, as David Kennedy summarises, ‘the indeterminacy of doctrine repeatedly forces a subjective political judgment’. 106 Thus, far beyond textual ambiguity, indeterminacy in this sense represents ‘an acute and deep problem of international law’, 107 being a system that ‘prizes attributes such as objectivity, certainty and stability’. 108 Here we see political subjectivity foregrounded as an essential component of international legal practice. Important challenges for human rights and child rights are therefore raised beyond the broad formulation of many provisions. Just as with other areas of law, determinacy and coherence are principles that support the legitimacy of human rights interpretation. 109 But through rights argumentation a range of policy solutions, even conflicting at a foundational level, are made possible and legally justifiable. As we shall see in chapter 4, this is no different with regard to human rights and drug control in general, and Article 33 specifically. For Rosalyn Higgins, however, this way of thinking leads us to the pessimistic belief that international law can only point to problems and not assist in the achievement of

105 Promotion of proportionate sentencing for drug related offences of an appropriate nature in implementing drug control policies UN Doc No E/CN.7/2016/L.2/Rev.1. The debates around the resolution were recorded at www.cndblog.org. See also the comments from States defending the death penalty above.


goals.\textsuperscript{110} We must find a way, she argues, to instead ‘accept the characterization of the origins of the place of contradictions in the legal system without concluding that there is no prospect of rationally choosing, for the common good, between these contradictions’.\textsuperscript{111} Higgins therefore encourages an approach in which we seek an ‘interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve’.\textsuperscript{112} This, in effect, restates Kennedy’s above summary and concedes Koskenniemi’s thesis. Subjective choices must be made, which Koskenniemi problematises and Higgins recommends. These choices, however, will have more to do with political preferences than the norm in question. Who, for example, is the ‘we’ in Higgins’ argument? By whose values should interpretations and choices be made, and which notions of the ‘common good’ should take precedence? Indeed, the interpretation and implementation of human rights is, in the final analysis, a debate about the common or ‘political good’.\textsuperscript{113}

From the perspective of this thesis, then, and as suggested by others, the indeterminacy thesis entails ‘a demand for responsibility’,\textsuperscript{114} within which our own biases have to be recognised. Such a demand is hardly revelatory, but still very important as a point of departure for the thesis. International law, after all, is


\textsuperscript{111} Higgins, \textit{Problems and Process}, p. 10.

\textsuperscript{112} Ibid.


not a theoretical discipline, but primarily one of practice. The right to protection from drugs, by the same token, is not merely an abstraction. It plays out and finds form in real world debates. It has an ‘interpretive community’ that must be taken into account in a given interpretation. And it also has what we might call an ‘argumentative community’, or those diverse actors with shared or conflicting views of what a right or norm might mean, and preferred outcomes, through which the norm takes shape. Thus, with the above discussion in mind, we may instead see Article 33 and its relationship with the drugs conventions as questions of argumentation, seek to understand how those arguments have been framed in response to each other, and in this way to make visible the values and preferences underpinning them.

1.2.3 Fragmentation and Structural Bias

‘Ours is not an abstract place of enduring ethics’ observes David Kennedy, ‘but a concrete place, in which particular people, regimes, and institutions contest what will be spoken, legitimated, and denounced’. Irrespective of indeterminacy, rulings are made by legal institutions, conclusions are drawn and recommendations are given. What, then, lies behind or drives the choices being made, if not an objective statement of the norm in question? This question demands an inquiry into institutional practice in specific contexts, which Koskenniemi saw as a necessary empirical corollary of his theory, and the ‘strong’ aspect of his more general critique. As Margaret Davies argues, while the law may well be conceptually indeterminate, it is often all too determine in its outcomes, and reproduces structures of power to the detriment of various groups. There is no reason to exempt human rights law from this potential.

115 Koskenniemi, From Apology to Utopia, p. 600.
116 Tobin, ‘Seeking to Persuade’.
118 Koskenniemi, From Apology to Utopia, pp. 600-615.
119 M. Davies, Asking the Law Question, Sweet and Maxwell, 1994, pp 165 and 166.
This inquiry, however, must be situated against the wider backdrop of the fragmentation of international law, which is of particular importance given the crossovers between the CRC and the drugs conventions. Simply, the more treaties there are, and the more issue-specific and regional adjudicative systems that develop, the greater the potential for conflict between these various treaty regimes and the number and type of forums in which such conflicts may manifest themselves.\textsuperscript{120} This poses an obvious challenge to that systemic harmony that is so often sought, or what the ICJ has referred to as the ‘essential consistency of international law’.\textsuperscript{121}

While it is not a new phenomenon, fragmentation has expanded since the end of the cold war and with the advance of globalisation.\textsuperscript{122} Today, ‘What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such exotic and highly specialized knowledges as “investment law” or “international refugee law” etc.’\textsuperscript{123} This form of fragmentation had, in fact, been predicted by the sociologist Niklas Luhmann who had ‘allowed himself the “speculative hypothesis” that global law would experience a radical fragmentation’ along

\textsuperscript{120} ‘Owing to the capriciousness of the legislator’ as Karlo Tuori put it ‘the legal order lacks a systematic character’. K. Tuori, \textit{Ratio and Voluntas: The Tension Between Reason and Will in Law}, Ashgate, 2011, p. 151. Thus, ‘instead of serving the law’s overall unity, the new fields appear to pose a threat to it.’, at 163.

\textsuperscript{121} \textit{Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)}, ICJ Reports 2010, pp. 639-694, para 66 (Referring to coherence between its findings and the Human Rights Committee).


‘social sectoral’ lines due to the demands of global society.\(^{124}\) International law has indeed gradually moved ever further into realms of technical problem-solving and complex social phenomena, as Jacob Katz-Cogan has so clearly shown.\(^{125}\) The problem, of course, is that fragmentation along these functional or sectoral lines exposes the absence of a ‘homogeneous system of international law’, revealing instead ‘different partial systems’, which are ‘unorganised’.\(^{126}\)

Based on these concerns, the International Law Commission (ILC) made fragmentation a focus of its long-term programme of work in 2002, and established a study group to counter these challenges to the ‘unity and coherence of international law’.\(^{127}\) That work culminated in the Commission’s influential final report on fragmentation, completed in 2006.\(^{128}\) Fragmentation has since been the subject of extensive literature.\(^{129}\) It is not always cast in a negative light, however. For some it also has positive implications.\(^{130}\) For the most part,


\(^{128}\) ILC Fragmentation Study.


though, fragmentation is presented as a problem to be solved through interpretive methods,\textsuperscript{131} or the identification of hierarchies.\textsuperscript{132} In recent years the interactions and conflicts between a wide range of regimes have now been studied, including humanitarian law and human rights,\textsuperscript{133} the WTO and other systems,\textsuperscript{134} and between regional and international systems.\textsuperscript{135} Scholars have also tackled fragmentation as it applies to very specialised areas such as biotechnology,\textsuperscript{136} climate change,\textsuperscript{137} tobacco regulation,\textsuperscript{138} and, recently, drug control.\textsuperscript{139}

There are, again, important implications for human rights and child rights law. Luhmann predicted fragmentation not along normative but instrumental lines due to ‘a transformation from normative (politics, morality, law) to cognitive

\footnotesize{\textsuperscript{131} For example, A. Van Aaken, ‘Defragmentation of International Law Through Interpretation: A Methodological Proposal’ \textit{16 Indiana Journal of International Law} 2, 2009, pp. 483-512.}


\footnotesize{\textsuperscript{135} In particular following the Kadi case at the European Court of Justice. See G. de Burca, ‘The European Court of Justice and the International Legal Order After Kadi’, \textit{51 Harvard International Law Journal} 1, 2010, pp. 1-49.}

\footnotesize{\textsuperscript{136} S. D. Murphy ‘Biotechnology and International Law’ \textit{42 Harvard International Law Journal} 1, 2001, pp. 47-139.}

\footnotesize{\textsuperscript{137} For example, H. Van Asselt et al, ‘Global Climate Change and the Fragmentation of International Law, \textit{30 Law and Policy} 4, 2008, pp. 423-449.}


\footnotesize{\textsuperscript{139} R. Lines, \textit{Drug Control and Human Rights in International Law}. Cambridge University Press, 2017, pp. 50-73 (Hereafter: Lines, \textit{Drug Control and Human Rights}, arguing for dynamic interpretation of the drugs conventions to resolve conflicts); See also Gispen, \textit{Human Rights and Drug Control} (focusing on the principle of ‘balance’ in the drugs conventions and bolstering the health dimensions of drug control through human rights law).}
expectations (economy, science, technology).\textsuperscript{140} Human rights law, of course, is fundamentally normative. But it is also ‘instrumental’ in seeking to resolve an extensive (potentially limitless) array of policy problems, as opposed to merely enumerating rights as foundational principles. Due to the expansion of human rights law, (or what Posner refers to as ‘hypertrophy’\textsuperscript{141}), fragmentation is evident not only between human rights and other legal regimes, but between human rights \textit{laws}.\textsuperscript{142} Because of this human rights law exemplifies ‘the ubiquitous problem of trade-offs’, the resolution of which has no ‘recipe’.\textsuperscript{143}

Rule conflict, however, is only one issue of fragmentation.\textsuperscript{144} The diversification of institutions is also a necessary component of the increasing diversity of international law.\textsuperscript{145} As the ILC noted, ‘Each rule-complex or “regime”

\textsuperscript{140} A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 \textit{Michigan Journal of International Law} 4, 2004, pp. 999-1046, at 1000. Luhmann’s distinction between ‘normative’ and ‘cognitive’ expectations corresponds well with Koskenniemi’s ‘normativity’ versus ‘concreteness’ set out above. More recently, scholars have suggested that international legal systems are helpfully categorised along these lines. See P. Diehl and C. ku, \textit{The Dynamics of International Law}, Cambridge University Press, 2010 (suggesting a taxonomy of ‘operating’ and ‘normative’ systems).

\textsuperscript{141} E. Posner, \textit{The Twilight of Human Rights Law}, Oxford University Press, 2014, pp. 91-94.


\textsuperscript{143} E. Posner, ‘Martti Koskenniemi on Human Rights: An Empirical Perspective’, \textit{Chicago Law School, Public Law and Legal Theory Working Papers} No. 164, 2014; See also E. Posner, \textit{The Twilight of Human Rights Laws}, Oxford, 2014, pp. 91-94. To be sure, human rights law incorporates various tests or standards, including ‘non-discrimination’, ‘progressive realisation’, ‘proportionality’, ‘margin of appreciation’ and, indeed, ‘the best interests of the child’. The problem is that these are no more ‘recipes’ for the objective resolution of conflicts than the specific rights and other interests between which they are supposed to mediate. There are, moreover, doctrinal methods for resolving fragmentation in given situations, but these, too, must be resolved towards some subjective aim or goal (see chapter 3).

\textsuperscript{144} Mads Andenas, for example, has identified three forms of fragmentation: ‘Substantive’, referring to the different legal systems or ‘self-contained regimes’; ‘Institutional’, referring to the proliferation of adjudicative mechanisms; and ‘methodological’, referring to the varying approaches of these mechanisms given their substantive field. M. Andenas ‘Reassertion and Transformation: From Fragmentation to Convergence in International Law, 46 \textit{Georgetown Journal of International Law}, 2015, pp. 685-732, at 694 – 702.

\textsuperscript{145} For a helpful mapping, see Project on International Courts and Tribunals, at http://www.pict-peti.org.
comes with its own principles, its own form of expertise and its own “ethos”, not necessarily identical to the ethos of neighbouring specialization." The legal language of the relevant field, in other words, provides it with a frame of reference and a way of seeing the world and a given problem that may not be shared by another institution within another field (see further chapter 3). Thus, '[A]ny decision also articulates the legal-institutional environment in view of substantive preferences, distributionary choices and political objectives.' For Koskenniemi (referring to specialised regimes as 'boxes'), ‘It is not only that the boxes have different rules’ (as, in this case, the CRC and drugs conventions do). ‘Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias: to examine nuclear weapons from a human rights perspective is different from looking at it from a laws of war perspective; a free trade perspective on chemical transports does not render the same result as an environmental perspective, whatever the rules’ (emphasis in original). Koskenniemi therefore identifies two ‘patterns’ in international law. One of these is the indeterminacy thesis. The other is the ‘substantive outcome that appears to satisfy the structural bias’ of a given institution or regime. ‘Structural bias’, in essence, refers to a hypothesis as to outcomes based on ‘a particular constellation of forces that relies on some shared understanding of

116 ILC Fragmentation Study, para 15.
117 ILC Fragmentation Study, para 480.
120 The word ‘bias’ should be approached with caution. It is not equivalent to inappropriate behaviour or malicious, prejudicial intent. There is always the risk of such factors being a part of any legal forum or other institution, of course. But the ‘bias’ here is towards certain outcomes based on a range of factors and is a more neutral claim.
how the rules and institutions should be applied’.\(^{151}\) It predicts that, irrespective of the breadth of possibilities the indeterminacy thesis exposes, and fragmentation enables, ‘the system still de facto prefers some outcomes or distributive choices to other outcomes or choices’ (emphasis in original).\(^{152}\) It asks us to consider structural factors affecting these outcomes, including how discretion is exercised and based on what influences, working practices, relations or institutional biases, implicit or explicit, known or unknown.

### 1.2.4 Research Questions and Methods

The above discussion leads to three main considerations or assumptions: First, Article 33 may not have objective, determinate content that we may ‘seek out’ through doctrinal methods. It may instead exist primarily in debate and the operation of legal institutions. Second, while the CRC and the drugs conventions seem to share a vision of child protection, they nonetheless represent different functional regimes, requiring an investigation into their underlying principles and ethos. And third, international institutions may approach a given norm in specific ways based on their own legal frames of reference, and institutional biases.

Let us return, then, to the two initial questions I had posed. What is the content of the child’s right to protection from drugs, and what is the nature of the relationship between the CRC and the drugs conventions? These remain the points of departure, but once a theoretical lens is placed in front of such questions they are necessarily altered. The two questions may therefore be re-framed: How has the child’s right to protection from drugs been understood? And what has been the relationship between the drugs treaties and the CRC? In pursuing these questions, the thesis may be seen as a descriptive critique, an exercise in ‘making visible what is visible’.\(^{153}\) It presents an argument, but

\(^{151}\) Koskenniemi, *From Apology to Utopia*, p. 608.

\(^{152}\) Ibid p. 607.

not one seeking to resolve a legal problem, or address a social problem through law. Instead, it is an argument based in history, argumentation and institutional practice about what has been the case with regard to the two research questions, rather than what I think the law really says (lex lata) or should say (lex ferenda).\footnote{My own previous work is unavoidable in this field, however, and appears in chapter 4 as part of the various arguments that have been put forward. In particular, a published work during the research period is included, and which presents a more doctrinal lex ferenda argument on what Article 33 of the CRC may require. See D. Barrett and J. Tobin, ‘Article 33: Protection from Narcotic Drugs and Psychotropic Substances’ in P. Alston and J. Tobin (eds) Commentary on the UN Convention on the Rights of The Child, Oxford University Press (forthcoming).} Bearing in mind the three above assumptions, the two research questions may be broken down into a series of sub-questions and methods across three themes.

The first is historical, looking to the origins and development of the right to protection from drugs and the convergence of the two regimes. This is vital as the values and ideas of a given time may be enshrined in norms that endure to the present.\footnote{A. Orford, ‘On International Legal Method’ 1 London Review of International Law 1, 2013, pp. 166-197 (Hereafter: Orford, ‘On International Legal Method’).} Thus, we may ask when and under what circumstances children came to be included in the drugs conventions, and vice versa, how drugs came to be included in the CRC. Chapter 2 therefore looks to the concurrent development of the drug control and child rights regimes, tracing these developments from the turn of the 20th century to the adoption of the CRC. In addition to secondary sources providing social and political context, it is based on a review of the proceedings of the International Opium Commission of 1909, the Official Journal of the League of Nations (with a focus on the opium and child welfare sections), the travaux préparatoires of the UN drugs conventions and the Convention on the Rights of the Child, as well as key UN resolutions over time.

The second relates to contemporary debates and related argumentation. Are there competing understandings of the child’s right to protection from drugs
and the relationship between the regimes? Chapter 3 presents an overview of the drugs conventions and the CRC, with an analysis of these treaty regimes against the background of fragmentation. It argues that while the treaties may seem to easily cohere, there are also underlying differences that permit each regime to operate as alternative legal frames of reference for the problem at hand. Chapter 4 develops this by presenting an analysis of the main arguments that have been made by scholars, NGOs, UN entities and States about Article 33 and the relationship between human rights, child rights and drug control. It is based on lessons from the historical analysis, literature review, and the official records of the 2016 UN General Assembly Special Session on Drugs.

The third is institutional. How has the content of Article 33 and the relationship between the two regimes been understood within the main legal forum monitoring its implementation? Despite the potential for incommensurate approaches to the two main research questions, is there nonetheless a structural bias that tends towards (or ‘prefers’) particular outcomes? For this research the periodic reporting process to the UN Committee on the Rights of the Child has been chosen for in depth analysis. Through Article 33 and the periodic reporting process, the CRC Committee is the only core UN human rights mechanism with an explicit mandate in relation to drugs. The periodic reporting process, moreover, is a procedure through which almost every State, given the CRC’s wide ratification, has reported on their obligations in this regard and to which the Committee has responded on multiple occasions. A document analysis has been undertaken of the periodic reporting process from 1993-2015, supplemented by semi-structured interviews with three members of the Committee. These methods and the rationale for the focus on the Committee are discussed in more detail in chapter 5.

156 This is also a primary method adopted by Marius Emberland in his study of the ICJ’s treatment of companies in international law. M. Emberland, ‘The International Court of Justice and
1.3 Outline of the Thesis

The thesis is divided into three parts following this introduction. Part I (chapter 2) looks at the parallel development of international child rights and drug control law. It documents the extent to which children (as a concern or subject matter, not as participants) influenced the drafting of the international drugs conventions and how drugs/drug policies influenced the drafting of international child rights law throughout the twentieth century. It demonstrates that after many decades of detachment, the two regimes began to converge as the threat narrative in international drug control escalated in the early 1970s. The two formally came together at the end of the 1980s through the CRC and the Vienna Convention, when what had become known as the ‘war on drugs’ was at its height, and when States were more willing than in previous decades to accept international law’s encroachment into traditionally sovereign domains. It demonstrates that the child’s right to protection from drugs was both a creature of a particular time, rooted in a threat narrative, and that the protection of children provided justification for the expansion and strengthening of a system that had been put in place without children and their specific needs in mind. Ultimately, drugs entered into child rights through its most progressive articulation to date, precisely when children entered into the most punitive and prescriptive drugs convention ever adopted. The chapter concludes by showing how reference to the CRC in resolutions of the Commission on Narcotic Drugs has increased in recent years, coinciding with the growing attention to human rights in drug control debates.

Building on the historical analysis, Part II (chapters 3 and 4) focuses on fragmentation and contention across the two regimes. Chapter 3 sets out the main

treaty frameworks in focus. It provides an overview of the content, structure and principles of the three UN drugs conventions and the CRC, before placing these treaties against the backdrop of ongoing debates about the fragmentation of international law. The chapter recalls the International Law Commission’s approach to conflicts in its fragmentation study, in which it was recognised that a conflict may not only relate to specific provisions. It may arise when two regimes can legitimately approach a given problem in different ways. While there appears to be consistency between the two systems, the potential for conflict that was evident in drafting remains ever present given that, at the most basic level, one system is grounded in transnational criminal law and the other in human rights law. From this perspective the chapter looks more closely at their principles and ethos, their object and purpose (or telos), and the position of the individual in each system. It asks whether the protection of children from drugs could look different depending on the legal ‘frame of reference’ through which one views the problem.

Chapter 4 shows how the theoretical challenges of indeterminacy and fragmentation play out in real-world debates between various actors on this topic. It presents opposing ‘positions’ adopted by scholars, NGOs, States and UN agencies across key thematic points of disagreement as to how the content of Article 33 and the relationship between the treaties should be understood. These are described heuristically as the ‘human rights’ and ‘drug control’ positions, reflecting the frame of reference given the greatest weight in any given interaction. Thematic disagreements include perception of risk and harm, the coherence between the regimes, the weight given to individual rights in relation to collective goals, and the approach to the text of Article 33. It concludes by applying the indeterminacy thesis to these positions, which demonstrate the predicted back and forth between concreteness and normativity, thereby foregrounding their political subjectivities.
Part III (chapters 5-7) focuses on the periodic reporting process to the Committee on the Rights of the Child. It begins in chapter 5 by discussing some challenges in studying structural bias, and goes on to outline the methods adopted for the chapters that follow. Chapter 5 then provides an analysis of the content and normative basis for the Concluding Observations of the CRC Committee from 1993-2015. The begins by asking whether a ‘dialogue’ is in fact taking place between States and the Committee on these issues. Based on a selection of thirteen States parties that have reported to the Committee at least three times, it demonstrates that the Committee is in fact in a ‘dialogue’ with States, in the sense of an identifiable ‘back and forth’. Issues the Committee raises will often be responded to later in State reports, where these had previously been absent. It then highlights recommendations the Committee has made relating to a range of areas from prevention to budgetary allocation, to alcohol and tobacco. In some cases these are challenging to government practice and enter into controversial territory, such as calls to implement harm reduction services for minors and for access to drug services to be possible without parental consent. They demonstrate the potential for the CRC, via Article 33, to operate as a frame of reference through which to view drug policies, producing recommendations that might not naturally emerge from the drug control system and to date have not appeared. There are, however, important weaknesses and gaps, including an apparent legal arbitrariness as to how Article 33 is normatively framed, an omission of the supply side of the drugs problem, and a lack of consideration of the effects of State action in fighting drug use and the drug trade on children and young people.

Building on these findings, chapter 6 focuses more on State party reports to the Committee on the Rights of the Child and what constitute ‘appropriate measures’ for the purposes of Article 33. The chapter shows that States parties to the CRC tend to equate their criminal legal frameworks and the stringency of their responses with the implementation of the right. Within this, severity
of punishment is often reported, mirroring General Assembly resolutions dating to the early 1970s (chapter 2), as well as the requirements of the Vienna Convention (chapter 3). States report many interventions put in place to protect children from drugs that raise fairly obvious human rights concerns, such as using the death penalty, compulsory drug treatment, and various drugs crackdowns. With very few exceptions, the Committee does not critique these practices or related legal frameworks. It is more likely to welcome drugs laws or policies without qualitative assessment as to content. Here, we see the importance of silences and exclusions, or what is not said by the Committee when presented with certain information.

Chapter 7 brings the insights of the two preceding chapters together into a succinct thematic description of the entire periodic reporting process. Combining these with insights from semi-structured interviews with Committee members it sets out a description of structural bias with regard to the child’s right to protection from drugs in the periodic reporting process. Across three main interconnected themes, the institutional ‘preferences’ of the Committee through the two decades of periodic reporting under review are described. The first theme is a consistent narrative of the child as a ‘victim’. This tends to oversimplify the realities of drug taking and involvement in the drug trade, even if exploitation is part of the picture. Drawing on the work of Nils Christie, the victim narrative implies a perpetrator against whom criminal enforcement and stringent measures are needed against the ‘good enemy’\textsuperscript{157} of drugs, risking the justification, through child rights, of many of the more problematic measures States have in fact been taking. The second theme is broadly described as ‘selective reticence’.\textsuperscript{158} This is composed of two sub-themes: a narrow issue focus; and a preference for the rights of the child versus the rights


\textsuperscript{158} The term was coined in Bewley-Taylor’s assessment of the International Narcotics Control Board. See Bewley-Taylor, \textit{Consensus Fractured}.
of adult others. Chapter 5 demonstrates an overwhelming focus on certain aspects of the drugs problem to the exclusion of others, demonstrating a certain ‘problem representation’,\textsuperscript{159} that tends to confirm and reproduce rather than challenge long-standing approaches. In particular, the effects of drug policies on children and adults, including in the pursuit of implementing Article 33, are very rarely part of the Committee’s work. In this regard, the Committee is far more comfortable discussing the rights of the child than the effects on adult others of protecting those rights, despite sufficient information presented by States parties themselves. As such, Article 33 tends to direct the Committee’s attention to the fact that the State is doing something rather than to the effects of what is being done. Related to this is the third theme, that of ‘under interpretation’. Through this theme the Committee’s reliance on standard language and ‘holistic interpretation’ is problematised, as is the very wide margin of discretion afforded States parties which leans beyond flexibility to permission. Based on interviews with Committee members, the chapter further discusses some of the practical considerations contributing to these apparent ‘preferences’, including workload, institutional memory and what one Committee member referred to as a ‘visibility bias’ affecting attention to Article 33.

Chapter 8 concludes with a review of the thesis as it relates to the two primary research questions. It goes on to argue that two normative transformations have taken place through the periodic reporting process. Even though the reference to the ‘relevant international treaties’ in Article 33 was originally intended to clarify which substances were involved, the periodic reporting process has affected this relationship such that the CRC reaffirms the strategies and vision of the drugs conventions. This is despite the fact that the treaty represents the potential for an alternative legal frame of reference, and that the drafting history showed weak attention to children in developing that regime.

\textsuperscript{159} C. Bacchi, \textit{Analysing Policy: What is the Problem Represented to Be?} Pearson, 2009 (Hereafter: Bacchi, \textit{Analysing Policy}). See further chapter 5.
But more than this, the strategies of drug control enshrined in the drugs conventions have in turn been transformed. A primary outcome of the periodic reporting process is a positive feedback loop between States parties and the Committee revolving around the right to protection from drugs. What was once a policy or instrumental strategy at a given time has become seen and recast as a universal human right. Indeed, we may begin to think not only about the content of Article 33 and what it has produced or reproduced, but what kind of norm or right it is, or has become. By way of conclusion it is argued that, in addition to protection and provision, we may view Article 33 as also having operated as a permissive norm, or a human rights-based licence for State action in drug control.
Part I: The Development of the Regimes
2. Detachment and Convergence: The History of Child Rights and Drug Control in International Law

2.1 Introduction

The history of the development of the international drug control regime has been investigated at various junctures in its evolution and from differing academic disciplines. A number of more doctrinal legal histories have been published, including those of S.K. Chatterjee (predating the Vienna Convention) and Neil Boister (focusing on penal provisions in view of the gap in Chatterjee’s work). More recently Richard Lines’ history of the development of the regime takes a more critical perspective, focusing on the conflicting narratives of humanitarianism and ‘evil’ that appear throughout, with a view to better understanding the ‘object and purpose’ of the conventions for the purposes of treaty interpretation. None of these, however, focus on children and young people, except in passing. This is because international drug

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163 Lines, Drug Control and Human Rights pp. 50-73. See, however, S. Hopgood, The Endtimes of Human Rights, Cornell University Press, 2015 (Arguing that the meta-narrative of evil has always gone hand in hand with humanitarianism). See also J. Petman, ‘The Problem of Evil and
control law began and developed due to other considerations, so a discussion
of children would not emerge as a primary issue or lead narrative in any histo-
riography of the regime. It needs to be looked for specifically. There have,
in addition, been many histories of drug use written over the decades that cap-
ture the social conditions within which drug use developed and changed, and
these are drawn upon below.\textsuperscript{164} The Convention on the Rights of the Child,
however, is missing from all of these works. And while legal overviews of the
development of the CRC are available,\textsuperscript{165} none focus to any great extent on
Article 33 as they address the entire, far-reaching treaty. None, by conse-
quence, address its relationship to the UN drugs conventions.

This chapter is not an historical analysis with a view to understanding the in-
tentions of the drafters for interpretive purposes (though the assumptions and
understandings of the drafters remain important). Nor is it aiming at anything
as ambitious as a new historiography of either drug control or child rights law
in general. It is instead, as Anne Orford suggests, a turn to history as critical
method.\textsuperscript{166} As Carol Bacchi observes, ‘Things we often take for granted as

\begin{footnotesize}
American Disease: Origins of Narcotic Control} (3\textsuperscript{rd} Ed) Oxford University Press, 1999; V.
Berridge, \textit{Opium and the People: Opiate Use and Drug Control Policy in Nineteenth and Early
Twentieth Century England}, Free Association Books, 1999; V. Berridge, \textit{Demons: Our Chang-
ing Attitudes to Alcohol, Tobacco and Drugs}, Oxford University Press, 2013.
\item[165] G. Van Bueren, \textit{The International Law on the Rights of the Child}, Martinus Nijhoff, 1998,
to the Travaux Préparatoires}, Martinus Nijhoff, 1992; Office of the High Commissioner for
2007 (Hereafter CRC LH Vol I and II, respectively); N. Cantwell, ‘The Origins, Development
Organizations in the Drafting of the Convention on the Rights of the Child’, \textit{12 Human Rights
Quarterly} 1, 1990, pp. 137-147.
\item[166] Orford, ‘On International Legal Method’.
\end{footnotesize}
forms of “fixed” reality are products of particular times and places. This is especially pertinent for legal studies given our focus on norms that endure across time. For Orford, ‘the past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation’. We see an example in the international drug control system, in fact, with its celebrations of the centenaries of the Opium Commission of 1909 and the Opium Convention of 1912. That history, proudly remembered, reinforces commitment to present norms, through which, according to celebratory resolutions, ‘great progress’ has been made. Similarly, the Convention on the Rights of the Child is celebrated as a landmark in the development of child rights and a sea change in how children were viewed in international law. But what of the intersections between the two? Within the history of the drug control system is a narrower story of the attention to children. And within the broader history of the CRC is a narrower one of attention to drugs. And while others have placed the development of child rights law in its wider historical context, each specific right in the CRC may also have its own context, Article 33 included. These narrower developments foreground incoherence, gaps and practical and conceptual challenges just as much as they show a degree of political consensus allowing for the contemporaneous adoption of stringent drug control obligations and far-reaching child rights norms. Despite surface level coherence, what we instead see is a drug control system that avoided children until the

167 Bacchi, Analysing Policy, p 264.
172 Khadeija Mahgoub has produced a brief review of the travaux of Article 33. It is limited, however, in the absence of a discussion of the drug control system or social and political context. K. Mahgoub, ‘Article 33 of the Convention on the Rights of the Child: The Journey from Drafting History to the Concluding Observations of the Committee on the Rights of the Child’ 2 Human Rights and Drugs 1, 2012, pp. 45-64.
very late stages, a novel human right that was adopted with little discussion of what it might mean, and a long shadow cast by fragmentation.

2.2 Children and Early Multilateral Drug Controls

While this chapter focuses on the UN period it is important to begin somewhat further back. As has by now been well documented, multilateral efforts for the control of drugs instead began in the wake of the second opium war between the British empire and China. While there is a rich history leading to it, multilateral drug control began with International Opium Commission, held in Shanghai in 1909. The Commission, comprised of all of the main colonial powers as well as China and Siam (Thailand), adopted nine non-binding resolutions\(^\text{173}\) that would prove to be influential in the development of international drug control law, establishing the supply-side focus that would remain to the present day and initiate the assumption that only a gapless international regime could respond to the opium ‘evil’.\(^\text{174}\) At this formative stage, children did not arise, either with regard to their involvement in poppy production or in relation to opium use. Indeed, children were deducted in their entirety from the estimated number of opium users in the country.\(^\text{175}\) This may seem an inconsequential omission if these problems were in fact so rare. But it is worth noting that the earlier Royal Opium Commission, convened in 1893 to discuss opium in India, had included considerable discussion of opium use by parents and children, and of the involvement of children in the poppy harvest.\(^\text{176}\) That

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\(^\text{175}\) *Report of the International Opium Commission Vol I: Report of Proceedings, 1909*, p. 120. Despite this the Japanese delegation did report (p. 267) on prevention efforts in Formosa via education aimed at reducing initiation of opium use among young people. As we shall see below, such efforts remained controversial for over half a century.

\(^\text{176}\) *Minutes of Evidence Taken Before the Royal Opium Commission Vol II, 1893*. For example, paras 2253, 2299, 2339 – 2343, 2757, 2758, 2797 – 2799, 3554, 3568, 6373, 6374, 7989.
Commission, however, had a different aim, that of addressing opium production and use in India. The Shanghai Commission was aimed at controlling trade. Following its report, drug control would enter into multilateral treaty form very quickly with the first Opium Convention, adopted in 1912,\(^ {177} \) which has been described as the ‘foundation and mainspring’ of international drug control.\(^ {178} \)

Through the Treaty of Versailles, the League of Nations was entrusted with a drugs mandate,\(^ {179} \) and also one relating to children.\(^ {180} \) These mandates, however, would remain detached for four main reasons. First, and most obviously, there were more pressing concerns. The League remained overwhelmingly focused on the regulation of the licit international trade and suppression of illicit supply, as opposed to drug use (among people of any age). On the other hand, with regard to children, League Members were seized with the far more urgent concerns of hunger, refugees and deportations,\(^ {181} \) and epidemics such as typhus.\(^ {182} \) Focused on these issues, the hugely influential 1924 Declaration of the Rights of the Child in 1924 (also known as the ‘Declaration of Geneva’)\(^ {183} \) did not include the drugs question.\(^ {184} \)

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177 International Opium Convention, 1912, 1922 LNTS 189.
179 Art 295 of the Peace Treaty of Versailles, States bound themselves to also ratify the 1912 Opium convention. Most parties to the 1912 treaty became parties in this way.
184 This might seem obvious, being a short five-point document, but it is noteworthy that the declaration was in fact presented to the International Save the Children Union for approval as a preamble to a much longer Children’s Charter containing seven parts and almost fifty clauses. This lengthier document also did not include the issue of opium or other drugs, even though it delved into considerable detail in other areas of social policy that extended far beyond humanitarian responses, including pre-natal care, school meals, health education, juvenile justice, play facilities, and ‘children in employment’. The text of ‘The Children’s Charter of the International Council of Women’ is available in P. Veerman, *The Rights of the Child and the Changing Image*
Second, there was a lack of interaction between the relevant committees of the League bureaucracy. The Child Welfare Committee never addressed opium or other drugs\textsuperscript{185} (though it did include alcoholism within the family on its agenda\textsuperscript{186}). Meanwhile, the Advisory Committee for the Suppression of the Illicit Traffic in Opium and Other Dangerous Drugs (often referred to as the ‘Opium Advisory Committee’) never addressed issues relating to children. This is demonstrated clearly by questionnaires on addiction issued to Member States by the League Secretariat in 1936, intended to get a better grasp on the scale of the problem globally.\textsuperscript{187} They did not enquire after children at all.\textsuperscript{188} Both Committees formed a part of the ‘Opium and Social Questions’ section. However, a comprehensive search of the reports of their meetings\textsuperscript{189} reveals no formal interaction between them.\textsuperscript{190}

\textit{of Childhood}, Martinus Nijhoff Publishers, 1992, Appendix VIII, pp. 439-444. Eglantyne Jebb, who drafted the declaration, knew that a short, universally acceptable document was needed, noting, from experience within the League, that ‘the more deeply a convention goes into a question the less likely it is to be accepted’. C. Mulley \textit{The Woman Who Save the Children: A Biography of Eglantyne Jebb, Founder of Save the Children}, OneWorld, 2009, p. 311. See also L. Mahood, \textit{Feminism and Voluntary Action: Eglantyne Jebb and Save the Children, 1876-1928}, Palgrave, 2009 pp. 185-205.

\textsuperscript{185} The Committee was of the view that in order to be effective, must have a ‘strictly limited programme’. Advisory Committee on the Traffic in Women and Protection of Children, report on the work of the fourth session, Annex 766a, Thirty-Fourth Session of the Council, \textit{6 League of Nations Official Journal} 7, 1925, p. 906. It was, however, reprimanded a year later for overstepping its mandate beyond issues that ‘require international regulation’. See J. Droux ‘A League of Its Own’? The Leagues of Nations Child Welfare Committee (1919-1936) and International Monitoring of Child Welfare Policies’ in \textit{The League of Nations’ Work on Social Issues: Visions, Endeavours and Experiments}, United Nations, 2016, p. 90.

\textsuperscript{186} \textit{League of Nations Official Journal} 6(7) 1925, p. 908.

\textsuperscript{187} Ignorance about issues affecting children may have affected attention to that topic, but ignorance of other concerns did not halt the wider development of drug control. Cannabis was internationally controlled before it had been studied, and before League of Nations questionnaires had been returned. D. Bewley-Taylor, T. Blickman and M. Jelsma, \textit{The Rise and Decline of Cannabis Prohibition: The History of Cannabis in the UN Drug Control System and Options for Reform}, Global Drug Policy Observatory, Transnational Institute, 2014.

\textsuperscript{188} LoN Doc OC 1657(1), \textit{17 League of Nations Official Journal} 6, 1936, p. 1236.

\textsuperscript{189} A hand-search of the \textit{League of Nations Official Journal} volumes 1 (1920) to 21 (1940) was conducted.

\textsuperscript{190} This is despite the cross-working between the Opium Advisory Committee and the Health Section, and between the Child Welfare Committee, the International Labour Office, and the Health Section. Moreover, it was acknowledged that the Child Welfare Committee, given the extent of its mandate, should give due consideration to the ‘relation to subjects being studied
Third was the continuing focus on the supply side and an unwillingness to take on board intrusive domestic obligations in treaty form outside of colonial territories. During the twenty years of the League five drug control treaties were adopted, two major treaties, two focused on colonial territories and one failure.¹⁹¹ The Opium Convention of 1925¹⁹² and the ‘Limitations Convention’ of 193¹⁹³ ‘refined’ and ‘extended substantially’¹⁹⁴ the treaty-based global drug control architecture, creating a detailed system of import and export control, as well as political and independent control organs. They remained the core treaties until being absorbed and superseded by the Single Convention in 1961. But, again, provisions relating to children were not included as the focus was squarely on supply reduction. Moreover, their capture was global.

Two further treaties, on the contrary, explicitly addressed sales to minors, incitement to use drugs, and anti-drugs education, all of which are now contained in contemporary drug control law. But these were limited to colonial possessions. The Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium was adopted was adopted in 1925¹⁹⁵ to establish a state monopoly on the opium market in far-Eastern colonial territories. Article II prohibited the sale of opium to minors, thereby introducing new concepts through legal obligations on States parties to take ‘all possible steps’ and to use ‘their utmost efforts’ to prevent the use of opium. Article III, meanwhile, prohibited allowing minors into any smoking ‘divans’.

¹⁹¹ For a detailed review of their drafting see McAllister, *Drug Diplomacy*, pp. 43-102.
¹⁹² International Opium Convention 1925, 81 LNTS 319.
¹⁹³ Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs 1931, 139 LNTS. 303.
¹⁹⁵ Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium 1925, 51 LNTS 337.
Article VII, however, was of particular interest as it required ‘suitable instruction in the schools’: In other words, what we now refer to as ‘prevention’.

The Agreement Concerning the Suppression of Opium Smoking, (Bangkok agreement) followed in 1931.\(^{196}\) Like its 1925 predecessor it introduced new concepts. Article II addressed young people and was divided into two parts. Sub-paragraph I stated that persons under the age of twenty-one shall be ‘prohibited from smoking opium and from entering any smoking-establishment’. This is notably different from the 1925 agreement, where the prohibition was directed at sales to minors. Here the prohibition was directed at those under twenty-one themselves.\(^{197}\) On the other side of this relationship, sub-paragraph 2 regarded ‘inducing a person under twenty-one years of age to smoke opium…or facilitating any such act’ as an offence, and called for ‘severe penalties’. It was an early example of incitement in international drug control law, an issue that would also remain controversial in later treaties.

The final treaty adopted during this period was the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936.\(^{198}\) It was a failure, but it is important to note as the Vienna Convention of 1988 would much later succeed where it had failed. In 1936 it was too much of an intrusion into sovereignty.\(^{199}\) By the late 1980s these concerns would have become secondary to the drugs threat.

\(^{196}\) Agreement concerning the Suppression of Opium Smoking 1931, 177 LNTS 375.
\(^{197}\) In this way the 1931 convention is somewhat closer to the modern formulation under the Convention on the Rights of the Child, which focuses explicitly on protection from ‘the illicit use’ of drugs. As we will see below, however, the language of prohibiting children from using drugs was rejected.
\(^{198}\) Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, 198 LNTS 301.
Fourth was an underlying fear that certain efforts developed in conditions of uncertainty might be counterproductive. Indeed, Article VII of the 1925 convention above included a clear caveat in that States may opt not to undertake prevention measures if these may be ‘undesirable under the conditions existing in its territory’. This reflected the view among many States at the time that drugs ‘propaganda’ could be harmful. Within the Opium Advisory Committee, in fact, the only discussions relating explicitly to children related to anti-narcotic propaganda and education, but the thrust of the discussion had to do with the perceived risks of such efforts, rather than promoting them, just as had been identified with regard to the 1925 treaty. The Opium Advisory Committee adopted a resolution warning States away from direct ‘propaganda’ unless addiction was already ‘a substantial problem’. Where it was merely ‘sporadic’, such efforts would be ‘evidently dangerous’. 200 The issue would remain controversial well into the 1960s, waning only as the drugs problem got steadily worse.

2.3 The Bedrock of the System

By the outbreak of World War II and the collapse of the League, therefore, the main principles of international drug control were in place without any focus on children. During World War II the drug control apparatus was only nominally operative. But with the creation of the United Nations it would be reinvigorated and strengthened considerably. What was an explicit drugs mandate under the Covenant of the League was now folded into the wider aims of the United Nations under the Charter through promoting ‘solutions of international economic, social, health, and related problems’. 201 This was an expansion from the mandate of the League, rather than a retreat, and was supported

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by more solid institutional arrangements.\textsuperscript{202} As Lines has set out, the Charter ‘established the framework for the creation of the legal and administrative tools necessary to enable the new organisation to take a more robust approach to international drug control than was previously possible’.\textsuperscript{203} There was now also an explicit human rights mandate within which the normative framework for child rights could grow.\textsuperscript{204}

Upon its creation some of the earliest business of the UN had to do with drug control. The Commission on Narcotic Drugs (CND) was established in 1946 as a ‘functional commission’ of the Economic and Social Council.\textsuperscript{205} Three protocols on the previous treaties were adopted under the auspices of the UN in 1946, 1948 and 1953, bringing the League’s mandates into the UN system and expanding the regime.\textsuperscript{206} But even though concerns about addiction in general had taken on ‘increased importance in the international sphere’\textsuperscript{207} drug use by any age group was still little more than a footnote in treaties focused on the supply side and market regulation.\textsuperscript{208}

\textsuperscript{202} As Lines notes ‘it would be incorrect to assume that the elimination of specific reference to drugs in the Charter represented, or was intended by States to be, a weakening of the mandate of the new UN organisation in the area drug control…the UN Charter does not remove drug control as a matter of international concern, but rather enshrines a more flexible formulation of wording that allows not only for the inclusion of drug control, but also for new and additional areas’. Lines, \textit{Drug Control and Human Rights}, p. 28.

\textsuperscript{203} Ibid, p. 32.

\textsuperscript{204} Ibid, p. 32.

\textsuperscript{205} ‘Resolution of the Economic and Social Council of 16 February 1946 on the Establishment of a Commission on Narcotic Drugs’ UN Doc No E/RES/1946/9(I), 16 February 1946.

\textsuperscript{206} Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs Concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946, 12 UNTS 179; Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success, New York, on 11 December 1946, 1948, 44 UNTS 277; Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and use of Opium, 1953, 456 UNTS 3.


With these agreements, moreover, the legal framework was by now a patchwork of nine treaties and protocols in force.\textsuperscript{209} Indeed, discussions around a unifying, or ‘single’ convention had begun in 1948.\textsuperscript{210} This took a decade to negotiate, through three major drafts,\textsuperscript{211} and was adopted as the Single Convention on Narcotic Drugs in 1961, replacing all of the early treaties (except for the 1936 trafficking convention). While it enshrined ‘the basic principles of the League of Nations regime’\textsuperscript{212} and ‘retained many of the features of its predecessors’,\textsuperscript{213} ‘its passage represented a moment when the multilateral framework shifted away from regulation and introduced a more prohibitive ethos’.\textsuperscript{214} For example, though it contained a new article on the treatment of addicts,\textsuperscript{215} addiction was now framed in its preamble as an ‘evil’ to be combatted. Indigenous, traditional and religious practices involving coca, cannabis and opium were specifically targeted for abolition.\textsuperscript{216} Albeit in weaker form, and significantly watered down from earlier drafts by ‘deleting the more draconian aspects’,\textsuperscript{217} the Single Convention now included the requirement to establish punishable offences and extradition undertakings that had been set out

\textsuperscript{209} As Gregg argued, there were ‘so many legal relationships between states and between states and the international drug organs that the control system has not been able to function at maximum effectiveness’. R.W. Gregg ‘The Single Convention on Narcotic Drugs’, 16 Food, Drug, Cosmetic Law Journal 4, 1961, pp. 187-208, at 194.

\textsuperscript{210} ‘Simplification of Existing International Instruments on Narcotic Drugs’, ECOSOC Res E/RES/1948/159(VII)1ID, 3 August 1948.


\textsuperscript{212} Lines, Drug Control and Human Rights, p. 35.


\textsuperscript{214} Ibid pp. at 73. See also Bruun et al, The Gentleman’s Club, p.17.

\textsuperscript{215} Article 38, now amended via the 1972 Protocol (see further 2.6.1 below).

\textsuperscript{216} Article 49, Single Convention.

\textsuperscript{217} McAllister, Drug Diplomacy, p. 211.
in the failed 1936 treaty. Far more than just a consolidating treaty, this was a new tone and approach forming the bedrock of the modern system.

With regard to children, however, the main trends from the League period persisted. First was the ongoing focus on supply reduction, but not on the root causes of rural production or on the conditions of those working and living along the supply chain. These were simply not at issue. Second, there was still the perception that drug use among children and young people was not a major concern, at least not an international one. In this regard it should be recognised that data relating to drug use and addiction were generally poor, leading to a reluctance to focus on it at all. And third, there remained the concern that anti-drugs ‘propaganda’ would be harmful if there was not already a substantial problem. During the Commission’s fourth session in 1949, for example, the United States made clear its view that ‘education could cause an increase in drug addiction as a result of curiosity, rather than a decrease, whereas measures for the limitation of production, such as the 1931 Convention, were certain to reduce it’. The USSR shared the view that the supply side must remain the focus. France, moreover, argued that propaganda efforts were only suitable to the Far-East and that ‘instruction regarding narcotic drugs in Western schools would certainly have a bad effect’.

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218 Article 36 on ‘penal provisions’. See D. Bewley-Taylor and M. Jelsma, ‘Regime Change: Revisiting the 1961 Single Convention on Narcotic Drugs, 23 International Journal of Drug Policy, 2012, pp. 72–81, at 76. It was because these provisions were seen as so weak that the Single Convention did not repeal the 1936 convention. See Boister, ‘Historical Development’, pp. 16 and 17.

219 Some States did look at the question specifically and found that in their countries concerns around drug use among under 18s had been exaggerated. See Commission on Narcotic Drugs, Report of the Eleventh Session 23 April – 18 May 1956, UN Doc No E/CN.7/315, 1956, para 341.


221 Ibid.

222 Ibid p. 19.
By the late 1950s there was some softening of this worry about drugs ‘propaganda’, but still not in any way significant enough to warrant inclusion in a treaty.223 None of the three drafts of the Single Convention included concerns about children or youth, even of a declaratory nature.224 But there were proposals to do so. In 1957 China suggested the addition of a provision equivalent to Article VII of the 1925 agreement on the suppression of prepared opium, but this was not taken up due to the concerns raised above.225 During the conference adopting the Single Convention, Hungary unsuccessfully called for the inclusion of incitement (or, in its words, ‘instigation’) to be included and subject to ‘severe punishment’.226 There is no official record of why Hungary’s suggestion was not taken up,227 but later treaty negotiations would illustrate misgivings with incitement as an obligation, as we shall see below. Beyond these recommendations children and young people arose only in passing.228 Indeed, from 1946 (and the establishment of the Commission) to 1961 (and the adoption of the Single Convention) over 270 drug-related resolutions

223 Commission on Narcotic Drugs, Report of the Eleventh Session 23 April – 18 May 1956, UN Doc No E/CN.7/315, 1956, para 335 ‘a firm policy of reprobation…would alert the population, especially the younger groups, to the evil inherent in using these substances…’.


227 In general, however, there were calls for the treaty to be concise enough for general agreement. See Commission on Narcotic Drugs, Analytical Compilation of Comments on the Single Convention, Second Draft, UN Doc No E/CN.7/AC.3/8/Add.1, 26 March 1957, p.2 (Canada).

228 1961 OR Vol I, Twelfth Plenary Meeting, p. 56 (Uruguay, referring to the ‘evil consequences’ of the illicit traffic on young people); Thirteenth Plenary Meeting, p. 60 (Ghana), and Twenty-Third Plenary Meeting, p. 105 (Burma) (both raising concerns about increasing rates of use among young people).
and decisions were adopted by the CND, ECOSOC and the General Assembly, including detailed resolutions about drug use, addiction\(^{229}\) and other topics.\(^{230}\) None referred to children or minors.

As before, the drug control system had more pressing concerns\(^{231}\) as did the embryonic human rights and child rights systems. The Universal Declaration of Human Rights was adopted in 1948 and the travaux préparatoires, as William Schabas points out, do not suggest ‘any interest at all’\(^{232}\) in the issue of drugs. This may seem an obvious omission given the post-war context of its adoption. But we must bear in mind that addiction did appear in the European Convention on Human Rights, adopted just two years later.\(^{233}\) Just as the bedrock of the drug control system omitted human rights, the bedrock of the human rights treaty regime also omitted mention of drugs. It was a starting point from which the drugs and human rights debates at the UN would remain ‘practically detached’\(^{234}\) for some time, conceptually and institutionally. It is within this arrangement that the child rights system would evolve.

But at these formative stages the issue of drugs was still not on the child rights agenda. In 1959 a second declaration on the rights of the child was adopted, seen as building both on the earlier 1924 declaration and the UDHR.\(^{235}\) It expanded considerably upon its League predecessor and laid the foundations for

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\(^{231}\) As can be seen from the priority setting resolutions and the decisions of the Commission during this time. See for example, ‘Priorities’, CND Res 5(III), May 1948; CND Decision A1(VII), April/May 1952; CND Decisions C1,C3,C4,C6- C31(X), April/May 1955; CND Decisions 1-24(XIV), April/May 1959; CND Decisions 1, 4-28(XVI), April/May 1961.


\(^{233}\) As Article 5(e), as a limitation on liberty and security of the person.

\(^{234}\) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN Doc No A/HRC/10/44, 10 January 2009, para 51.

the CRC thirty years later.\textsuperscript{236} As with its 1924 counterpart, however, it remained a welfare document. But still, twenty-one governments commented on the draft of the Declaration, and none suggested that the drugs issue needed inclusion.\textsuperscript{237} Moreover, NGOs that were actively involved in the development of both international child rights and drug control norms were not yet connecting the two issues.\textsuperscript{238} Nor was the newly established Unicef.\textsuperscript{239}

2.4 Upheaval in the 1960s

The timing of the Single Convention was unfortunate as it is widely recognised that drug use increased dramatically and patterns of use changed significantly during the 1960s. The use of various substances exploded, challenging the pre-existing focus on opiates nationally and internationally, even as opiate use continued to increase and the average age of use continued to fall.\textsuperscript{240} In the US and across Europe, social and cultural changes saw a major increase in cannabis use alongside synthetic substances, including MDMA, LSD and amphetamines.\textsuperscript{241} In the US drugs became ‘a decisive electoral factor for the first

\textsuperscript{236} Among its innovations were the best interests principle (principle 2, now article 3 of the CRC) and the right to free and compulsory primary education (principle 7, now article 28). Other principles built upon the existing legal framework around human trafficking and child labour and on the previous declaration’s five points.


\textsuperscript{238} During this period the International Federation of Women Lawyers fed into both the Commission on Human Rights and the Commission on Narcotic Drugs, where it was one of the earliest NGOs represented. See, for example, Commission on Human Rights, \textit{Draft Declaration of the Rights of the Child, Communication from the International Federation of Women Lawyers}, UN Doc No E/CN.4/NGO/85, 4 February 1959; Commission on Narcotic Drugs, \textit{Technical assistance for narcotics control, Statement of the International Federation of Women Lawyers}, UN Doc No E/CN.7/NGO/2, 2 May 1961; Commission on Narcotic Drugs, \textit{Preparation for Coming into Force of the 1961 Convention, Statement of the International Federation of Women Lawyers}, UN Doc No E/CN.7/NGO/3, 25 May 1962.


\textsuperscript{240} For the UK, see for example, A. Mold, ‘Illicit Drugs and the Rise of Epidemiology During the 1960s’, \textit{61 Journal of Epidemiology and Community Health} 4, 2007, pp. 278-281.

\textsuperscript{241} See, for example, the contributions from Belgium, Denmark, France, Germany, Italy, the Netherlands, Poland, Spain, Sweden, Switzerland and the United Kingdom, in R. Colson and

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time’ as patterns of use changed and ‘middle-class young whites had started dying or being arrested’. These and other building concerns would, by the late 1960s, begin to affect and fundamentally change the international debate. As McAllister puts it ‘In less than a decade, the problem of substance abuse reached crisis proportions. Unprepared for the onslaught, the control regime would be shaken to its core by the events of the 1960s’.

It is at this stage that concerns around young people became more prominent in international drugs diplomacy, but within a regime that had not accounted for them in its formative stages. The first resolution of the UN Commission on Narcotic Drugs to refer to youth was adopted in 1968, decades into international controls. It concerned a new problem: the potential negative effects on positive role models caused by doping in sport. This may seem unusually specific, even trivial, but doping in sport was one of a range of new phenomena causing concerns related to youth at the time. Of major concern was the apparent increase in the use, especially by young people, of amphetamines, hallucinogens and sedatives which were not under the controls set out in the Single Convention. This was an obvious problem with the international drug control system, generated by a ‘spurious dichotomy’ between certain classes of substances. The Commission on Narcotic Drugs had all along treated

H. Bergeron (eds) European Drug Policies: The Ways of Reform, Routledge, 2017 (Chapters 4-10 and 12–15). All include historical backgrounds indicating significant changes during the 1960s.


244 McAllister, Drug Diplomacy, p. 211.


246 Davenport-Hines, Pursuit of Oblivion p. 272
some substances far more favourably than others. Whereas addiction to opiates, cannabis and cocaine was considered ‘evil’, synthetic pharmaceuticals were not subject to international controls as they had been long defended by their powerful, western producer States.247 Pharmaceutical companies were making massive profits.248 Pressure was building from a range of different camps to increase controls over such substances249 and towards the end of the 1960s calls for international measures had increased in and from many States.250

2.5 The 1971 Convention

In 1967 a 17 year-old girl had died of an amphetamine overdose in Sweden as a result of a poorly managed prescription programme.251 By 1968, a new, far stricter policy programme had begun in the country that formed the basis of current visions of a ‘drug free society’.252 Sweden became a lead State in the push for international controls over amphetamines and there followed Swedish resolutions both at the World Health Assembly and at the Commission on Narcotic Drugs to propose the inclusion of amphetamines under the Single Convention’s system.253 After a lengthy discussion of this at the 23rd session of the CND, several States, including the US and UK, expressed similar concerns about the problem but rejected Sweden’s legal solution254 An alternative

247 Alcohol and tobacco were of course entirely excluded. See D. Courtright, ‘A Short History of Drug Policy or Why We Make War on Some Drugs but not on Others’ in J. Collins (ed) Governing the Global Drug Wars, London School of Economics, LSE IDEAS, 2012 pp 17-24.
248 By the late 1960s, for example, approximately 8 billion amphetamine pills were being produced annually by US based companies. Davenport-Hines, Pursuit of Oblivion p. 339
249 Davenport-Hines, Pursuit of Oblivion, p. 271
250 McAllister, Drug Diplomacy, p. 227
254 For Sweden’s comments see ibid paras 362 and 363. For others see paras 364 (US and UK) and 366 (resolution co-sponsors). Those objecting were supported by advice from the Legal
joint resolution was instead adopted by consensus, which referred to increasing stimulant use among young people as ‘a grave danger for the health of the individual and for society’ but did not seek to impose existing international regulations over them. A new treaty was considered by the majority as the better route for bringing synthetic substances under international control.

The Convention on Psychotropic Substances was drafted rapidly between 1968 and early 1971, with the bulk of the negotiations taking place during the first special session of the CND in 1970 and during the conference adopting the convention in January-February 1971. Due to the above issues, summary records of the final conference show that concerns about young people were more prominent than in earlier treaty negotiations. Opening the conference, for example, the Austrian president of the Commission noted that the treaty had been prepared, inter alia, to protect youth ‘against modern civilization’s many hazards’. The Chilean representative referred to young people seeking refuge from hopelessness through drugs (a view echoed by Ghana). Other countries expressed their concerns about increasing drug use among the youth of their respective nations (even when they also said it was not actually much of a problem).

Affairs division of the UN, which stated that the Single Convention was not designed to do this, at para 354.


1971 OR Vol II Fifth Plenary Meeting para 19.

For example, 1971 OR Vol II First Plenary Meeting, paras 19 and 35 (Austria); Third Plenary Meeting, para 6 (Canada) and para 23 (UK).

1971 OR Vol II, Fifth Plenary Meeting, para 48 (Japan).
Just like the Single Convention negotiations, such concerns were primarily rhetorical, but often deeply political.\(^{264}\) No legal obligations were ultimately taken on board focusing on this age group. There was in fact no mention of youth, minors, children or young people in any of the drafts.\(^{265}\) The focus of States from the outset had been whether the treaty was technically needed or politically desirable given the uncomfortable fact that many of the substances now coming under international control were the domain of pharmaceutical companies rather than farmers in developing countries.\(^{266}\) When children and young people were discussed it was mostly to express an underlying justification for the drug treaty expansion process or whatever position a State may have had. According to Canada, for example, young people were ‘the very people the conference was trying to help’.\(^{267}\) For Chile, meanwhile, despite the convention containing ‘errors and some inadmissible discrimination’ (referring to the imbalance in controls between the 1961 and 1971 regimes\(^{268}\)), it was nonetheless accepted as a ‘benefit to youth’.\(^{269}\)

In the few concrete debates that were had, concerns about young people were approached cautiously, echoing concerns that had been aired throughout the

\(^{264}\) Traditional producer States, for example, were glad to see the tables turned and the focus on the scale of production in the US and elsewhere. McAllister, *Drug Diplomacy*, p. 228. Chile also stated that the greatest threat was marijuana use among those aged 9-21 who were being exposed to drugs propaganda ‘of foreign origin’. 1971 OR Vol II Fourth Plenary Meeting, paras 50 and 51. Of course, the draft convention under discussion could have no effect on marijuana.\(^{265}\) See United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, 11 January - 19 February 1971, Official Records Vol I, UN Doc No E/CONF.58/7, 1971 (1971 OR Vol I) parts two and three.\(^{266}\) See generally Commission on Narcotic Drugs, *First Special Session. Comments by Governments on the Draft Protocol on Psychotropic Substances. Note by the Secretary-General*, UN Doc No E/CN.7/525, 30 September 1969.\(^{267}\) 1971 OR Vol II Twenty-Sixth Plenary Meeting, para 51.\(^{268}\) Pharmaceutical companies, supported by their host nations, were successful in ensuring that the 1971 treaty was considerably weaker than its earlier counterpart. See McAllister, *Drug Diplomacy*, pp. 229-232.\(^{269}\) 1971 OR Vol II, Twenty-eighth (closing) plenary meeting, para 13. It was a view shared by Nicaragua. Twenty-eighth (closing) plenary meeting, para 18. There is evidence that pharmaceutical industry representatives were also on Latin American delegations. McAllister, *Drug Diplomacy*, p. 232.
decades. These debates were led by the Holy See, which stated that ‘neither science nor the law, nor yet force’ were enough. ‘There must also be education’. 270 From this perspective, given its vague provisions on drug abuse, ‘the draft Protocol could not be said to be wholly satisfactory’. 271 Others recognised the Holy See’s misgivings, but worried, as they had in previous processes, about the complications involved in predicting youthful behaviour 272 and in identifying those at risk. 273 Even after all of the decades that had passed, there remained a great deal of ignorance as to the actual measures to take on the ground. Unlike the detailed supply-side provisions in both treaties, the final Article 20 of the 1971 convention on ‘measures against drug abuse’ was therefore general. States parties, it said:

‘shall take all practicable measures for the prevention of abuse of psychotropic substances 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.’ 274

2.6 ‘An Especially Serious Threat to the Youth of the World’

‘Prior to 1970’, writes Lines, ‘language typically adopted in General Assembly resolutions on drug control tended to be of a fairly technical nature’. However, ‘beginning around 1970 there is a noticeable shift’. 275 That shift was

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270 1971 OR Vol II, Fifth plenary meeting, para 31; Sixth plenary meeting para 6.
271 Ibid.
273 1971 OR Vol II, France, Sixth plenary meeting para 25.
274 Article 20(1), 1971 Convention. This open wording was intentional so that the article would reflect ‘guidelines’ rather than ‘mandatory rules’. Commentary on the Convention on Psychotropic Substances, UN Doc No E/CN.7/589, 1976, p. 331.
275 Lines, Drug Control and Human Rights, p. 68.
from technical resolutions and bureaucratic arrangements to a rhetorical narrative of threat - to humanity, the State, and to the social fabric. Resolutions in the early 1970s referred to ‘addicts’ themselves as ‘a danger to society at large’;\(^{276}\) stated that drugs represented a ‘threat to human dignity and society’;\(^{277}\) and held that ‘the misuse of narcotic and psychotropic substances presents an actual as well as a potential danger to the health and future of mankind’\(^{278}\) These resolutions marked a clear turn in consensus documents as a consequence of the developments of the 1960s and the increasing stringency of approaches domestically. And it was against this background that the first General Assembly resolution relating to young people and drugs was adopted in December 1971. Entitled ‘Youth and dependence-producing drugs’ it stated that drug use ‘presents an especially serious threat to the youth of the world, among whom this disease has been growing at an alarming rate’. It called upon ‘all States to enact effective legislation against drug abuse’ to meet that threat, to put in place treatment and rehabilitation, and to impose ‘severe penalties for those engaged in illicit drug-trafficking’ as a means of protection.\(^{279}\)

2.6.1 The 1972 Protocol

The tenor of the above resolution reflected concerns at this time that the Single Convention was too weak. It had been ‘widely accepted’, for example, that the Single Convention’s controls over opium were a relaxation of the 1953 Protocol.\(^{280}\) For this and other reasons the US had not been pleased with the

\(^{276}\) ‘Technical assistance in the field of narcotic drugs’, UN Doc No A/RES/2720(XXV), 15 December 1970.

\(^{277}\) ‘International instruments relating to drug abuse control’, UN Doc No A/RES/3013(XXVII), 18 December 1972.

\(^{278}\) ‘Abuse of and illicit traffic in narcotic drugs’, UN Doc No A/RES/3279(XXIX), 10 December 1974. This mirrored national sentiments. In Sweden, for example, the drugs issue had changed from an issue facing a small minority to a ‘threat to society, the nation, and the youth of the nation’. J. Edman ‘Swedish drug policy’ in R. Colson and H. Bergeron (eds) *European Drug Policies: The Ways of Reform*, Routledge, 2017.

\(^{279}\) ‘Youth and Dependence-Producing Drugs’, UN Doc No A/RES/2859(XXVI), 20 December 1971.

Single Convention\textsuperscript{281} and under the Nixon administration a conference was convened for its amendment, this being the year following its announcement of a ‘war on drugs’, itself framed around the threat to children.\textsuperscript{282} The result was the 1972 Protocol amending the Single Convention.

Foreshadowed by the above resolution, references to children and young people as a reason to expand or strengthen the treaty regime were frequent.\textsuperscript{283} Moreover, in a change from previous negotiations, there was a cautious interest in prevention and treatment in international diplomacy. The 1971 General Assembly resolution above, for example, had urged governments to take steps to ‘inform…youth about the dangers of drug abuse’. Earlier scepticism about drugs ‘propaganda’ in both the League and the early years of the UN seems to have been waning. As McAllister suggests, the idea ‘that public campaigns would only increase drug experimentation, especially among the young, carried little credence in the face of rampant illicit use.’\textsuperscript{284} The above 1971 resolution of the General Assembly had further called on States to ‘promote the establishment of comprehensive community-based drug treatment and rehabilitation facilities, especially for young drug users’, mirroring the sentiment expressed in Article 20 of the 1971 Convention. That article served as a model for the new Article 38 of the Single Convention, brought in via the 1972

\textsuperscript{284} McAllister, \textit{Drug Diplomacy}, p. 220. The worry was nonetheless still expressed at the time. See 1971 OR Vol II, Sixth plenary meeting, para 51 (International Criminal Police Organization).

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amending Protocol, and which is identical in its wording. Demand reduction had finally entered into the bedrock of the regime, but it was no repair for the ongoing imbalance towards the supply side.

2.6.1(a) ‘Root Causes’ Rejected

Despite the expressed concerns about youth, the only reference to children, youth or minors in the final 1972 agreement is in the third resolution of the conference adopting the Protocol. This focused on ‘social conditions and protection against drug addiction’. Referring to social degradation and the ‘unwholesome environments’ in which drug use develops, the resolution urged States to ‘develop leisure and other activities conducive to the sound physical and psychological health of young people’. This was the proposal of the Holy See, building on its concerns raised during the 1971 negotiations. Early in the proceedings the Holy See had set out its agenda, declaring that ‘…more attention should be paid to the root causes…it should be possible to fight that situation at the international level.’ On this basis the Holy See submitted a proposed amendment, originally intended for inclusion in the treaty’s preamble. But such issues yet again proved to be unpopular as treaty provisions in the drug control system, even if only preambular. The limits of the conference were set out from the start. As Ghana stated, ‘Education, improved social conditions and better treatment all had parts to play which could not be expressed

285 Article 38(1). ‘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, aftercare, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.’ Explaining the amendments to article 38 to match article 20 of the 1971 Convention, see Sweden’s remarks in 1972 OR Vol II, Committee II, Sixth Meeting, paras 4-6.
288 For the debates around the resolution see 1972 OR Vol II Eleventh Plenary Meeting (draft resolutions) paras 19-80. The Holy See noted that it had ‘submitted an amendment to the preamble of the 1961 Convention in Committee II, but had subsequently decided, in the light of the debate, to submit a draft resolution to the plenary Conference’ (at para 20). It was clear that it was declaratory and ‘without legal force’.
in amendments to the 1961 Convention. When so many young people felt that they had to escape from themselves, it was urgent to re-examine existing social, economic and political structures; that, however, was not the Conference's responsibility. But this was not a consensus view. While the UK and US felt that the above 1971 GA resolution was sufficient, for example, France, Italy and Venezuela sided with the Holy See, that root causes should be a drug treaty matter. The Soviet Union expressed its dismay that although the Conference had before it ‘a draft resolution concerning the very core of the problem for which it had been convened’, States were questioning its competence to look at it. The reason for the controversy was that in identifying social conditions as contributors to drug addiction, searching questions were being asked of deep political and economic structures, as the Soviet Union specifically pointed out. This was not territory the majority of nations were willing to explore in a treaty of this type. The fracturing of the Universal declaration into two Covenants just a few years earlier was evidence of similar rifts.

2.6.1(a) The Criminalisation of Incitement Rejected

Costa Rica, meanwhile, sought to return to Hungary’s proposal during the Single Convention negotiations for the inclusion of a specific obligation around incitement. In introducing the proposal Costa Rica admitted that the ongoing lack of understanding about what to do in relation to young people’s drug use had led to the use of ‘repressive measures’ in its region. Nonetheless, for Costa Rica ‘mass media were now playing a preponderant role in society.

280 1972 OR VOL II, First Plenary Meeting, para 11.
281 1972 OR VOL II, Eleventh Plenary Meeting, para 23.
282 Ibid, paras 22, 35, 36 and 41.
283 Ibid, para 38.
284 Ibid, para 39.
285 1972 OR Vol II Committee I, Twentieth Meeting, paras 1 and 11.
If they helped to encourage drug consumption, they nullified restrictive, preventive and corrective measures or reduced their effectiveness. 296 The proposal therefore suggested that Article 35 of the Single Convention (on measures against illicit traffic) should include a requirement for the ‘adoption of simultaneous measures for education against drug abuse and for the control of any activity or advertising which encourages the consumption of drugs’. 297 The ‘sole purpose’ of the amendment ‘was to protect young people against the drug scourge’. 298

Some States had concerns about freedom of speech and freedom of the press, with both the Netherlands and Denmark taking the strongest stands. 299 Costa Rica knew this was a concern when it presented the proposal. Indeed, it had already been watered down. 300 Still, it argued that ‘Far from limiting those freedoms, the proposed new provisions would ensure that they were not used in a manner prejudicial to public health, whether physical or mental’ 301 and that ‘such action would jeopardize neither freedom of expression nor the freedom of the press, but would benefit society as a whole’. 302 The Soviet Union agreed and completely dismissed such concerns, stating that freedom of speech arguments ‘carried no weight when it was a question of protecting young people against so serious a scourge as that of drugs’. 303 Others shared this view, 304 including those arguing that drugs propaganda could hide ‘under cover of freedom of expression’. 305 It was argued that the proposal allayed any

296 Ibid, para 11.
297 Ibid, para 15.
298 1972 OR Vol II, Committee I, Twenty-First Meeting, para 66.
299 1972 OR Vol II, Committee I, Twentieth Meeting, paras 20 and 22.
300 The original wording had included encouragement to use drugs ‘explicitly, subtly or by omission’. Lamenting the cutting of these words as a ‘pity’, see Soviet Union, ibid para 19.
301 1972 OR Vol II, Committee I, Twentieth Meeting, para 12.
302 Ibid, para 14.
303 1972 OR Vol II, Committee I, Twenty-First Meeting para 14.
304 See, for example, the statements of Venezuela 1972 OR Vol II, Committee II, Twentieth Meeting, para 35.
305 Togo, ibid, para 57.
fears about restrictions on civil liberties by stating that any measures must be ‘subject to constitutional limitations’. 306 Denmark did not see this as a sufficient reply. At issue was not merely whether States were obligated to implement such measures, but also the potential permissiveness with regard to infringements on civil liberties that such a provision might introduce. 307

After a lengthy debate, Costa Rica submitted a revised proposal that received cross-regional support despite the misgivings of some as to duplication and freedom of speech. 308 But when passed to the plenary conference for final adoption Canada introduced an alternate proposal entirely, 309 much to the surprise of those that had supported the Costa Rican proposal. 310 The new article removed any controversial elements, including incitement, leaving only the establishment of regional information centres. Canada’s proposal was adopted, but with thirty-eight abstentions. 311 Evidently, the removal of incitement was not popular.

2.7 ‘A Danger of Incalculable Gravity’: The Vienna Convention

Throughout the 1970s UN resolutions on drugs would occasionally refer to the threat to youth. But despite this rhetorical turn, children and young people were still not on the international agenda for drug control in a substantive way,

306 1972 OR Vol II, Committee II, Twenty-First Meeting, para 30 (India), 42 (Iran), 50 (France), 54 (Yugoslavia).
307 1972 OR Vol II, Committee II, Twenty-First Meeting, para 55.
308 In support see 1972 OR Vol II, Committee II, Twentieth Meeting, Soviet Union (para 19); Philippines (para 32); Holy See (para 33); Iran (para 42); Togo (para 57); Argentina (para 44); Egypt (para 46); Mexico (para 48); France (para 50); Yugoslavia (para 54). 1972 OR Vol II, Committee II, Twenty-First Meeting, Panama (para 5); Burma (para 6); Brazil (para 7); Ghana (para 10); Guatemala (para 12); Cyprus (para 16); El Salvador (para 17); Ceylon (para 18).
309 1972 OR Vol II, Twelfth Plenary Meeting, para 97.
310 For example, ibid, Uruguay (para 101); Soviet Union (para 102); Spain (para 105); Togo (paras 111 and 131).
311 Ibid, p. 127.
being limited in almost every case to the threat to youth followed by a reaffirma-
tion of the extant system. This was again reflected in the other direction. The drugs issue was still not on the child welfare and development agendas. For example, in response to the 1971 General Assembly resolution set out above, the Unicef Executive Board focused on ‘child drug abuse’ in 1973. This was its first attention to the issue since its founding in 1946. However, the recorded discussions indicate a continuing caution in this area of exactly the same sort that had been evident over the decades in the drug control sys-
tem, and reflected further in the unwillingness to adopt more specific legal obligations in the 1971 and 1972 agreements. Unicef had been requested to become more involved on the question of drug use among children in those countries that requested its assistance. But while some delegations favoured the move, others felt that it was not a priority and/or that not enough was known about prevention and treatment for this age group and that intervention by Unicef would thus be ‘premature’. Thereafter the issue again disappears from the Unicef Board’s proceedings for the remainder of the decade. The 1980s, however, would bring about significant changes.

312 See, for example, ‘Abuse of and Illicit Traffic in Narcotic Drugs’ UN Doc No A/RES/3279(XXIX), 10 December 1974, which simply restates the threat to the ‘future of mankind, especially that of youth’. This language would become fairly standard over the years. See also ‘International Co-operation in Drug Abuse Control’ UN Doc No A/RES/34/177, 17 December 1979. This lengthy resolution refers again to the threat to youth, but when listing the wide range of UN agencies that should remain seized of the issue it omits Unicef.


314 Ibid. It was decided that Unicef could nonetheless assist if requested and if the programmes had been set up by other agencies.

Ever since the adoption of the Single Convention, and despite the international regime, the drugs situation had been ‘steadily and rapidly deteriorating’ including for children and young people. During the 1970s, school and household surveys had begun in some countries, showing that rates of drug use were continuing to rise, a pattern that persisted into the 1980s. In the US, for example, the national household survey had begun in 1971. In 1972 lifetime cannabis use among 12-17 year olds (i.e. those having ever used cannabis) was 7%. In 1974 it was 12% and in 1977 it was 17%. That year 10% of 18-25 year olds has used cocaine. By 1985 it was one third. Though attention continued to shift to the demand side in an effort to balance the traditional supply side bias of the regime, a more restrictive approach to drug use grew in response to the perceived permissiveness of earlier decades. In the UK, psychiatrists began pushing for compulsory treatment of people who were drug dependent, with complete abstinence as the primary goal. In Sweden, drug use (as opposed to possession for use) was criminalised in 1988, building on the restrictive approach that had begun in the late 1960s, and justified, at least in part, on the basis of protecting youth. Crack cocaine entered the scene in the United States during the 1980s, and with it the ‘crack baby’ scares that led to the punishment of pregnant women and new mothers. By 1989 US drug czar William Bennett was describing crack as a new ‘plague’ at a time when 64% of the US population viewed the drugs issue as one of the most important political challenges of the day. Three years earlier it had been only 3%.

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319 UN Office on Drugs and Crime, Sweden’s Successful Drug Policy: A Review of the Evidence, UNODC 2007, p. 16. At the time the maximum punishment was a fine, but this was increased to potential imprisonment in 1993.
320 Davenport-Hines, Pursuit of Oblivion, p. 355
Meanwhile, the drug trade came even more to be seen as ‘a threat to national and international order’. Opium production in Afghanistan increased considerably in the 1980s and Europe saw a considerable increase in injecting drug use as cheap Afghan heroin hit the streets; a concern that was intertwined with the emerging threat of HIV. China, for its part, experienced a significant influx of heroin from the Golden Triangle following its economic reforms that opened its borders. In response, it increased its focus on drug enforcement, creating its first specialised drugs police force in 1982.

Though heroin from Afghanistan challenged Europe, and the Golden Triangle caused serious problems for China, Latin American cocaine dominated US and Latin American concerns. Based in Colombia, the brutal Cali and Medellin cartels gained in power over the course of the decade, and moved their operations to other countries in the region. In the late 1980s the Cali cartel had begun a campaign of violence in response to counter-narcotics efforts. In 1989 it bombed a domestic passenger plane, killing over 100 people. It was revenge for the imprisonment of one of its senior figures. The ‘narco-terrorist’ had entered the scene. In response, interest in cross-border efforts grew. Funding for the US Drug Enforcement Agency increased exponentially during this period and allowed it to spread its techniques around the world. And in 1986 the still controversial ‘decertification’ procedure was introduced, through

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323 McAllister, _Drug Diplomacy_, p. 244
326 S. X. Zhang and K-I Chin, _A People’s War: China’s Struggle to Contain its Illicit Drug Problem_, Brookings Institute, 2015, p. 10.
327 ‘Colombia Confirms Bomb Killed 111 on Plane: Cocaine Traffickers are Suspected in the Nov. 24 Explosion’ _LA Times_, 6 December 1989.
which (mostly Latin American) States that were seen to not be complying with international drug control obligations could see their US aid restricted.  

A global anti-trafficking treaty had been attempted in 1936, but States were then not ready to take on board its intrusive obligations. Fifty years later, ‘altered circumstances’ in the form of the scale of the trafficking threat ‘created a more receptive atmosphere’. At the same time, as Jakob Katz-Cogan demonstrates, international law was entering more into the control of private behaviours.

The General Assembly requested the initiation of a draft convention against trafficking via resolution 39/141 in 1984. This was in view of the scale of the drug trade, gaps in the international regime, especially with regard to penal provisions, and the ‘increasing damage which the illicit drug traffic causes to public health, the economic and social development of peoples, and young people in particular.’ The resolution referred to two declarations issued in 1984, one in Quito and the other in New York, both declaring trafficking to be a crime against humanity, and both driven by Latin American States. The Quito Declaration was itself framed in relation to protecting youth and human

329 Davenport-Hines, Pursuit of Oblivion, p. 359. It remains one of the main enforcement mechanisms of the international drugs conventions.
331 Katz-Cogan, ‘Regulatory Turn’.
333 Vienna Convention Commentary, p. 1 para 3. See also Commission on Narcotic Drugs, Initiation of the Preparation of a Draft Convention against the Illicit Traffic in Narcotic Drugs, Note by the Secretary-General, UN Doc No E/CN.7/1985/19, 14 January 1985, para 4.
335 For the New York Declarations see UN Doc No A/39/551, 10 October 1984, Annex. On crimes against humanity see principle 2. For the Quito Declaration, see UN Doc No A/39/407, 17 August 1984, Annex. On crimes against humanity see principle 2 and article 10(a) respectively. Referring to the declarations see GA Res 39/143 and 40/121, and Nicaragua’s intervention in the conference adopting the Vienna Convention. 1988 OR Vol II Sixth Plenary Meeting, para 45.
rights. Similarly, the General Assembly had viewed trafficking as, at least, a ‘shameful and heinous crime’. But annexed to the 1984 resolution was also a first draft of the Convention which sought to ‘declare’ trafficking a ‘grave crime against humanity under international law’ relating this specifically to its ‘inflicting serious harm on the youth of the world’. 

In this way young people were, at least rhetorically, at the forefront of the reasoning for the treaty from the outset and this was reiterated by many States in drafting. Setting the tone in opening the conference adopting the Convention was the Bolivian Presidency. ‘The time had come’ it said ‘for the international community to make it forcefully known that it would no longer tolerate the poisoning of future generations’. The tone of the statements made by delegates was very different to earlier drug treaty adoption processes. During the conference adopting the convention Colombia referred to a ‘drug holocaust’ that was the ‘worst enemy of the human race’. Bolivia, meanwhile, referred to drugs as a ‘scourge of humanity’ and the need for this kind of convention for States to be successful in ‘humanity’s war on drugs’. The Inter-parliamentary Union and the European Union of Women both argued that drug trafficking must be seen as a crime against humanity, and both based

336 Quito Declaration, paras and 1, 3, 4 and 9.
337 ‘Declaration on the Control of Drug Trafficking and Drug Abuse’ UN Doc No A/RES/39/142, 14 December 1984, Annex, para 4
339 1988 OR Vol II first Plenary Meeting, para 7. See also, for example, Second Plenary Meeting, para 16 (Holy See); Second Plenary Meeting, para 19 (German Democratic Republic); Fourth Plenary Meeting, para 3 (Colombia); Fourth Plenary Meeting, paras 8 and 9 (Nepal); and the debates relating to specific provisions below.
342 Ibid para 24. See also 1988 OR Vol Ii Second Plenary Meeting para 33 (Saudi Arabia); paras 45 and 48 (Iran); Sixth Plenary Meeting, para 50 (Morocco).
their view on the protection of children.\textsuperscript{343} While this was rejected,\textsuperscript{344} during the drafting process various other measures were suggested by States that pushed the boundaries of what was agreeable in treaty form, but demonstrated the overall tenor of the negotiations. Travel restrictions, denial of passports and addressing the perceived leniency of sentencing were all suggested at the meeting of the heads national law enforcement agencies in the far East, and presented in a document that fed into the process.\textsuperscript{345} The use of preventative detention and a prohibition of depenalisation of even minor offences were suggested.\textsuperscript{346} The United States and France, meanwhile, sought to exclude trafficking offences from the constitutional protections that had been included in the penal provisions of earlier drugs conventions, indicating in the clearest way the desire at the time to break down the barrier that sovereignty had long posed to the adoption of a truly universal system.\textsuperscript{347} Malaysia, for its part, suggested that capital punishment be added as a possible penalty.\textsuperscript{348} While these specifics did not pass, they indicate a consensus for increased stringency

\textsuperscript{343} Commission on Narcotic Drugs, \textit{Text of a Resolution Forwarded by the Inter-Parliamentary Union}, UN Doc No E.CN.7/NGO/1, 2 February 1987; Commission on Narcotic Drugs, \textit{Text of a Resolution Forwarded by the European Union of Women}, UN Doc No E/CN.7/1987/NGO/4, 9 February 1987, para (e) (referring to an ‘offence against humanity’).

\textsuperscript{344} Though the inclusion of severe penalties against traffickers was agreed, the specific idea of a legal determination of drug trafficking as a crime against humanity was strongly contested by some States, and was removed at second draft. Commission on Narcotic Drugs, \textit{Comments and Proposals Received from Governments Concerning a Draft Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances}, \textit{Report of the Secretary-General}, UN Doc No E.CN.7/1986/2/Add.1, 24 December 1985, para 58. Interestingly, one of the opposing States was Argentina, which had signed the New York Declaration expressing the opposite view. The debate did not disappear, however. See 1988 OR Vol II, Committee I Twenty-Eighth Meeting, para 13 (Philippines lamenting the fact that ‘the international community was not yet ready to abandon the narrow confines of national sovereignty in order to combat, if not eradicate, the illicit traffic in drugs which it had stigmatized as a crime against humanity’).


\textsuperscript{347} Commission on Narcotic Drugs, \textit{Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances}, \textit{Report of the Secretary-General}, UN Doc No E/CN.7/1987/2/Add.1, 30 December 1986, para 123.

\textsuperscript{348} Ibid, para 159.
in the new treaty and for harmonisation of national law and criminal frameworks in this regard.\textsuperscript{349} As we shall see in chapter 6, despite their rejection as explicit provisions in the Vienna Convention, these and other such measures have since then been readily reported to the Committee on the Rights of the Child to signal compliance with Article 33 of the CRC.

2.7.1 The Preamble
The Vienna Convention ultimately included a range of new provisions, including those that were ‘deliberately Draconian’,\textsuperscript{350} those that sought to harmonise strict national criminal penalties\textsuperscript{351} and ease extradition,\textsuperscript{352} and those specific to children and young people. One such provision was the preamble, within which the threat to children posed by drugs found its articulation in treaty form for the first time. It describes the use of children in the drug trade or ‘the use of children as a consumers market’ as a ‘danger of incalculable gravity’. Introduced by Peru on behalf of a grouping of States, primarily from Latin America,\textsuperscript{353} it passed with little discussion, having arrived fairly late in the drafting process. It also mostly reiterated a depiction of a threat that States had accepted many times already. ‘Such criminal activity’ said Peru, ‘sapped the roots of society, and the destruction of young people also robbed humanity of its future. … An international instrument of such importance as the proposed convention could hardly fail to mention the saddest and most harmful

\textsuperscript{349} Commission on Narcotic Drugs, \textit{Report of the Ninth Special Session 10-14 February 1986}, UN Doc No E/CN.7/1986/13, para 23. This push for increased stringency was reflected in academic writing at the time. See for example, J.L. Harding 'International Narcotics Control: A Proposal to Eradicate an International Menace', 14 \textit{California Western International Law Journal}, 1984, pp. 530-554.

\textsuperscript{350} \textit{Vienna Convention Commentary}, para 5.73 (referring to article 5 and asset forfeiture, which was ‘a serious interference with the rights of individuals’ requiring particular care for constitutional and human rights protections)

\textsuperscript{351} Article 3, Vienna Convention.

\textsuperscript{352} Article 6, Vienna Convention.

aspect of the drug trafficking problem. None disagreed with this sentiment or the preambular paragraph as drafted. It passed with no substantive changes, and with the agreement that it be placed near the beginning of the preamble to demonstrate its central importance as justification and rationale for the strategies that followed.

2.7.2 Children as Aggravating Circumstances

Already in 1971, the General Assembly had called for severe penalties for traffickers, given the threat to youth. It was in this context that the first substantive provision relating to children was adopted, but it extended far beyond trafficking. It related to the involvement of or proximity to children as aggravating circumstances for the crimes covered by the treaty, and had been included in the second draft following comments from States. There was consensus that ‘particularly serious crimes’ should extend not only to those who victimised or exploited minors, but to those who used them in any way. There were some misgivings about this. As the Netherlands pointed out ‘Young people could be “used” in drug trafficking without, strictly speaking, being “exploited”’. But while this was pointed out by way of caution it was precisely for this reason that the formulation ‘victimisation or use’ was ultimately adopted in Article 3(5) of the Convention. It was intended to capture a much wider range of ‘uses’ of children, including insignificant activities, and without the need for evidence of exploitation or victimisation per se. The

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354 1988 OR Vol II Committee I Thirty-Third Meeting, para 152.
355 Ibid, paras 164 and 165.
356 Commission on Narcotic Drugs, Preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances, Report of the Secretary-General, UN Doc No E/CN.7/1987/2, 17 June 1986, p. 7. The first draft did not include the victimisation of minors as an aggravating circumstance.
357 1988 OR Vol II Committee I, Second Meeting, paras 38-56. This had earlier been proposed by Argentina, see Preparation of a Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Report of the Secretary-General, UN Doc No E/CN.7/1987/2/Add.1, 30 December 1986, para 169.
358 1988 OR Vol II Committee I Second Meeting, para 46.
Commentary to the Vienna Convention confirms that this is the case, indicating that ‘use’ includes but is not limited to exploitation, and that a minor acting as a messenger could qualify. As such, so could ‘use’ in farming of certain crops. But what of the minor involved in the relevant crimes? On this the treaty is silent.

More controversial was the proposal to include the location of certain offences, i.e. where they took place, within the category of ‘particularly serious crimes’. Initially it was suggested that this should include if the offence was committed in a school, but an expansion was suggested by Argentina, Colombia and Mexico to include ‘places or areas where groups of schoolchildren carry on out-of-school cultural or recreational activities’. There was considerable debate on this aspect. One side had concerns about its vague formulation. It could include offences committed anywhere and activities undertaken when children were not present. What, in other words, was ‘particularly serious’ about that? It was, in the words of the Netherlands, ‘much too broad’. The other side maintained that the provision was about securing the maximum protection for children and young people. It was, in effect, a form of ‘legal overkill’ but one that ultimately won out. Thus, while some concessions were given, the agreed text remained very broad. Particularly serious’ would be those committed:

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359 Vienna Convention Commentary, para 3.121.
360 1988 OR Vol II Committee I Second Meeting, paras 59-81.
362 See for example, 1988 OR Vol II, Committee I Second Meeting, para 62, where the Netherlands explained how it could ‘not fully understand the significance of singling out specific locations as aggravating circumstances when the real concern was presumably with the persons occupying those locations’. See also Germany’s intervention at para 65 and Vienna Convention Commentary, para 3.122.
363 1988 OR Vol II Committee I, Third Meeting, para 15. See also paras 17 (United States), 20 (United Kingdom), 22(Spain) and 23 (Italy)
364 See for example, 1988 OR Vol II, Committee I Second Meeting, paras 63 and 73 (Mexico).
366 1988 OR Vol II, Committee I Second Meeting, para 75; 1988 OR Vol II Committee I, Third Meeting, paras 1-30. The final wording was suggested as a compromise by the UK, at para 20.
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’. 367

In many built-up urban areas, this could capture a significant proportion of territory. Such ‘zoning’ has since been the subject of considerable critique. As one report has put it, a few hundred feet can mean the difference between probation and years in prison.368

2.7.3 Criminalisation of Incitement Accepted

With the Vienna Convention the vexed question of incitement to use drugs finally entered into binding international law. While the criminalisation of incitement or promotion of drug use could not be agreed in any treaty since the Agreement Concerning the Suppression of Opium Smoking of 1931, it was agreed through Article 3(1)(c)(iii) of the Vienna Convention. Subject to constitutional limitations, States parties must establish as a criminal offence:

‘Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly’

367 1988 OR Vol I p. 104 and Article 3(5)(g), Vienna Convention.
368 C.J. Ciaramella and L. Krisci, ‘The Myth of the Playground Pusher: In Tennessee and Around the Country ‘Drug Free School Zones’ are No More than an Excuse for Harsher Drug Sentencing’ Reason, January 2018. Though federal law created drug free school zones in 1970, at the State level they proliferated in the late 1980s and early 1990s. Almost 40% of the city of Memphis is covered by such a zone. In Veliz v. State, 664 A.2d 387 (Md. Ct. Spec. App. 1995) the Maryland Appellate Court upheld the conviction of a defendant who had neither possessed drugs nor intended to do so in the relevant statutory school zone. Instead ‘the defendant was convicted for the commission of acts within the statutory zone which were in furtherance of a general conspiracy to deliver drugs at a different location beyond the proscribed zone’. W. L. Mowery, ‘Stepping Up the War on Drugs: Prosecution and Enhanced Sentences for Conspiracies to Possess or Distribute Drugs Under State and Federal Schoolyard Statutes’, 101 Dickinson Law Review 4, 1997, pp. 703-727 at 705. Mowery argues for the universal use of this reasoning.
The protection of children was central to its inclusion in the treaty, with this view coming from inter- and non-governmental organisations and States alike. The Inter-Parliamentary Union, for example, used its submission to encourage the control of the media, cinema, radio and television for the protection of youth.\textsuperscript{369} Mexico, which had been at the forefront of the provisions above regarding children and minors, proposed the actual provision by way of an amendment to earlier drafts.\textsuperscript{370} In stark contrast to previous treaties, the criminalisation of incitement sailed through with almost no debate. Concerns about free speech and freedom of the press that had arisen in 1972 were completely absent.\textsuperscript{371} Indeed, the provision was intended to capture movies and magazines deemed to ‘glorify’ drug use, and thus was an intentional limitation on freedom of expression.\textsuperscript{372}

We may recall that the inability to agree on incitement in 1972 was unpopular. Its agreement in 1988 is further evidence of the changing circumstances allowing for the elaboration of State obligations that were previously not acceptable in an international treaty. At the height of the drugs threat and in the most punitive drugs convention to date, it was an easy call. However, as we shall see, incitement had been rejected in the drafting of another treaty just two years earlier: the Convention on the Rights of the Child.

\textsuperscript{369} Commission on Narcotic Drugs, \textit{Text of a Resolution Forwarded by the Inter-Parliamentary Union}, UN Doc No E.CN.7/NGO/1, 2 February 1987, para 16.
\textsuperscript{370} 1988 OR Vol II Committee I Third Meeting, para 48.
\textsuperscript{371} The draft provision already included the standard constitutional safeguard clause to allay concerns about the constitutionality in some countries of what was being proposed. Colombia, however, disagreed with any such constitutional safeguard, as had the US and France in earlier drafts. 1988 OR Committee I, Third Meeting, para 54.
\textsuperscript{372} \textit{Vienna Convention Commentary}, para 3.72.
2.8 A Human Right: Article 33 of the CRC

While the welfarist vision of the ‘child savers’ had dominated international agreements on child rights in 1924 and 1959, by the 1970s a diverse social movement had grown calling for the greater recognition of rights for children, including around civic participation.373 By the 1970s, in the wake of the development of international human rights law, the idea of children as active agents had gained in prominence.374 There were also increasing calls for a binding treaty on child rights to replace the older declaration, and the idea of a UN convention on the rights of the child came to international attention.

The UN Convention on the Rights of the Child was adopted by the General Assembly on 20th November 1989.375 It is recognised as a landmark in the development of child rights and a significant development from earlier conceptions of the child as a passive object, rather than active subject of the law.376 And it is through the CRC that the drugs question entered into binding child rights law for the first time. But here we see the parallel contexts leading to the CRC in General, on the one hand, and to its specific drugs provision on

373 Key figures such as Janusz Korczak, seen by some as the father of contemporary child rights, had long ago included such participation rights in their visions of a child rights framework. See J. Korczak, ‘The Child’s Right to Respect’, 1927 (republished the Council of Europe in Janusz Korczak: The Child’s Right to Respect, 2009, pp. 23-42). See also T. Hammarberg, ‘Children have the right to be heard and adults should listen to their views’ in Janusz Korczak: The Child’s Right to Respect, Council of Europe, 2009, pp. 81-90 at 81 and 82.


376 This is usually regarded as a positive. See for example, A. Parkes, Children and International Human rights Law: The Right of the Child to be Heard, Routledge, 2014, p. 5 (referring to earlier authors); see also the various contributions in J. Connors et al (eds) 18 Candles: The Convention on the Rights of the Child reaches Majority, Office of the High Commissioner for Human Rights, 2007. But this aspect of the CRC was not without controversy. See for example B. Hafen and J. Hafen ‘Abandoning Children to their Autonomy: The UN Convention on the Rights of the Child’, 37 Harvard International Law Journal 2, 1996, pp. 449-492 (arguing that the CRC is ‘misguided’ in this regard, even if the protection elements are good). This, of course, relates to long unresolved theoretical debates about the foundations of child rights. For an excellent and still highly relevant collection setting out differing perspectives, see P. Alston and J. Seymour (eds) Children, Rights and the Law, Clarendon/Oxford University Press, 1992.
the other. Article 33 was possible due to a number of overlapping factors: The ongoing strength of the welfarist approach despite this new more participatory and empowerment vision for child rights;\textsuperscript{377} the ambition to create a ‘comprehensive’ treaty, addressing almost all areas of children’s lives; the prominence of contemporary international responses to the threat posed by drugs which had let to the Vienna Convention during the same period; and because of this the absence of any real controversy from States, NGOs or UN agencies about the idea.

Drafting of the CRC began on the initiative of Poland in 1978 to mark the international year of the child.\textsuperscript{378} The very earliest contributions included suggestions from NGOs to cover the drugs issue in the treaty deliberations.\textsuperscript{379} Spain even suggested specific wording. Referring to then Article II on the child’s physical and moral development, Spain suggested the addition of the child avoiding ‘anything that damages or may impair his physical or mental health, especially drugs in any of their forms.’ \textsuperscript{380} The summary records of the open-ended working group to draft the Convention indicate no discussion of this suggestion, however, despite further indications of interest in seeing it included from NGOs. \textsuperscript{381} The second draft of the Convention also omitted the


\textsuperscript{379} Letter from the International Federation of Women Lawyers to T. Van Boven, Director, Division of Human Rights, 24 October 1978, UNOG archives, G/SO 214 (28). The letter included an attachment setting out topics of workshops at the twentieth biennial congress of the Federation that might be considered in the draft Convention. These included drug abuse. The annex was not included in the compilation of replies issued by the Secretariat, however. See Commission on Human Rights, Question of a Convention on the Rights of the Child, Report of the Secretary-General, UN Doc No E/CN.4/1324, 27 December 1978, pp. 22 and 23.


\textsuperscript{381} For discussions of the first round of comments see Commission on Human Rights, Question of a Convention on the Rights of the Child, Report of the Working Group, UN Doc No
issue. It therefore did not arise in working group discussions held in 1981 based on that draft, even though further interest had been expressed from NGOs.

Drugs were therefore on the agenda from the outset both from States and NGOs but the main initiative for a specific provision began with China in 1982. The proposed wording was to include ‘preventing and prohibiting the child from using drugs’ as a sub-paragraph of what was then Article 12 on the child’s right to health. The idea was not discussed due to lack of time, but with this proposal the idea began to take root, and further concrete proposals emerged. During the next round of discussions in 1984 a new article on serious health risks was suggested by the International Federation of Women in Legal Careers, which would include an obligation

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386 Ibid. It is worth recalling that China had sought the inclusion of a provision similar to this in the drafting of the Single Convention, but had failed. This was also, as we have seen, coincidental with China’s increasing focus on drug enforcement. So its persistence on the matter is perhaps unsurprising.
‘To take all necessary scientific, technical, educational and remedial measures for the national and international combating of drug abuse and, in particular, the use by children of drugs of whatever kind’. 387

The Federation argued that this was necessary because of the growing use of drugs among children and that the favourite targets of drug traffickers were schoolchildren. 388 The following year China submitted a version of its earlier proposal, arguing that if it did not work as an element of the right to health, the protection from drugs could stand alone, reading:

‘The States Parties to the present Convention shall take measures to prevent and prohibit children from taking drugs.’ 389

Though both proposals were before States in 1985, they were overshadowed by other articles. 390 Still, there was by now a consistent interest from influential NGOs and at least one powerful State, and in 1986 China again submitted wording, this time for a fully fleshed out stand-alone provision:

‘1. The States Parties to the present Convention shall take all appropriate legislative, administrative, social and educational measures to prevent and prohibit a child from taking narcotic drugs as defined in

388 Ibid p. 3
the relevant international conventions. The competent national authorities should investigate cases of drug abuse by a child and timely medical treatment should be provided for the child so that he or she may be assured prompt rehabilitation and healthy growth.

2. The States Parties to the present Convention shall take legislative and administrative measures to prevent and prohibit trafficking in narcotic drugs by a child. The States Parties should, in accordance with their national legislation, apply sanctions, including appropriate criminal punishment, to anyone who uses or incites a child to become involved in various forms of drug trafficking.  

A further, more succinct NGO proposal was also on the table, this time from the NGO Ad Hoc Working Group that had been organised to co-ordinate NGO input, led primarily by Save the Children and Defence for Children International. It read:

‘The States Parties to the present Convention shall take all necessary national and international measures of a scientific, technical, educational, remedial and curative nature to protect children from the abuse of narcotic and psychotropic substances as defined in international treaties, and shall combat all forms of distribution to children, and the use of children in the trafficking of such substances.’


With two fleshed out drafts for a potential provision on drugs before it, the 1986 working group session finally discussed the issue.\textsuperscript{393} An informal discussion group made up of China, Canada, the German Democratic Republic and the United Kingdom was convened, and a consolidated text was agreed among them.\textsuperscript{394}

‘The States Parties to the present Convention shall take all appropriate measures, including legislative, social and educational measures, to protect children from the illegal use of narcotic and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illegal production and trafficking of such substances.’\textsuperscript{395}

The opening wording of China’s two paragraphs was the formulation adopted, but its more specific elements were removed. NGOs were therefore influential, as their broader format was ultimately adopted. It is also worth noting that the States that finally agreed the consolidated text were some of the most prominent in the development of international drug control law all along.


\textsuperscript{394} A group of NGOs from Argentina suggested an alternate article, but as it was submitted in late 1987, it was too late into the process. In any case it did not differ substantially from what had been agreed, except to include a provision specifically on assistance programmes for children who use drugs. \textit{Propuesto Del Grupo Especial Argentino, Comit€e de las Organizaciones no Gubernamentales y Observadores de Organizaciones O$ciales, Noviembre y Diciembre, 1987}, UNOG archives, G/SO 214 (28).

2.8.1 Insights from the Drafting Process

Compared to other provisions in the Convention, the discussions leading to the final Article 33 were remarkably brief. But there are still a number of interesting insights that we may glean from them, and from the fact of the brevity of the negotiation itself.

With regard to the text, States preferred a broad formulation. For example, on the recommendation of the Netherlands, supported by Germany, the focus on ‘preventing and prohibiting’ the child from using drugs was rejected in favour of a broader formulation of protection from such use. And from the lengthy and more prescriptive Chinese proposal, the final wording more closely reflects the vaguer NGO approach, though retaining China’s opening lines. Prescriptive obligations of investigation, prompt medical treatment, incitement and strict penalties were dropped.

The reference to the ‘relevant international treaties’ was included to make clear which drugs were being referred to. The Netherlands broached this exact question by asking if the Chinese draft included ‘all drugs’. The United States, for its part, felt that the provision should include reference to alcohol. Though the record is silent as to why, it is clear that ‘all drugs’ including alcohol and tobacco were not included. By way of clarity, the wording of the drugs conventions then in force was adopted, delimiting the scope of Article

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396 Contrast the Article 33 deliberations with those for either Article 32 or 34. CRC LH Vol II, pp. 693-708 and 713-722.
398 This may be explained by the inclusion of medical treatment under Article 24 on the right to health, but the record is silent on this.
400 Ibid, para 81.
33 to the substances under international control and omitting alcohol and tobacco.\textsuperscript{401}

There are interesting coincidences between the drafting processes of the CRC and the Vienna Convention. For example, shared elements between both treaties appeared in the CRC prior to the Vienna Convention, so it is possible that child rights law influenced drug control in this way. The CRC adopted the broad concept of the ‘use’ of the child in the illicit drug trade by 1986, and which was not discussed in the Vienna debates until 1988. There was never a suggestion for narrower wording such as ‘exploitation’ or ‘victimisation’ in drafting Article 33 as arose in the Vienna process. Moreover, the article focuses both on drug use among children and the use of children in the drug trade, again predating the preambular provision to this effect in the Vienna Convention, which was also not suggested until 1988.

Conversely, elements that were included later in the Vienna Convention were dropped from the CRC. China, as we have seen, proposed obligations both relating to appropriate sanctions and to incitement to use drugs. These represent the precise context for the references to children in the Vienna Convention. However, the word ‘incites’ was rejected by both the US and Japan, though, again, the archive does not indicate their reasons.\textsuperscript{402} There is no record of why the reference to sanctions was removed. Clearly, however, neither strict sentencing nor incitement were taken on board explicitly as obligations under the CRC, and were easily stripped from the text, in contrast to the Vienna Convention where they were so easily included.


There were also crossovers between the two negotiations. States that were influential throughout the drafting of the drugs conventions – China, the US, the UK, Netherlands, Canada and Germany – were mostly responsible for the final wording of Article 33. NGOs that had earlier taken part in the Commission on Narcotic Drugs and that took part in the Conference adopting the Vienna Convention were also involved in drafting the CRC. Latin American States pressed for the inclusion of children in the Vienna Convention, and made clear their desire to connect the two issues in drafting the CRC. Peru, for example, spearheaded a resolution at the General Assembly following the adoption of the Vienna Convention, and which referred to the draft CRC. Alongside calls for greater efforts to protect children from drug use, it reiterated the now longstanding call for severity of punishments. Peru called attention to the resolution in the final conference adopting the CRC.

But in contrast to the Vienna debates, where States struggled with the legalities of what was being proposed and their lack of knowledge about proper responses, the discussions around Article 33 were cursory. There was no recorded objection to the idea of such a right in the Convention, which was adopted by consensus. States, NGOs and international organisations indicated their desire to see the provision included throughout the drafting, but

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405 Additional to the submission set out above, summary records of the discussions in the Commission on Human Rights are collated in CRC LH Vol I. See, for example, the Soviet Union, UN Doc No E/CN.4/1987/SR.55, 16 March 1987, para 22 (CRC LH Vol I p. 161); World Health Organization and International Association of Educators for World Peace, UN Doc No E/CN. 4/1989/SR.54, 15 June 1989, paras 72 and 105 (CRC LH Vol I p. 218 and 229); During the conference adopting the CRC see Colombia, Burkina Faso and Mexico, UN Doc No A/C.3/44/SR.37, 15 November 1989, paras 1, 33 and 57 (CRC LH Vol I pp. 242 and 243, 248,
no discussion was had as to what kind of right this might be, beyond its placement between articles 32 and 34, both dealing with exploitation.\textsuperscript{408}

The CRC is widely celebrated as a turning point in child rights, when the child as subject rather than object of international law came into being. But Article 33 was clearly a creature of its times – its specific drug policy context - negotiated and adopted at the height of fears about the threat of drug trafficking.\textsuperscript{409}

The protection of children from drugs was so self-evidently a good thing that it could be included in a human rights treaty with ease, uncomplicated by the specific challenges that the enunciation of such a right might entail.

2.8.2 To the Present: The CRC and Reform

The convergence between the two regimes that began with the adoption of the CRC and the Vienna Convention continued into the 1990s and beyond. Both treaty systems increased in ratification and accession until both the CRC and the Vienna Convention reached near universality (at 196 and 189 States parties respectively at the time of writing). Protection from drugs and the drug trade was included in further treaties and declarations relating to children, each of them following on the heels of the CRC in various ways. Politically, a UN

\textsuperscript{408} Article 33 was adopted as Article 18bis and later renumbered. The more general concerns around child protection reflected in Articles 10(3) of the ICESCR and Article 24(1) of the ICPR are fleshed out through these provisions. See Preamble, Convention on the Rights of the Child, referring to these provisions.

\textsuperscript{409} Just two weeks after the adoption of the CRC the General Assembly requested that the International Law Commission initiate a study on the creation of an international criminal court for drug traffickers, referring to the threat posed to human rights 'International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes’, UN Doc No A/RES/44/39, 4 December 1989. It was a narrative that continued into the human rights system, which was itself prone to using the most reactionary rhetoric of the drug control system. See Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, \textit{Prevention of Discrimination and Protection of Children: Human Rights and Youth, Final Report On Human Rights And Youth, Submitted by Mr. Dumitru Mazilu, Special Rapporteur, E/CN.4/ Sub.2/1992/36, 18 June, 1992, paras 108-111 and 275(d).}
‘decade against drug abuse’ was declared in 1991, and in 1996 the World Programme for Youth to the Year 2000 and Beyond was adopted. It included drug use prevention in a UN-endorsed global youth strategy for the first time.\textsuperscript{410} The decade culminated in a General Assembly Special Session on drugs in 1998 which would seek the goal, endorsed by youth organisations citing Article 33, of a ‘drug free world by 2008’.\textsuperscript{411}

Between 2000 and 2017, eight resolutions were adopted at the UN Commission on Narcotic Drugs referring to the CRC in preambular provisions.\textsuperscript{412} While still few in number (of approximately 200 resolutions during this time), this demonstrates an increase from previous decades not only in references to human rights treaties in CND resolutions, but also in the focus on children.\textsuperscript{413} But just as with previous decades the context of this attention and these references is important. Of the eight, six have been adopted since 2014. This was

\textsuperscript{410} ‘World Programme of Action for Youth to the Year 2000 and Beyond’, UN Doc No A/RES/50/81, 13 March 1996, annex, paras 73-85.
\textsuperscript{411} Youth Charter for a Twenty-First Century Free from Drugs, 1998, produced with the support of UNESCO and the UN Drug Control Programme. The charter’s preamble began with Article 33. See also The Vision from Banff, 18 April 1998, a youth declaration submitted to the Special Session that emerged from a conference supported by the UN Drug Control Programme and the Governments of Canada, Italy, Norway, Sweden and the UK. Both contained interesting ideas, but both called for increased severity on the supply side.
\textsuperscript{412} Resolution 43/4 ‘International Co-operation for the prevention of drugs abuse among children’, 2000; Resolution 53/10 ‘Measures to protect children and young people from drug abuse’, 2010; Resolution 57/3, ‘Promoting prevention of drug abuse based on scientific evidence as an investment in the well-being of children, adolescents, youth, families and communities, 2014 (this language mirrors a thematic focus of the Outcome Document); Resolution 57/7 ‘Providing sufficient health services to individuals affected by substance use disorders during long-term and sustained economic downturns, 2014; Resolution 58/2 ‘Supporting the availability, accessibility and diversity of scientific evidence-based treatment and care for children and young people with substance use disorders’, 2015; Resolution 58/3 ‘Promoting the protection of children and young people, with particular reference to the illicit sale the purchase of internationally or nationally controlled substances and of new psychoactive substances via the internet’, 2015; Resolution 59/6, ‘Promoting prevention strategies and policies’, 2016; Resolution 60/7 Promoting scientific evidence-based community, family and school programmes and strategies for the purpose of preventing drug use among children and adolescents’, 2017.
\textsuperscript{413} Three other resolutions specific to prevention and treatment among children and young people were adopted that did not cite the CRC. Resolution 55/10 ‘Promoting evidence-based drug prevention strategies and policies’, 2012; Resolution 51/2 ‘The consequences of cannabis use: refocusing prevention, education and treatment efforts for young people’, 2008; Resolution 44/5 ‘Prevention of the recreational and leisure use of drugs among young people’, 2001
the year that began the preparations for the third General Assembly Special Session on Drugs, held in April 2016. Indeed, the CRC was ultimately cited in the Outcome Document of the Special Session.\textsuperscript{414} Critically, however, the Special Session was driven by Latin American States, which were now seeking reforms to the regime. This came alongside the increased attention to human rights in the drug control system set out in chapter 1. Thus, while the convergence between the regimes was in response to the threat of trafficking in the 1980s, their coming together in the present day has more to do with the controversy of reform. This was exemplified by the 61\textsuperscript{st} Session of the Commission on Narcotic Drugs in March 2018 in which a Russian draft resolution grounded in the CRC became one of the most controversial debates of the event (discussed in chapter 1). The political consensus of the late 1980s no longer exists. But the norms and legal standards created during this period remain.

2.9 Conclusion

It has been said, and often repeated by now, that human rights and drug control operate in ‘parallel universes’.\textsuperscript{415} With regard to child rights, this is not entirely accurate. But even if these regimes converged in the late 1980s they rested upon decades of formative detachment. Drug use among children and young people and their involvement in the drug trade simply did not arise until over half a century into the development of the system, and by which time its main strategies and infrastructure were in place. Both regimes had, as we have seen, more pressing concerns in their formative stages. There was, in addition, a resistance to international drug control law encroaching on traditionally sov-

\textsuperscript{414} 2016 UNGASS Outcome, para 4(f)

ereign domains. This waned in general in international law as the century progressed, but also as the drug threat increased. As the drugs situation changed in the 1960s attention to children and youth increased. A central concern, after all, was that drug use was on the rise among ever younger people. But throughout the drafting of the drugs conventions, States were very concerned, and had admitted their lack of understanding, about what to do about this. This prevented the introduction of specific provisions in earlier treaties, such as those relating to prevention in schools (or ‘drugs propaganda’) and resulted in very general prevention and treatment provisions (for all age groups). In parallel, it also led to the adoption of what Costa Rica referred to as ‘repressive measures’ in the absence of evidence based and effective responses. This lack of knowledge, in other words, helped pave the way for more stringent international measures as the clear threat posed by drug trafficking became more and more apparent. This is the context in which Article 33 of the Convention on the Rights of the Child was drafted; a new provision in human rights law bolstering a regime that had developed without human rights in mind.
Part II: Fragmentation and Contention
3. Fragmentation: The Treaty Framework

3.1 Introduction

This chapter provides an overview of the three UN drug control conventions and the Convention on the Rights of the Child, each, in their way, considerable developments in their legal fields. Doctrinal commentaries on each are available elsewhere. Here, we situate these treaties within wider discussions about the fragmentation of international law in view of the fact that while the two converged in the late 1980s they remain different legal regimes. It argues that while they may seem to easily cohere, there are also fundamental differences between the two systems based on their subject matter, principles and ethos. The legal frame of reference one adopts may determine how the issues and legal relationships are understood.

3.2 The UN Drugs Conventions

3.2.1 Overview

The three UN drugs conventions combine global administrative law and transnational criminal law for the international control of narcotic drugs and psychotropic substances. Together they form a closely woven system controlling

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the entire supply chain, with the aim of limiting the uses of controlled substances strictly to ‘medical and scientific purposes’. To achieve this a system of indirect controls is established. States must ‘incorporate into their national legal systems the provisions contained in the relevant international conventions’ and then apply them, primarily through criminal law. Collectively, the drugs conventions contain 118 articles. A detailed analysis of each is unnecessary here. Instead this section provides a general overview of the main aspects of the treaties, including provisions specifically referring to children or minors.

The Single Convention is the cornerstone of the regime, controlling plant-based substances and derivatives, with a primary focus on cannabis, coca, and opium poppy. This includes a wide range of substances used for medical purposes, such as morphine, and, indeed, cannabis (e.g. as anti-seizure medication), heroin (as diamorphine, for pain) and cocaine (a local anaesthetic). It also established the system’s main administrative and monitoring mechanisms, incorporating those that had been developed through the League treaties. The 1971 Convention adds by bringing under international control synthetic substances that had been omitted, such as amphetamines. The Vienna Convention supplements both by strengthening transnational co-operation against illicit trafficking and bringing under control precursor chemicals necessary for the production of substances controlled under the other treaties. The treaties are considerably weighted towards illicit production and trade, and on controlling the licit market, rather than on the demand side (see Annex 1). This, as we have seen in chapter 2, is due to their being based on theories of control and the nature of the drugs problem that had developed much earlier.

419 For the League’s system of monitoring and administration see Lines, Drug Control and Human Rights, pp. 21-27.
However, a ‘balance’ is supposed to be struck between supply and demand side policies. This is more of a political development than a principle of the treaties in the strict sense, but is nonetheless important to recognise. Attention to demand really grew following a 1998 Special Session of the General Assembly on the world drug problem in an attempt to repair the treaty imbalance. At that time the ‘Guiding Principles on Demand Reduction’ were adopted, and today, consensus language at the UN is for a ‘balanced and integrated approach’.

Article 1 of each treaty is definitional, relating to substances, mechanisms and certain legal concepts. There are, however, important omissions. ‘Drug abuse’, for example, is nowhere defined. We may assume, though, that ‘abuse’ is drug use that is not for ‘medical or scientific purposes’. This stems from the General Obligations of the system, set out in Article 4 of the Single Convention. Alongside general obligations of good faith implementation (Article 4(a)) and co-operation (Article 4(b)), the general obligation of the Single Convention is:

‘to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.’ (Article 4(c))

Thus, a further ‘principle of balance’ is incorporated, this time between the suppression of the illicit market on the one hand, and ensuring access to controlled substances for medical and scientific purposes on the other. As Annex 1 demonstrates, however, the actual provisions of the conventions focus

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420 On this, see D. Bewley-Taylor, Consensus Fractured, pp. 50 and 51.
421 See, for example, 2016 UNGASS Outcome, preamble.
422 Gispen, Human Rights and Drug Control pp. 62 and 63. The preamble to the Single Convention states 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’. The 1971 Convention, in similar terms, notes that ‘the use of
overwhelmingly on the illicit market. This balance is also not, evidently, well struck.423

To give effect to the general obligation, Articles 2 and 3 of the Single Convention and Article 2 of the 1971 Convention establish a system of schedules into which controlled substances are placed. The controls applied to a given substance depend on the schedule in which it is appears, which in turn rests on its perceived risk versus medical or scientific value. Thus, a substance in Schedule I of the Single Convention will be subject to stricter controls than those in schedules II or III, while even further restrictions are applied to those in Schedule IV.424 The Vienna Convention applies to all substances scheduled under the previous treaties, but also has its own schedules (referred to as ‘Tables I and II’) for precursor chemicals.

The process for adding substances to the schedules, removing them, or changing the schedule in which they are listed is set out in Articles 3 of the Single Convention, 2 of the 1971 Convention, and 12 of the Vienna Convention. While the processes are fairly detailed,425 it is important to note in brief, primarily the defining feature that decisions are made by majority vote of the

424 See Article 3(4) and (5), Single Convention.
425 The Single Convention process provides a good overview. Through that arrangement a State party or the WHO may notify the Secretary-General of the need for a change to the schedules. The Secretary-General then brings this to the attention of the UN Commission on Narcotic Drugs (CND), a Functional Commission of ECOSOC and the central policy making body within the UN for drug control. If a substance is not already scheduled, the WHO, based on a study of its Expert Committee on Drug Dependence, will recommend a schedule. If a substance is already scheduled, the WHO may recommend moving it, or deleting it. The Commission ‘may’ then follow the WHO’s recommendation and decisions are made by a simple majority vote. It is not, however, bound to do so. The CND may decide by consensus not to vote at all and delay scheduling but without a WHO recommendation, it has no legal basis for including or changing the schedules. This has been subject to some controversy, however, following a recent proposal of China to control ketamine absent a WHO recommendation. The Office of Legal Affairs issued advice stating that this was possible, but it was heavily criticised as being
Commission on Narcotic Drugs. Through the scheduling system, a majority of the members of the Commission can therefore alter the scope of the drugs conventions without the need for a plenipotentiary conference. There is no possibility for States to reserve on a given substance, though they may be reviewed by ECOSOC. Richard Lines refers to this as ‘highly unusual, effectively authorising a subcommittee of the UN to amend the terms of the treaties themselves’. He provides the useful counter-example of the Convention on International Trade in Endangered Species (CITES) through which new species can only be scheduled through a conference of the parties, and individual States may reserve on any given species. The drugs scheduling process is an outgrowth of the desire, evident since the turn of the twentieth century, for a gapless and universal international system.

The Single and the 1971 Conventions set out various forms of control to be applied, with certain provisions applicable only to given substances or to given schedules. These are summarised in Annex 1 and include licencing, import and export controls, various minutiae such as labelling, as well as very general penal provisions and those relating to the illicit traffic. The Single Convention and the 1971 Convention differ in the nature of their controls in some ways, with special measures relating to cannabis, opium and coca set out in the Sin-

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poorly researched and erroneous. See Transnational Institute, *International Control of Ketamine: Legal and Procedural Considerations About the Mandate of the Commission on Narcotic Drugs with Regard to Scheduling Decisions Under the 1971 UN Convention on Psychotropic Substances*, 2015. It must be noted that each process differs, sometimes significantly. The 1971 process, for example, is more detailed and operates by two-thirds majority. It provides more explicitly for the ‘determinative’ nature of the WHO recommendations on medical and scientific matters and for the ability of the CND to take into account other relevant ‘economic, social, legal, administrative and other factors’. Article 2(5), 1971 Convention. There is no role for the WHO under the Vienna Convention process as the substances in question are for production. Each provision is fairly detailed and a full discussion is available elsewhere. See C. Hallam et al, *Scheduling in the International Drug Control System*, Transnational Institute, Series on Legislative Reform of Drug Policies No. 25, 2014.

426 Lines, *Drug Control and Human Rights* pp. 42 and 43.
gle Convention (a more stringent treaty overall). It includes, for example, obligations to uproot or destroy illicitly grown crops and wildly growing coca,\textsuperscript{428} which is strengthened by Article 14 of the Vienna Convention, dealing with eradication.\textsuperscript{429} While measures under Article 14 of the Vienna Convention must take into account human rights and environmental concerns (Article 14(2)), any measures taken may not be ‘less stringent’ than those under the Single Convention (Article 14(1)). In this way the human rights safeguard is tempered. The Single Convention further explicitly bans, after a certain grace period, the traditional, religious or ‘quasi’ medicinal use of opium, coca or cannabis (Article 49\textsuperscript{430}) and specifically requires that possession be only permitted ‘under legal authority’ (Article 33).

\textsuperscript{428} Article 22(2), Single Convention, ‘A Party prohibiting cultivation of the opium poppy or the cannabis plant shall take appropriate measures to seize any plants illicitly cultivated and to destroy them, except for small quantities required by the Party for scientific or research purposes’; Article 26(2), Single Convention, ‘The Parties shall so far as possible enforce the uprooting of all coca bushes which grow wild. They shall destroy the coca bushes if illegally cultivated.’

\textsuperscript{429} Article 14, Vienna Convention is entitled ‘Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances’. Paragraphs 1 and 2 read:

‘1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.’

\textsuperscript{430} Article 49(2), Single Convention. Sub-paragraphs (d)-(g) read:

\ldots

(d) The quasi-medical use of opium must be abolished within 15 years from the coming into force of this Convention as provided in paragraph 1 of article 41.

e) Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41.

f) The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41.

g) The production and manufacture of and trade in the drugs referred to in paragraph 1 for any of the uses mentioned therein must be reduced and finally abolished simultaneously with the reduction and abolition of such uses.’
All three of the conventions include a provision on demand reduction, including a general provision on prevention and treatment. As noted in the previous chapter, Articles 38 of the Single Convention and 20 of the 1971 Convention are almost identical, with the Single Convention stating, at paragraph 1, that:

‘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.’

Article 14(4) of the Vienna Convention, meanwhile, requires that States parties

‘…shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic.’

As we saw in chapter 2, these provisions were intended to remain general, given States’ misgivings about the appropriate actions to take on the ground.

The Vienna Convention was a major development in the legal framework. It buttresses the two earlier treaties by setting out detailed provisions on domestic penal measures and transnational co-operation against illicit trafficking. These had been fairly weak in both of the earlier treaties. From Annex 1 the punitive additions of the Convention are clear and make up the bulk of the treaty. Penal provisions are lengthy. Article 3 on offences and sanctions, for

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431 See Articles 35 and 36, Single Convention; and similar provisions in Articles 21 and 22, 1971 Convention.
example contains eleven paragraphs. Through Article 3(2), the Vienna Convention was the first to include a requirement, subject to ‘constitutional principles’, to criminalise possession and cultivation for personal use.432 This was a far less ambiguous approach to this issue than how it had been dealt with under the previous conventions, where it was not explicitly dealt with in this way. As a transnational crime convention, moreover, it also includes lengthy sections on, inter alia: confiscation, including anti-money laundering and asset forfeiture (Article 5(1)-(9)); mutual legal assistance (Article 7(1)-(20)) and other forms of co-operation (Articles 8-10); and ‘controlled delivery’ (Article 11).433 Each of the three treaties, moreover, contains an extradition clause, with the Vienna Convention’s twelve paragraphs extending these provisions considerably.434

3.2.2 Provisions Relating to Children

To some extent all of the various provisions may be seen as ‘relating’ to children if one accepts that the system that has been put in place has an overall protective effect. This includes decisions as to which substances are to be controlled. As new substances are brought under control, these decisions will have effects on children in some ways, albeit unpredictable. Moreover, as we shall see below, scheduling decisions engage the obligations of the CRC. However, the Vienna Convention is the only one of the three treaties to refer explicitly to children or minors. Its preamble makes clear that the measures envisaged

432 2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

433 Controlled delivery is defined at article 1(g) as ‘the technique of allowing illicit or suspect consignments’ of drugs ‘to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences’.

434 Articles 36(2)(b), Single Convention; 22(2)(b), 1971 Convention; 6 (1)-(12), Vienna Convention.
by the treaty are adopted out of a concern for children. It explains States parties’ ‘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.’

Article 3 then sets out the main penal aspects of the international drug control system, and includes specific provisions on aggravating circumstances for the purposes of sentencing. Article 3(5) requires that:

‘The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 435 of this article particularly serious, such as:

...  
(f) The victimization or use of minors;
(g) The fact that the offence is committed in a penal institution or in

435 Article 3(1):
‘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’.
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.’

A third provision that should be mentioned is, of course, the requirement to criminalise incitement to use drugs, which arose throughout the drafting of the drugs conventions. Article 3(1)(c) states that, ‘subject to its constitutional principles and the basic concepts of its legal system’, States parties must establish as a criminal offence:

‘Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly’

While this does not refer to children or minors explicitly, in drafting it was stated as being aimed at this group (see chapter 2). Clearly ‘publicly inciting or inducing…by any means’ can be read to mean a wide variety of activity. The official commentary on the provision notes, blithely, that it is not ‘entirely free from ambiguity’.436 It is ‘far from clear’ what ‘publicly’ was intended to signify but it can include the method of speech (e.g. broadcast) or the venue (e.g. a private versus a public meeting).437 The commentary acknowledges that the term ‘by any means’ demands a broad interpretation.438

Beyond these provisions, the demand reduction (early identification, prevention, treatment) provisions are of course relevant for children who are at risk of or who use drugs. The relevant provisions in both the Single Convention (Article 38(1)) and 1971 Convention (Article 20(1)) call for:

436 *Vienna Convention Commentary*, p. 74 para 3.73.
437 Ibid, p. 74 para 3.73.
438 Ibid, p. 75 para 3.74.
‘the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved.’

Such measures may include children if we consider them to be ‘the persons involved’. The Commentary to the 1971 Convention mentions ‘classes in schools’ in this regard, but does not elaborate. As we have seen, however, there was no specific discussion of children or young people in drafting this provision, which was introduced via the 1972 protocol. Moreover, as noted in chapter 2, the provision was left intentionally vague as a ‘guideline’ to the extent that even its commentary is described as ‘tentative’.

It should be noted that these interventions are also the measures that may be used as alternatives or additions to conviction or punishment for certain offences under Article 3(4)(b), (c) and (d) of the Vienna Convention, which state that:

‘(b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

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

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441 See footnote 433.
(d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.’

It should be noted that any flexibilities under these provisions may not be employed to offences considered ‘particularly serious’, and which are dealt with in the subsequent paragraph. These, as we have seen, include those relating to the involvement of children and the locations of certain offences.

As worded, the penal provisions of the Vienna convention apply to children as perpetrators of the listed crimes, depending on national criminal justice systems. But none of the official commentaries discuss this issue and it did not arise in drafting of any of the conventions. Instead, reference to children was to enumerate aggravating circumstances and the description of ‘particularly serious’ crimes under Article 3(5). Status as a legal minor as a mitigating factor or as contributing to an offence being considered of a ‘minor nature’ was not discussed. The relationship of these provisions to the minimum age of criminal responsibility and juvenile justice standards is therefore omitted and left to the discretion of States. As we shall see in chapters 5 and 6, these issues arise frequently in the periodic reporting process to the Committee on the Rights of the Child.

3.2.3 Administrative and Monitoring Mechanisms

Articles 5-9 and 12-20 of the Single Convention establish the control organs and monitoring mechanisms. The Commission on Narcotic Drugs is a ‘functional commission’ of ECOSOC, made up of fifty-three UN Member States,\(^{442}\)

\(^{442}\) It cannot have more Member States than its superior body.
and based in Vienna. It is considered the main policy-making body within the
UN system for international drug control and has also served as the main body
for drafting the drugs conventions as well as the key political declarations on
drug control over the decades.

The International Narcotics Control Board is the quasi-judicial monitoring
mechanism for the drugs conventions. Created by the Single Convention (Ar-
ticles 5 and 9-11), it was designed to amalgamate the older, overlapping drug
control organs created under earlier treaties. The Board is made up of thirteen
individuals who, ‘by their competence, impartiality and disinterestedness, will
command general confidence.’ As set out in Article 9(4) of the Single Con-
vention, its mandate is to ‘endeavour to limit the cultivation, production, manu-
facture and use of drugs to an adequate amount required for medical and
scientific purposes, to ensure their availability for such purposes and to pre-
vent illicit cultivation, production and manufacture of, and illicit trafficking in
and use of, drugs.’ As part of this broad aim it has a number of roles, including
the administration of the estimates and statistical returns system under the Sin-
gle Convention (Articles 12 and 13) with a view to ensuring no surplus beyond
‘medical and scientific purposes’, and therefore no diversion into the illicit
market. Through that system States parties must submit estimates of need for
controlled drugs for medical and scientific purposes so that import and export
authorisations can be granted. The ‘statistical returns system’, in turn, requires
States to provide the Board with information about production, imports and
exports, consumption, seizures and disposal and so on. There is no such sys-

tem for the pharmaceuticals controlled through the 1971 Convention. The
Board is also tasked more generally with monitoring the implementation of

443 Article 9(2), Single Convention. Board members work in their personal capacity and are
elected for renewable five-year terms by secret ballot at ECOSOC. Three members are elected
from nominations by the World Health Organization to ensure medical, pharmacological or
pharmaceutical capacity. Article 9(1)(a), Single Convention.
444 Articles 19 and 20, Single Convention.
the Conventions, which, as Article 9(5) states, shall be done in ‘continuing dialogue’ with States parties.\textsuperscript{445} The Board may, for example, undertake country missions and does so on a regular basis. But its primary mechanism is its annual reports (Article 15, Single Convention; Article 18, 1971 Convention; Article 23, Vienna Convention). These reports are somewhat similar to the Concluding Observations of human rights treaty bodies, in that they offer an assessment of compliance. But they are even more general, as the global situation and regional situations are addressed at once. Though specific States parties are referred to, based on country missions, recommendations apply to all States parties. In addition, the opening chapter of each annual report considers a thematic area relating to the implementation of the treaties. In this way, they function something like the General Comments of human rights treaty bodies. They are regularly referred to by States as authoritative statements.\textsuperscript{446}

3.3 The UN Convention on the Rights of the Child

3.3.1 Overview

Following its adoption in November 1989 the CRC entered into force in rapid time and quickly garnered more ratifications and accessions than any other human rights treaty. Today it has 196 States parties, with the United States having signed but not ratified. The Convention consists of fifty-four articles, and again there is no need to go through each. Its provisions are, however,

\textsuperscript{445} The powers of the Board were strengthened by the 1972 Protocol amending the Single Convention. This introduced the ability to enter into discussions with non-compliant States and call upon them to adopt remedial measures (Article 14(1)-(6)). If the Board is not satisfied with such measures it may bring the issue to the attention of the Commission and ECOSOC. In doing so, it may recommend sanctions, in the form of an embargo on imports imposed by the parties on the relevant State (Article 14(2)). While such consultations have been entered into with Afghanistan, a recommendation of an embargo has never been recommended. Given that it would effectively block essential medicines, it would likely be a particularly inhumane response.

\textsuperscript{446} The author has attended all CND sessions from 2008-2018, including as a civil society member of a State party delegation 2008-2012. During the meetings, the Board’s reports are regularly referred to.
grouped into various themes that give a sufficient overview of content (see Annex 2).

Article 1 defines the child as anyone below the age of 18 unless the age of majority is achieved earlier. Articles 43 to 45 establish the monitoring mechanism for the Convention (see further below and chapter 5), while Articles 46-54 are the typical concluding provisions of treaties of this type, relating to signature, ratification, reservations, depository and language. Articles 2 to 40 and aspects of Articles 42 and 44, however, are the substantive provisions of the Convention, which have often been categorised into the ‘3Ps’: Protection rights, provision rights and participation rights.447 This model effectively captures the tensions between the traditional welfarist and more recent agency views of child rights that both had to be incorporated into the same treaty. As the label suggests, protection rights include, for example, freedom from cruel inhuman and degrading treatment (Article 37), freedom from violence and neglect (Article 19), and protection from economic and sexual exploitation (Articles 32 and 34). Provision rights include the right to social security (Article 26), the right to an adequate standard of living (Article 27) and the right to education (Article 28). Participation rights essentially refer to the child’s civil liberties and include freedom of expression and information (Article 13), freedom of assembly and association (Article 15), the right to privacy (Article 16) and the right to be heard (Article 12). This is by far the weaker aspect of the treaty, even though (perhaps because) it was its most innovative.

For the purposes of reporting on the implementation of the Convention, however, the various substantive provisions have been generally grouped into nine

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more specific ‘clusters’ which provide a clearer view of content than the 3P model: \(^{448}\)

1. General measures of implementation
2. Definition of the child
3. General principles (non-discrimination; best interests of the child; right to life, survival and development; right to be heard)
4. Civil rights and freedoms
5. Violence against children
6. Family environment and alternative care
7. Disability, basic health and welfare
8. Education, leisure and cultural activities
9. Special protection measures

The relevant provisions falling under each cluster are set out in Annex 2, but from these nine categories alone the expansive scope of the CRC is clear. It was intended that the treaty should attempt to capture all aspects of the child’s life, and to bridge the division between civil and political and economic, social and cultural rights in the two Covenants. Indeed, as part of the comprehensive approach that was pursued, the Convention introduced a number of new human rights into international law, even if some of these had longer traditions in domestic systems. They include the right to know and be cared for by one’s parents (Article 7(1)), the right to play (Article 31) and the right to be heard (Article 12). A further new right was, of course, the right to be protected from drugs and the drug trade, set out in Article 33. The CRC is the only core UN human rights treaty to refer to this issue.

3.3.2 Article 33 and other Rights Relating to Drug Policy

3.3.2(a) Characteristics of Article 33

Article 33, as we have seen, is fairly compact and broadly framed:

‘States Parties shall take all appropriate measures, including legisla-
tive, administrative, social and educational measures, to protect chil-
dren 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.’

While the drafting history shows that this relative openness of the article was
intended (much like the demand reduction provisions of the drugs conven-
tions), a number of important characteristics may be discussed.

First, two clauses follow this formulation, or essentially two rights: protection
from the illicit use of drugs, and prevention from involvement in the illicit
drug trade.449 This mirrors the preambular provision of the Vienna Convention
set out above, and discussed in chapter 2. Related to this, and second, the ar-
ticle is placed between Articles 32 (on economic exploitation) and Article 34
(on sexual exploitation). It was intended that it sit among other ‘special pro-
tection measures’ addressing the exploitation of the child. This again appears
to reflect the Vienna Convention’s approach, which adopts the convoluted
wording of the ‘use of the children as a drug users market’ in its preamble to
frame its responses to the drugs trade as a child protection measure. However,
Article 33 now appears across two clusters of rights in the in the periodic re-
porting process. This was a fairly recent development and controversial from
a particular reading of Article 33, which saw moving drug use to ‘basic health

449 Posner lists Article 33 as two separate rights in his critique of how expansive human rights
law has become. E. Posner, The Twilight of Human Rights Law, Oxford University Press, 2014,
p. 156.
and welfare’ as undermining the stronger status of Article 33 as a special protection measure.\textsuperscript{450}

Third, the formulation ‘shall take’ is one of the stronger ways of framing the obligations in the CRC. Compare, for example, ‘shall use their best efforts to ensure’ (Article 18(11) which limits the idea of ‘ensuring’ the right); ‘such care could include’ (Article 20(3), which is clearly discretionary, based on a chapeau provision); ‘shall promote’ (Article 23(4)); or ‘agree’ (Article 29(1)).

Fourth, reference to the ‘relevant international treaties’ is important for two reasons. The first has to do with the scope of controls. As substances enter onto international schedules based on the voting process at the Commission on Narcotic Drugs, States parties to the CRC must, because of Article 33, take ‘all appropriate measures’ to protect children from using them, and prevent the use of children in their production and trade. And they must do this to the ‘maximum of available resources’ (Article 4). In other words, scheduling decisions of a majority of the fifty-three members of the Commission on Narcotic Drugs affect the obligations of all 196 States parties to the CRC, including those few that have not ratified the drugs convention in question, and those that may denounce these treaties but remain parties to the CRC. The connection between the two systems is concrete in this regard, whatever the CRC ultimately requires or how that connection plays out. The second has to do with Article 41 of the CRC, its ‘more favourable protection clause’. It states that that nothing in the CRC:

‘Shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

\textsuperscript{450} See chapter 4.
(b) International law in force for that State.’

A central question, then, is whether the drugs conventions could be more conducive to the realisation of the rights of the child than the CRC.

3.3.2(b) Other Relevant Rights

Given the scope of the CRC it is genuinely difficult to find any article that cannot be linked to drug use or the drug trade. Consider the following examples:

- Non-discrimination (Article 2) and data on patterns of drug use, dependence, and related health harms disaggregated by age, gender, and location;
- The best interests of the child (Article 3) and drug treatment decisions, or the sentencing of parents;
- Budget allocation (article 4) for drugs prevention and treatment;
- The right to privacy (Article 16) and drug testing, searches, and other such detection efforts;
- Assistance to parents in child rearing (Article 18(2)) and children of drug dependent parents;
- The right to health (Article 24), access to essential controlled medicines, and access to drug dependence treatment;
- The right to an adequate standard of living (Article 27) and crop eradication campaigns;
- The right to education (Article 28) and exclusion for drug use;
- The right to enjoy culture (Article 30) and the ban on traditional uses of controlled plants (e.g. coca leaf);
- Detention of children as a last resort (Article 37) and compulsory residential drug treatment;
- Juvenile justice (Article 40) and criminal drug laws.
On the one hand these linkages could be seen to provide significant normative content to the goals enshrined in Article 33. On the other, they may answer little, and merely add to interpretive dilemmas.\textsuperscript{451}

3.3.3 Monitoring Mechanism

The Committee on the Rights of the Child was established ‘for the purpose of examining the progress made by States Parties’ to the CRC.\textsuperscript{452} It is made up of eighteen individuals of ‘high moral standing and recognized competence’, working unpaid and in their personal capacity, who are nominated by States parties and elected by ballot at ECOSOC.\textsuperscript{453} The main monitoring and compliance mechanism is the ‘periodic reporting process’, set out in Articles 44 and 45, through which States parties must report on progress and receive recommendations from the Committee. This mechanism is discussed further in chapter 5, but the basic process that each State party must provide an initial report on the child rights situation in the country two years after ratification of the Convention. Thereafter, a periodic report must be submitted every five years. The Committee has developed its own model of period reporting, as it is permitted to do.\textsuperscript{454} Once the report is received the Committee holds a ‘pre-sessional meeting’ where it can hear from national human rights institutions or ombudsmen, international organisations and NGOs.\textsuperscript{455} From this a ‘List of Issues’, or questions on the report, is produced, to which the State party must respond via ‘written replies’. There follows a further opportunity for non-State actors to input, after which a main session with a delegation from the state party is held. The final outcome is the Committee’s ‘Concluding Observations’ which contain positive reflections, areas of concern and various recommendations. During the next reporting stage, the State party should respond to

\textsuperscript{451} See further chapters 5 and 7.

\textsuperscript{452} Article 43, CRC.

\textsuperscript{453} Articles 43(2), (3) and (6), CRC.

\textsuperscript{454} Article 43(8), CRC.

\textsuperscript{455} Art 45(a), CRC.
the Concluding Observations, resulting in a ‘constructive dialogue’ over time. All of the documentation is publicly available.

As with other human rights treaty bodies, the Committee may also adopt General Comments on specific rights or cross-cutting issues of relevance to the interpretation and implementation of the Convention. These are regularly preceded by ‘days of general discussion’ in order to gain input from a variety of actors. At the time of writing there has been no such day or General Comment on Article 33, though other General Comments of relevance are discussed in chapter 5. Moreover, since the adoption of the third optional protocol to the Convention, the Committee may now hear individual or group complaints by or on behalf of children. The process is still new, but it does ask important questions of what a ‘breach’ of Article 33 might entail and highlights the importance of further unpacking this provision.

3.4 The Treaties as Frames of Reference: Complementarity or Conflict?

3.4.1 Alternative Frames

The well-known saying is that for the person with a hammer everything looks like a nail. Legally we might adapt this. ‘When we public international lawyers look out the window’ says Kennedy, ‘we see a world of nation-states and worry about war. We remember the great wars of the twentieth century. We were traumatized by the Holocaust…Trade lawyers, by contrast, look out the window and see a world of buyers and sellers struggling to deal. Their trauma was the Great Depression’. What do child rights lawyers, transnational

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crime lawyers, or those interested in drug control law see? What is their ‘trauma’ or, less dramatically, what do they prioritise?

Even in the absence of a strict conflict between norms, in other words, we may still have differing legal ‘points of departure’ or ‘frames of reference’ which can ‘lead to different understandings of situations’.\(^{458}\) This potential has long been recognised across very different theoretical perspectives. In the New Haven School this might be referred to as a ‘focal lens’.\(^{459}\) Koskenniemi refers to it as ‘field constitution’.\(^{460}\) Though different, they amount to a similar observation. In effect, the legal frame of reference provides a language and set of norms through which alternative understandings and solutions may be derived from the same rules, which ‘reflects upon a prior political decision independent of the language finally chosen’.\(^{461}\)

The challenge of alternative frames reflects the wide approach to conflicts adopted by the ILC in its fragmentation study. ‘Two treaties or sets of rules’, it said, ‘may possess different background justifications or emerge from different legislative policies or aim at divergent ends...’\(^{462}\) As such, a conflict arises if or when ‘two rules or principles suggest different ways of dealing with a problem’.\(^{463}\) But it arises also when two argumentative positions rooted in a given legal tradition approach the same concern.\(^{464}\) As Judge Fitzmaurice noted in *Golder v UK*, ‘there is no solution to the problem unless the correct


\(^{459}\) M. Reisman, ‘The View From the New Haven School of International Law’ Proceedings of the American Society of International Law, 1992, pp. 118-125, at 120-121.

\(^{460}\) Koskenniemi, ‘Effect of Rights’, at 140-142.

\(^{461}\) Ibid. p. 141.

\(^{462}\) ILC Fragmentation Study, paras 24 and 25.

\(^{463}\) Ibid.

\(^{464}\) It is well recognised, moreover, that one’s background, including legal tradition, will have an effect on interpretation of legal norms, even if using the VCLT rules. See B. Schlüter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’ in H. Keller and G. Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy, Cambridge University Press*, 2012, pp. 261-319, at 262 ‘one has to take into consideration the perspective and (legal) background of the person interpreting’.

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– or rather acceptable – frame of reference can first be determined. With regard to the CRC and the drug control conventions, then, from which legal perspective do we begin? Which normative framework is our baseline? The drugs ‘problem’ passed through a criminal and administrative legal framework may produce entirely different results than one being passed through child rights, or human rights. And it is not necessarily the case that norms from one regime translate well into the other.

3.4.2 Human Rights Versus Commodity Control

The CRC and the drugs conventions appear on their face to be consistent and complementary. Through Article 33 children have a right to protection from drugs, and States have concurrent obligations through the drugs conventions to control those drugs in certain ways. Simply, we have a normative goal backed up by more purposive obligations to flesh it out. But could there be a deeper inconsistency or even conflict between them? Consider, again, the fact that incitement was rejected in the drafting of Article 33 of the CRC but accepted with ease in the Vienna Convention. Conversely, through a holistic child rights treaty the root causes of various social harms could be taken up (see the array of ‘provision’ rights in Annex 2). But such considerations could still not be included in international drug control obligations. Despite their convergence around children and drugs, the legal culture and ethos of each regime may be very different. This allowed, as we have seen, for differing obligations to be accepted and/or rejected through their drafting processes.

As a human rights treaty, the CRC focuses on State obligations towards individuals and groups, and related claims against the State. It includes a mixture

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466 It is worth recalling in this regard the reticence of the International Criminal Tribunal for the Former Yugoslavia in embracing ‘too quickly and too easily concepts and notions developed in a different legal context’. Prosecutor v Kunarac, Case No. IT-96-23 and IT-23/1-A, 12 June 2002. ICTY Trial Chamber, 22 February 2001, para 471.
of abstract norms combined with fairly prescriptive instrumental provisions, exemplified by Articles 24 (the right to health) and 40 (juvenile justice). It is also grounded in four child-centred ‘general principles’ through which the entire treaty should be approached: non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and participation, or the right to be heard (Article 12).  

The drugs conventions, on the other hand, are instruments for the regulation of commodities (administrative law) and for the suppression of certain activities and behaviours (transnational criminal law). The general obligation centres on the limitation of the uses of certain products strictly to ‘medical and scientific purposes’. Underlying principles are more difficult to define. The treaty is established based on States’ ‘concern’ for the ‘health and welfare of mankind’, but this is not a principle, as such, and more a rationale. On the other hand, the developing need for ‘balance’ between supply and demand side approaches is arguably now an operating principle, even if this has developed in policy commitments rather than the actual articles of the treaties. So,

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467 See Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc No CRC/GC/2003/5, 27 November 2003. (Hereafter CRC, GC 5). The General Principles were introduced by the Committee in its 1996 guidance to States parties on the content of periodic reports. (Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc No CRC/C/58, 20 November 1996). They have been largely endorsed and accepted as guiding principles over time. They are not without controversy, however. The best interests principle has been the subject of voluminous literature, praising and critiquing it in equal measure (For an interesting collection see The Best Interests of the Child: A Dialogue Between Theory and Practice, Council of Europe, 2016. In particular, N. Cantwell, ‘The Concept of the Best Interests of the Child: What Does it Add to Children’s Human Rights?’, pp. 18-26.) The child’s right to optimal development has been criticised as being lacking in proper elaboration by the Committee (N. Peleg, ‘Reconceptualising the Child’s Right to Development: Children and the Capability Approach’, 21 International Journal of Children’s Rights 3, 2013, pp. 523-542). It has also been noted by a former Chair of the Committee that the Committee did not fully explain its reasoning for selecting these particular provisions as general principles. He also questioned the added value of Article 6 as a principle, when it merely seems to restate what the CRC is for (J. Doek ‘The General Principles’ in J. Connors et al (eds) 18 Candles: The Convention on the Rights of the Child Reaches Majority, Office of the High Commissioner for Human Rights, 2007, pp. 31-38 at 31 and 37).

468 Article 4(c), Single Convention.
too, is the need for balance between access to substances for medical purposes and the control of the illicit market.\textsuperscript{469} The intended outcome is human health, but this is indirect. The principle focus is on the nature of controls.

This conceptual distinction between the more person-centred human rights system and the commodity control-centred drug control system is fairly obvious, but its relevance has come to the fore in international discussions.Various States have begun calling for a ‘people centred’ approach to drug control moving forward, including as to how the drugs conventions are implemented.\textsuperscript{470} This was articulated very clearly during the 2016 Special Session. ‘Today’, said Switzerland, ‘the contours of a new paradigm — placing the human being, and not substances, at the heart of drug policies — are taking shape.’\textsuperscript{471} During the same meeting, Poland set out its view that ‘there is a need to base the principles of the drug-prevention policy on solutions going beyond the narrowly understood subject of controlled substances. Those principles should be viewed in the context of human rights...’\textsuperscript{472}

3.4.3 The Position of the Individual

The position of the individual in international law has evolved considerably in the past century.\textsuperscript{473} At a basic level, the traditional view was that only States could be subjects of the ‘law of nations’, and by and large this remains the


\textsuperscript{470} See for example, New Zealand Ministry of Health, United Nations General Assembly Special Session on the World Drug Problem (UNGASS) Issues paper to support a New Zealand Position, December 2015.

\textsuperscript{471} UNGASS OR 2, p. 2

\textsuperscript{472} UNGASS OR 4, p. 7.

case. Over the course of the 20th century, however, a ‘regulatory turn’ has been evident, with treaties focusing more and more on private behaviours, and culminating in direct criminal liability under the Rome Statute.474 As international law has entered more and more into the realm of complex social phenomena, moreover, the effectiveness of regimes is determined not just by State compliance, but also by their ability to help solve the problems for which they were intended. They require outcomes additional to State action or restraint. We see this in particular within international environmental law.475 Similarly, the WHO Framework Convention on Tobacco Control, while requiring State action, is geared also towards business compliance and strategies for the reduction of smoking.476 Human rights law also represented an important shift from horizontal to vertical obligations. But also, through human rights law, individuals and groups had mechanisms of redress, or access to the international system. They became subjects rather than merely passive objects.

The CRC falls into both of the above transformations: the treaty entails vertical obligations and the child is a rights holder. The drugs conventions, however, fall only into the former. There are certainly vertical obligations, but the individual remains an object rather than a subject. While limited in many ways, human rights law is therefore, at least conceptually, more of a two-way system to the one-directional nature of the drugs conventions. Weak as it may be, it contains a more participatory element.477 The third optional protocol to the CRC illustrates this difference by providing a mechanism for communications to the CRC Committee. On the other hand, the individual has no access

474 Katz-Cogan, ‘Regulatory Turn’.
476 WHO Framework Convention on Tobacco Control, 23 May 2003, entered into force 27 February 2005, 2302 UNTS.
477 Higgins prefers to view the individual as a ‘participant’ in international law in order to avoid the problematic dichotomy of objects versus subjects. See R. Higgins Problems and Process: International Law and How We Use It, Oxford University Press, 1994, pp. 49 and 50.
to the international drug control system (even if NGOs may in some ways participate). 478

Human rights, of course, are well known to be primarily focused on the individual. For this it has long been lauded and criticised in equal measure. The CRC is somewhat ambiguous, however, as are various aspects of economic, social and cultural rights, given the public policy questions they necessarily entail. In places the CRC refers to ‘the child’ and in others to ‘children’. Article 33 uses the latter. Nonetheless, alongside the civil rights aspects of the treaty, its general principles highlight the individualistic focus, in particular ‘the best interests of the child’ and ‘the right to be heard’. It is also clearly stated in the preamble that an aim of the CRC is that ‘the child be fully prepared to live an individual life in society’.

Common to the Single Convention and the 1971 Convention conventions, on the other hand, is the stated concern with ‘the health and welfare of mankind’. The Vienna Convention mirrors this concern, noting that the drug trade and demand for drugs constitute a threat to ‘the health and welfare of human beings’, to the economy and to the security and stability of nations. This is a key factor in the ethos of the drugs conventions, and an important rationale, i.e. the protection of the common good, represented by health, security, economic stability etc. 479 While this clearly indicates an ultimate concern with the human


479 While the position of individual has come more to the forefront in recent years, the possible tensions between this and the treaty vision have not been fully unpacked. The International Narcotics Control Board discussed the concept of ‘the health and welfare of mankind’ in its 2015 Annual Report, for example. While it stated that the term refers to ‘public and individual health’, the Board did not discuss the collective dimensions of the concept of ‘mankind’. International Narcotics Control Board, Annual Report for 2015, UN Doc No E/INCB/2015/1, 2016, pp. 1-8. Similarly, UN Member States have reaffirmed that ‘appropriate emphasis should be placed on individuals, families, communities and society as a whole, with a view to promoting and protecting the health, safety and well-being of all humanity’. 2016 UNGASS Outcome, preamble.
person, it is more of a collective view. This is not by any means unique to drug control law. Public health strategies are similar, and always operate in tension with individual rights because they must involve a degree of behaviour change. It is not that one perspective is ‘good’ and the other ‘bad’. The tensions between the two perspectives, however, are precisely the point and the potential weight given to individual rights in the context of drug control is important to highlight. Indeed, this also arose during the 2016 Special Session. ‘The ultimate goal’ said Argentina ‘is to put individuals at the centre of drug policies. We [Argentina] promote a shift in the central focus from the substance to the individual, as a subject of rights’.480 In a typical Dworkinian analysis, rights would ‘trump’ the mere policies of drug control. But Article 33 blurs this distinction, both in referring to drug control in a rights treaty, but also in its use of the word ‘children’, indicating the collective. Depending on one’s frame of reference and approach to Article 33 it can affect how one weighs and values certain rights and interests.

3.4.4 Object and Purpose

Recognising the above conceptual distinctions further engages the ‘object and purpose’ of the regimes. The drug control regime aims to protect the ‘health and welfare of mankind’ by restricting controlled substances to medical and scientific purposes. While this is a public health goal, it is primarily to be achieved through command and control strategies underpinned by criminal sanctions and strict commodity control. As such, there is a teleological goal (object) of improving health, and a more instrumental strategy (purpose) of what Boister has termed ‘effective suppression’.481 The Convention on the Rights of the Child, on the other hand, has the object and purpose, tautological as it may sound, of realising the rights of all children.482 This is to be achieved

480 UNGSS OR 3, p. 8.
482 The Inter-American Court of Human Rights has, for example, described the object and purpose of the American Convention on Human Rights as ‘the protection of the fundamental rights
through the implementation of a combination of protection, provision and participation rights. These goals of the two regimes may well coincide. But they may not. It depends on if one sees these teleological objectives and the strategies they entail as necessarily commensurate. And it depends on how one views not only the object and purpose of the CRC as a whole, but the object and purpose of Article 33, nested within those wider goals.

Related to this is the fact that the CRC and the drugs conventions are both explicitly conceived of as ‘floors’ and not ‘ceilings’. On the one hand there is the permissive norm, common to all three of the drugs conventions to the effect that nothing they contain prevents States taking ‘more strict or severe measures’. 493 This is directly related to the object and purpose of the treaties. The conventions are a common minimum beneath which States may not fall, while retaining permission to increase stringency for the achievement of the aims of the conventions, including the improvement of ‘health and welfare’ 494 This provision mirrors, from a drug control perspective, the ‘most favourable protection’ clauses found in human rights treaties, including the CRC through Article 41 (see above). This, too, is teleological in outlook, the goal being to achieve the best outcome for child rights. More conducive measures for this aim could include those that are more stringent, or those that are less, i.e. ‘beneath’ the ‘floor’ set by the drugs treaties. In other words, if the two regimes have divergent teloi, then the fact that both are intended to operate as floors

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493 Article 39, Single Convention; Article 23, 1971 Convention; and Article 24, 1988 Convention.

494 In its discussion of ‘more strict or severe measures’ permitted under Article 39 of the Single Convention the official commentary reflects the views of some states at the time that the death penalty for drug offences was an example of one such measure, but it is careful not to condone the practice. Commentary on the Single Convention on Narcotic Drugs, 1961. Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council Resolution 914D (XXXIV) of 3 August 1962, United Nations 1973 pp. 449–450, para 2.
and not ceilings could serve as a point from which further fragmentation is possible. If the drugs conventions are seen to be ‘more conducive to the realisation of the rights of the child’, then they are brought closer together.

3.5 Conclusion

The legal ‘worlds’ of child rights and drug control came together in the late 1980s. Their convergence was an event at a given moment, influenced by a variety of social and political factors. But that event simultaneously produced a fragmentation, as if two trajectories might cross at a given point, but continue on their paths, widening their divide as they go. Even in the absence of any obvious (or strict) conflict between specific provisions, the drug control and child rights regimes are specialised in different ways. They are theoretically different points of departure with an ultimately different subject matter (drugs versus children). While the CRC and the drugs conventions have crossovers, therefore, it is possible that drugs question may look very different when filtered through a child rights lens than through drug laws. It depends on the legal frame of reference adopted and, within this, what Article 33 means.

This may be illustrated with a simple question: if the UN drug control conventions did not exist, yet the CRC and Article 33 remained, would we necessarily arrive at the same legal solutions? This is not merely rhetorical. The CRC now has 196 States parties, while the three drugs conventions have between 183 and 189. Thus, some (mostly small island) States have obligations in relation to internationally controlled drugs through the CRC independent of the drugs conventions. Indeed, many States ratified the CRC before acceding to the drugs conventions. Moreover, should any State denounce any of the drugs conventions its obligations under the CRC with regard to the same substances would continue, so long as those substances remain under interna-
tional control, even though the specific obligations under the drugs conventions would no longer apply. The CRC, in other words, contributes legal obligations independent of the drugs conventions.485 Do we begin, then, with the child’s right to protection from drugs through which appropriate drug laws and policies may be developed? Or do we begin with drug laws and policies through which the content of the child’s right to protection from drugs may be understood?

4. Contention: The Politics of Article 33

4.1 Introduction

‘Much more insight is needed’, according to Ellen Desmet and colleagues, as to ‘the underlying norms, values and logics that shape children’s rights practices today and the way in which these are understood.’ This challenge is of particular relevance for the present study. Drug policy is a highly charged political issue. There are often discernible ‘camps’ on specific problems and ideas. The question of whether to legalise drugs or not is probably the most obvious, but not by any means the only one. Harm reduction approaches to drug use have been a flashpoint of diplomacy for many years. Recently, so has human rights. Through human rights a range of different perspectives are made possible, from overall legal and policy responses to specific interventions. Within this there are differing approaches to the content of Article 33 and the interrelationship between human rights, child rights and drug control. These various debates form interwoven strands of argumentation falling into opposing perspectives, each responding to the other on key points. Overall, we might call these the ‘drug control position’, which largely supports the dominant approach represented by the extant drugs conventions, including on human rights grounds; and the ‘human rights position’, which challenges that same system on human rights grounds. I do not wish to present an overly black and white situation, however. The actors involved are diverse. It is not claimed that these are the only positions held or that human rights are the only topic discussed. The two positions are heuristic in that they capture and help explain

487 Bewley-Taylor, Consensus Fractured, pp. 100-151. See also chapter 1.
the state of the overall debate specifically with regard to human rights and
drug control and fundamental differences in how rules and values are under-
stood on key topics. There are certain areas of agreement (primarily on the
need for prevention, treatment and access to medicines) and overlap. But these
are overshadowed by the fact that the attendant human rights and drug control
obligations are employed, prioritised and understood differently, leading to or
justifying solutions that are often incommensurate. Critically, their frames of
reference differ, such that the weight given to one or other system is not
shared. One begins with human rights (challenging drug control), the other
with drug control (confirmed by human rights). From these perspectives, and
alternative views of the child’s right to protection from drugs, very different
approaches to the drugs question are justified.

This chapter introduces these positions and represents an analysis of the vari-
ous arguments that have been made across key thematic areas of disagreement.
It looks to the Vienna Convention on the Law of Treaties and conflict rules to
see if these are viable tools for objective resolution of these debates. And it
concludes that the argumentation conforms to the patterns predicted by the
indeterminacy thesis. This foregrounds the biases of the positions, the uses to
which international law is put in the service of predetermined aims, and
demonstrates the range of approaches that may be legitimately taken with re-
gard to the content of Article 33 and the relationship between the two regimes.
4.2 The Human Rights and Drug Control ‘Positions’

The human rights position is closely connected with harm reduction, criminal justice reform, indigenous rights and rural development. It is articulated mostly by harm reduction and drug policy reform NGOs, public health researchers and, increasingly, human rights NGOs. Some UN bodies and human rights mechanisms have also begun taking this position in recent years, as have some States, due in part to the advocacy of the aforementioned groups. Its central characteristic is its starting point in human rights law, which operates as a primary frame of reference. From this starting point the drug ‘problem’ is viewed through a human rights lens, which tends to focus on the individual, patterns of vulnerability, on human rights progress and violations, and on restraining and directing State action. An overarching concern


is that the drug control regime generates human rights risks (as all ‘suppression regimes’ do\textsuperscript{409}), and which are manifested in documented rights violations throughout the supply chain.\textsuperscript{410} There is less concern, as a matter of priority, with reducing the overall scale of the drugs market, than with reducing the violence associated with it and securing sustainable livelihoods for rural producers. And 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.\textsuperscript{411} Thus, we can see clear tensions with the extant drug control system’s goals and basic approach as set out in chapters 2 and 3.

From this starting point, the human rights and drug control systems are seen, by definition, as being in ‘conflict’ in the broad sense set out in the previous chapter (even if normative conflicts in the strict sense are uncommon\textsuperscript{409}) because they are seen to come to different conclusions for law, policy and practice. International human rights law is therefore seen to operate as a ‘normative counterweight’ to the drug control system\textsuperscript{412} and in any potential conflict

\textsuperscript{411} For a good introduction to this perspective see International Drug Policy Consortium, Drug Policy Guide, 3rd edition, IDPC, 2016, p. 8.
\textsuperscript{412} The ban on indigenous practices pursuant to Article 49 of the Single Convention, however, now likely represents a conflict in the strict sense. See S. Pfeiffer, ‘Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing’ 5 Goettingen Journal of International Law 1, 2013 pp. 287-324. 

\textsuperscript{412} Elliott et al, ‘Human Rights Challenge to Global Drug Policy’. 

or where there are tensions between these systems, this must be resolved in favour of human rights. During the 2016 Special Session Canada expressed this position explicitly. ‘Our approach to drugs…must respect human rights’ it said. ‘In Canada, we will apply those principles with regard to marijuana. To that end, we will introduce legislation in the spring of 2017 that ensures we keep marijuana out of the hands of children, and profits out of the hands of criminals. While that plan challenges the status quo in many countries, we are convinced it is the best way to protect our youth while enhancing public safety.’

What Canada was announcing was its legalisation of cannabis in breach of the Single Convention. Jamaica made a similar announcement at the UN relating to its cannabis reforms allowing for religious use by Rastafarians.

The drug control position, on the other hand, is associated with abstinence-based approaches, anti-drugs campaigning and law enforcement. It is adopted mainly by drug policy NGOs and drug policy academics, but also by the

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496 UNGASS OR 3, p. 4.

497 UNGASS OR 3, p. 13. Jamaica claimed, however, that it was still adhering to the Single Convention. Canada did not address the treaty issue directly.

main UN entities responsible for drug control⁴⁹⁹ and likely the majority of States.⁵⁰⁰ Contrary to the above, the drug control position begins with the implementation of the drug control framework as its frame of reference, seen as the best means, agreed by international consensus, to achieve the goal of protecting ‘the health and welfare of mankind’.⁵⁰¹ This is often stated plainly. As South Africa stated during the 2016 Special Session ‘Our overarching objective since the beginning of the war on drugs has been to promote the health and welfare of humankind.’⁵⁰²

The protection of children and youth has become a core component of that consensus. The connection between Article 33 of the CRC and the drugs conventions is, for the drug control position, a clear articulation of a shared framework and vision, fundamentally undermining the human rights position’s assumption of conflict. Human rights law, and child rights law in particular, are

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⁵⁰⁰ The positions of States were on display at the UN General Assembly Special Session on Drugs in April 2016. See, for example, the statements during the human rights roundtable during the event. This was not recorded in the official records, which focus on the plenary sessions. Available (though not verbatim) at http://cndblog.org/2016/04/round-table-3-cross-cutting-issues-drugs-and-human-rights-youth-women-children-and-communities/

⁵⁰¹ Preamble, Single Convention.

⁵⁰² UNGASS OR 1, p. 30.
supportive of international drug control law, not a challenge to it. This is the foundational difference between the human rights and drug control positions, however, rooted in their respective frames of reference. Because if drug control poses a risk to human rights more broadly, as some claim, then by extension it poses risks to child rights, and in turn international child rights law must, as a component of human rights law, also be in conflict with drug control.⁵⁰³

Each position therefore has its feet rooted in a different legal system. This colours how the other system is approached, understood, valued and, of course, used. When it arises, Article 33 sits at the centre of these two perspectives and legal frames of reference. But it too is approached differently, pulled in alternative, opposing directions by these original starting points. Let us consider some key points of disagreement in more detail.

4.3 Thematic Points of Disagreement

4.3.1 Risk Assessment and Problem Representation

Recall the question raised by Kennedy above. What ‘trauma’ drives a given discipline? Trauma may be the wrong word here. Let us consider it instead as risk assessment. What is the source of harm? What, as Bacchi asks, is the problem ‘represented to be’?⁵⁰⁴ How the problem is represented by each position determines how one views the existing legal obligations surrounding it, and we do see disagreements as to the roots of drug-related harms, human rights problems in drug policy, and the main source of the threat posed by drugs.

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⁵⁰⁴ Bacchi, Analysing Policy.
For the human rights position, an initial concern is that the drug problem is framed, like terrorism, as one of existential threat. Political speeches referring to drugs as a ‘scourge’, a ‘plague’ and a ‘global threat’ are a regular feature in UN forums. The Single Convention refers to the ‘evil’ of addiction and the moral duty of States parties to ‘combat this evil’. It is a narrative that has a long history in drug control and has been criticised in this regard by scholars. Critically, however, the threat is not only against health. According to Emily Crick, ‘Where once drug policy concerned itself with preventing the “social and economic danger to mankind” brought about by addiction to drugs, since the end of the Cold War, the focus of international drug policy has been associated with the security of the State’. This is evident in the preamble of the Vienna Convention, which sets out the threat to the ‘stability, security and sovereignty of States’. Moreover, as Steve Rolles has argued ‘Prohibitionist rhetoric frames drugs as menacing not only to health...but also...to the moral fabric of society itself, using the “drug threat” to children as a specific rhetorical vehicle’. The Vienna Convention’s preamble, of course, refers to a ‘threat to the health and welfare of human beings’, to the ‘economic, cultural and political foundations of society’, and to a ‘danger of incalculable gravity’ to children.

506 The International Drug Policy Consortium hosts the website www.cndhog.org where speeches and resolution debates at the Commission on Narcotic Drugs have been recorded since 2009. A simple word search demonstrates the frequency of such language. Many examples are evident in the speeches at the 2016 Special Session. See, for a small selection, UNGASS OR 1, p. 19 (costa Rica), p. 20 (Panama) p. 30 (South Africa), p. 34 (Angola); UNGASS OR 2, p. 13 (ASEAN Group); UNGASS OR 3 p. 17 (Cuba), p. 19 (Cameroon), p. 21 (Togo). See also chapter 2 for the views of states during the drafting of the various treaties see Lines, Drug Control and Human Rights, pp. 50-73. See also C. Hobson, ‘Challenging Evil: Continuity and Change in the Drug Prohibition Regime’, 51 International Politics 4, 2014 pp. 525-542.
The focus here is the threat-based framing. For the human rights position this rhetoric generates important effects, one of which is harmful stigma. According to the International Network of People Who Use Drugs, for example, ‘people who use drugs, by default, are stigmatised as deviant criminals.’ What is articulated here is the concern that while criminal laws might aim at stigmatising a particular behaviour to reduce that behaviour, the stigma is inevitably experienced by people. At the other end of the supply chain, meanwhile, farming communities and poor people engaged in low-level drug offences also experience significant stigma. As Julia Buxton argues ‘…alternative development with respect to drug crops is often relegated to a military stabilization and consolidation strategy, while drawing the development community into a “threat” perspective that frames drugs as a cause rather than symptom of poverty and exclusion’. As such, farmers also ‘do not comply with international community norms’, and are tarred with the image of being part of the threat to wider society, to children and to the State. There have therefore been calls for reforms to criminal drug laws aimed at decriminalising both users and farmers to reduce this effect.

When a threat of the scale of illicit drugs is set up, moreover, heavy-handed laws, policies and interventions are easier to justify. In one of his final reports

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510 International Network of People Who Use Drugs, Stigmatising People Who Use Drugs, Drug War Peace Initiative, 2015, p. 1. The concern finds support through the UN Office on Drugs and Crime which has admitted that, through international drug control, ‘A system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalized from the social mainstream, tainted with a moral stigma…’ UNODC, Fit for Purpose, p. 11.


514 J. Buxton, Drug Crop Production, Poverty and Development, Open Society Foundations, 2015 (arguing that criminalization of rural production has been an impediment to development)
to the UN Human Rights Council, Manfred Nowak, then UN Special Rapporteur on Torture, noted the various ‘exceptional circumstances’ or ‘unique situations’ used by government officials to explain acts amounting to torture and cruel, inhuman and degrading treatment. Among them was the threat posed by drugs.\textsuperscript{515} Over time, various extraordinary measures such as heavy penalties, forced eradication of crops or military/police ‘crackdowns’ have been put in place. Because of this, harm reduction and human rights NGOs have raised concerns about the human rights effects of law enforcement in drug control.\textsuperscript{516} Critically, for the human rights position, the drugs conventions cannot be separated from this outcome.\textsuperscript{517} This is summed up by Boister, ‘The drugs conventions and the 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 a national level.’\textsuperscript{518} For example, a correlation between the signing or ratification of the Vienna Convention and the adoption of capital drug laws has been shown.\textsuperscript{519} For Boister ‘It is disingenuous to argue that these measures have nothing to do with the 1988 Convention… It would be less difficult to defeat an accusation that such encour-

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513 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum, Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, UN Doc No A/HRC/13/39/Add.5, 2010, para 44.


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agement results in the taking of egregious steps such as ex post facto criminalisation or capital punishment, if the Convention expressly prohibited such measures’. 520

The drug control position, however, adopts an alternative risk analysis. It views the drug trade as a primary threat, not State action or how the threat is talked about. As Cuba stated during the 2016 Special Session ‘It is unfair to make generalizations and maintain that the tough approach on drugs is responsible for the current magnitude of this scourge.’ 521 Drug use is seen as the main driver of harm, not responses to it or any attendant stigma. Thus, while others problematise the threat narrative, the drug control position sees this as entirely appropriate given the scale of the problem. The drug trade causes corruption and violence, and drugs destroy lives. The threat is very real. By extension, those who are threatened (the ‘victims’) are understood differently. The primary concern with drug users as a vulnerable population is rejected and the threat to wider society is instead foregrounded. As the President of the INCB has put it, ‘Drug abuse is neither harmless nor victimless and causes serious damage to both individuals and society.’ 522 Thus, the common good reflected in the drugs conventions is the main focus. Although assistance to drug users is still a prominent feature, in particular through drug treatment, the responsibilities of drug users for the harm they cause, including to children, is highlighted. As the INCB states ‘drug abuse is often in conflict with the due recognition of the rights and freedoms of others and in meeting the requirements of health, public order and the general welfare in a democratic society.’ 523 The World Conference on Human Rights made a similar point in the influential

520 Boister, ‘Suppression Conventions’, p. 221.
521 UNGASS OR 3 p. 17.
522 INCB, 2009 Statement by Professor Hamid Ghodse.
523 Ibid.
Vienna Declaration and Programme of Action, according to which drug trafficking contributes to the ‘destruction of human rights’. The World Summit in 2005 issued a similar statement. Against this background the problem of stigma associated with drug use is less of a concern.

It is recognised, of course, that human rights abuses happen in the context of drug control. There is no way to deny this, and over time (aside from States retaining the death penalty), the opposition to the death penalty has become widely shared. But even if the practice is condemned, solutions are not agreed because the risk analysis set out above is rejected. For the drug control position is not the international drug control treaties that are to blame, or even drug policy at national level, but the pre-existing lack of effective justice standards and poor human rights records in those States within which such practices take place. From this perspective, Saul Takahashi responds to the association of drug control with the death penalty directly: ‘The problem is one of the death penalty and its general incompatibility with international human rights standards in those countries in general’ he argues, ‘not one of drug control as such’. The association between the Vienna Convention and increasing adoption of capital drug laws, as made by Boister, is therefore rejected as an ‘unsubstantiated claim’. As the UNODC argues ‘Nothing in the Conventions

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526 Some refer to drug users as abusing child rights through their actions, S. Dahlgren and R. Stere, The Right of Children to be Protected from Narcotic Drugs and Psychotropic Substances: A Human Rights/International Law Perspective, Paper Presented at the World Forum Against Drugs, 2010. For others stigma is an important tool for maintaining the societal view that drug use is harmful and that it should not be disregarded as a catalyst for entering recovery N. McKeganey, ‘Bad Stigma...Good Stigma?’ Drink and Drug News, 15 February 2010, pp. 14 and 15.
528 Takahashi, False Dichotomy, p. 113.
provides a justification for punishment or other actions directly contrary to human rights’. Simply put, the structural causes of human rights abuses presented by the human rights position are not accepted.

A similar difference reveals itself in relation to access to essential controlled medicines (those medicines controlled under the drugs conventions, such as morphine, and that are also on the WHO model essential medicines list). On this, the human rights and drug control positions could be seen to be in agreement, just as they both oppose the death penalty. There is no disagreement that access must improve. But that agreement is again only on the existence of a problem. Disagreement remains on the role of the drugs conventions in its creation. From one perspective the system under the drugs conventions contributes to this gap, and human rights law must play a stronger role in resolving it. From the other, the conventions remain the key to the solution.

4.3.2 Conflict and Coherence: The Requirements of the Drugs Conventions and Human Rights Law

The human rights position sees broad conflict between the two regimes because what States are required to do under the drugs conventions is seen to generate human rights risks. To be sure, under the drugs conventions States are required, inter alia, to control individual behaviours, ban indigenous and religious practices, carry out investigations, arrests, prosecutions, extradition,

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530 Gispen, Human Rights and Drug Control.
crop eradication, asset forfeiture, and to control speech due to the criminalisation of incitement to use drugs. The majority of tensions or conflicts between human rights and drug control law are seen to reside in the translation of these obligations into national action. In this regard, the INCB has confirmed that ‘...each State has discretion to transpose the provisions of the conventions into domestic law and practice in line with its own legal system and principles.’ But, as Boister has observed, these obligations are translated into national systems around the world, sometimes where national human rights protections are very poor. But human rights are all but absent from the international treaties.

Beyond specific requirements, conflicts are seen to arise in the permissive nature of the drugs conventions, albeit again in a context of the absence of human rights safeguards. This has been articulated clearly by Lines, who argues that the provision in each of the drugs conventions permitting ‘more strict or severe measures’ places the two regimes in a persistent state of conflict. The official commentary to the Single Convention bears out this worry, referring to the death penalty as an example of a ‘more strict or severe’ measure permitted under Article 39. As Boister argues, ‘These conventions introduce invasive measures into domestic law, but importantly, they also introduce a no-holds-barred ethos into domestic crime control law.’ Thus, the drugs conventions are in a constant state of conflict with human rights law, which seeks to influence those national structures in other ways. The ongoing international consensus around international strategies for drug control enshrined in the treaties

533 Lines, Drug Control and Human Rights.
535 Boister, ‘Suppression Conventions’.
536 Article 39, Single Convention; Article 23, 1971 Convention; and Article 24, 1988 Convention.
539 Boister, ‘Suppression Conventions’, pp. 220 and 221.
is therefore viewed as problematic, masking human rights problems and conflicts between legal regimes. Any exposure of the increasing strains on that consensus is therefore welcomed.\footnote{See for example ‘Leaked Paper Reveals UN Split Over War on Drugs’, The Observer, 30 November 2013.}

In its worth noting, then, that this broad notion of conflict has been identified by States. For some, the focus must be on human rights, even if this requires reform to the drugs conventions. During the 2016 Special Session, for example, Mexico declared its view that ‘The goal is to review the current international strategy and, above all, define the better solutions from a human rights perspective...’\footnote{UNGASS OR 1 p. 16.} But even for those opposed to the encroachment of human rights into drug policy the same conflict is apparent. Mere moments later, during the same session, Pakistan argued that ‘the concepts involved that lack consensus, such as harm reduction and the so-called human rights- based approach, are likely to further complicate the issue.’\footnote{UNGASS OR 1, p. 30.} China stated its opposition to the use of human rights ‘out of context’ as it would complicate law enforcement.\footnote{Author’s notes from attendance at the human rights roundtable at the UNGASS. Official records did not capture the roundtables. See, however, the notes at http://end-drug-weblog.org/2016/04/round-table-3-cross-cutting-issues-drugs-and-human-rights-youth-women-children-and-communities/.} The conflict is agreed, then. These States merely lean towards the existing drugs conventions for how to resolve it.

While the human rights position sees conflict, the drug control position values highly the length and the strength of the consensus on this topic. The history of the regime and the near universal ratification of the drugs conventions is regularly cited.\footnote{See for example, International Narcotics Control Board, Annual Report for 2007, UN Doc No E/INCB/2001/1, 2008, para 11.} Similar human rights problems are identified. But as Takahashi’s approach to the death penalty illustrates, the difference is in the
rejection of the perceived influence of the drugs conventions in these situations. This has a technical element, rooted in treaty interpretation. The drugs conventions, it is argued, permit sufficient flexibility to avoid and even prohibit the excesses of some States. The human rights position overlooks these flexibilities and in doing so effectively erects a straw man to knock down. According to the UNODC’s analysis, for example, there is no obligation to apply the death penalty, no obligation to treat people who use drugs inhumanely or stigmatise them, and no obligation to deny harm reduction services such as opioid substitution therapy. The treaties do not condone or promote a ‘war on drugs’ approach or even a ‘prohibitionist’ one.545 There is explicit recognition of the ability to adopt alternatives to conviction or punishment for minor offences, and requirements to provide effective treatment. The INCB makes the very same arguments.546 Abuses happen, but they are the actions of specific States, sometimes based on their understanding of their international obligations. But this proves only that the real problem lies at national level and an incorrect reading of the treaties. Appropriate interpretation and implementation would avoid the human rights consequences that are blamed, unfairly, upon the drug control treaties. Taking this further, it has been claimed by the UNODC that an approach that abuses rights ‘flies in the face of the provisions of the Conventions and misinterprets their object and purpose’.547 UNODC is here arguing that such measures by governments are inconsistent with the drugs conventions, not just human rights law. The INCB has taken a

547 UNODC, Drug Policy Provisions, p. 14
similar approach, arguing recently that extrajudicial executions in the Philippines are ‘a clear violation’ of the drugs conventions, which instead approach the issue through formal legal processes.\footnote{International Narcotics Control Board, ‘INCB condemns acts of violence against persons suspected of drug-related crime and drug use in the Philippines’, Press Release, UNIS/NAR/1331, 18 August 2017.}

The tensions between human rights and drug control upon which the human rights positions rests its arguments are therefore overstated and represent a ‘false dichotomy’.\footnote{Takahashi, \textit{False Dichotomy}.} The two are mutually supportive, rather than in a relationship of conflict. Referring to the Outcome Document of the 2016 Special Session, and reflecting the views of other States,\footnote{During a thematic panel on human rights at the 2016 Special Session on Drugs various States claimed that their laws were already in full conformity with their rights obligations. Indeed, a problem with the prominence of the death penalty debate was that its absence arguably became synonymous with human rights conformity, rendering other human rights concerns less visible, including in those countries opposing capital punishment. What remained were general statements as to the need to comply with human rights, but little in the way of concrete declarations as to what this might mean.} Belgium made this clear: ‘…it confirms the importance of the goals and objectives of the three international conventions on drugs, especially physical health and the well-being of humankind…it is in accordance with …the Universal Declaration of Human Rights’.\footnote{UN General Assembly \textit{Special Session on the World Drug Problem. Official Records, Fourth Plenary Meeting}, UN Doc No A/30/PV.4, 20 April 2016, p. 17. (Hereafter UNGASS OR 4)} The INCB, for its part, has been consistent on this matter over the years. As the Board’s President stated by way of introduction to a major review of UN drug control in 2009 ‘Controlling drugs and protecting human rights are not opposites but go hand in hand.’\footnote{INCB, \textit{2009 Statement by Professor Hamid Ghodse}.} In an earlier report, while it recognised that human rights must be taken into consideration, and the report contains recommendations that States refrain from excessive measures, it was also clear that there was no underlying conflict between the regimes. ‘The fact that so far over 95 per cent of all States have chosen to become parties to the conventions’ it said ‘is evidence that those binding legal instruments represent
a proportionate response to global drug problems’ (emphasis added). 553 The two systems are intertwined, according to the INCB, to the extent that ‘Due respect for universal human rights, human duties and the rule of law is important for effective implementation of the international drug control conventions’ (emphasis added).554 ‘The international drug control system’, it asserted, ‘was established out of concern for the health and welfare of humankind…this core objective is fully supportive of the key elements—children, young people, health and well-being… It also has a direct link to human rights treaties’.555 The Board cited Article 33 of the CRC and the right to health under the ICESCR to support this argument.556

For the UNODC, ‘The Conventions aim to protect the human rights of vulnerable populations from the dangerous effects of controlled drugs, from the health and social consequences of drug use disorders and from the control of criminal organization managing the illicit drug market. The dignity of human beings and their rights to freedom, especially the right to health are essential elements of the drug control system…’557 As such, if both human rights and drug control seek the same ends in improved health and welfare, then these

555 Ibid.
556 Ibid. This followed strong criticism for the Board’s silence on human rights issues and on its refusal to condemn the death penalty for drug offences. In recent years, with a change in presidency (i.e. chairmanship), the Board has made recommendations that States take human rights law into account, including the abolition of the death penalty and the right to health. See for example, Annual Report for 2017, UN Doc No E/INCB/2017/1, 2018, paras 30-37 (on drug dependence treatment as a component of the right to health). It is an approach the Board has recently again taken in commemorating the beginning of the UN’s year-long recognition of the 70th anniversary of the Universal Declaration of Human Rights. While recognising many rights violations, and calling for respect for human rights in drug control, the shared visions of the two regimes was again affirmed. Press Release, Human Rights Day – Applying a Human Rights-Based approach to Drug Control, UN Doc No UNIS/NAR/1340, 11 December 2017.
are not, in fact, in conflict; a direct response to the arguments made by, inter alia, Lines and Boister above.

4.3.3 Normative Hierarchy

The above discussion of conflicts leads to a wider discussion of the normative hierarchy between the regimes. From one perspective international human rights law must take precedence over the drugs conventions. The opposing view is not quite that the drugs conventions should instead take precedence (though this has been asserted), but more, as we have seen above, that there is no conflict to speak of. The treaties pursue the same goals and hold the same basic values. The two positions therefore have different takes on the normative hierarchy between the regimes. On the one hand it is argued that the international community recognises the need for drug control to be human rights compliant, thereby placing human rights law in a superior hierarchical position. Annual omnibus resolutions of the General Assembly and UN political declarations are cited to this effect. These state, in long standing consensus language, that countering the world drug problem must be ‘carried out in full conformity’ with human rights.\(^{558}\) However, on the other hand we see the same wording being used as evidence that States themselves do not see ‘any inherent conflict between drug control and human rights.’\(^{559}\) Here, States’ apparent understanding of conflicts or their absence is prioritised, not the abstract potential of such a conflict.

From the human rights position, Marie-Elske Gispen has argued that in seek-

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\(^{559}\) Takahashi, ‘Myths and Realities’, p. 42; See also, Dahlgren and Stere, *A Minimum Human Rights Standard*, p. 47.
ing a ‘balance’ between limiting access to controlled substances for illicit purposes and ensuring access for medical purposes there is a human rights imperative to lean towards the latter. Lines has argued in wider terms, that in a situation of normative conflict (where two norms are fundamentally contradictory) or a ‘conflict of the applicable law’ (where a State cannot apply two norms in the same context), it is drug control law that must give way. It has further been argued that Article 103 of the Charter of the United Nations provides a primary status to human rights over the drug control conventions. The conflict in this case is in the de facto outcomes of the drug control system and the purposes and principles of the UN – security, development and human rights - set out in Articles 1 and 55. There is some disagreement here. Lines, for example rejects the Article 103 claim. From each of these perspectives, however, the shared view is that as human rights law operates as a ‘normative counterweight’ to the obligations of the drugs conventions, the balance should be struck on the human rights side. While not stated outright, a normative hierarchy appears to be adopted between the principles of human rights on the one hand and the regulatory policies of drug control on the other.

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561 This is a central argument in Lines, Drug Control and Human Rights.
562 See for example, J. Collins ‘Rethinking Flexibilities in the International Drug Control System: Potential, precedents and models for reform’ International Journal of Drug Policy (In press, 2017). Article 103 reads: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’. See also Article 30(1) VCLT ‘Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs’
565 As Lines puts it, quoting Albie Sachs, a ‘thumb on the scales’ must be placed in favour of human rights over law enforcement. Lines, Drug Control and Human Rights, p. 186. See also N. Boisier, An Introduction to Transnational Criminal Law, Oxford University Press 2012, p. 131 ‘...restrictions arise out of the international human rights obligations of the specific parties and not out of the suppression conventions.’
566 The human rights position therefore reflects Dworkin’s well-known argument that ‘individual rights are political trumps held by individuals’. R. Dworkin, Taking Rights Seriously, Duckworth, 1977 p. xi.
The use of human rights law as counterweight takes various forms. For the most part the focus has been on resolving tensions with regard to national implementation, such that any flexibilities in the drug control treaties are exploited to avoid human rights harm.\textsuperscript{567} As Boister puts it, States must ‘proceed to apply these treaties against the background of the limits that the human rights conventions place on state action.’\textsuperscript{568} A prominent example has again been the death penalty, with scholars and UN mechanisms arguing that ‘most serious crimes’ for the purposes of article 6(2) of the International Covenant on Civil and Political Rights operates so as to inform ‘particularly serious’ crimes under the Vienna Convention and thereby to constrain State sentencing in this regard.\textsuperscript{569} Harm reduction has also been a focal point. While at best optional under the drugs conventions,\textsuperscript{570} though obviously grating against their strategic vision,\textsuperscript{571} human rights arguments have been employed to argue that such services are \textit{required} by human rights law, in particular the right to health.\textsuperscript{572} This approach has also led to more direct challenges to the drug control treaties, not only from NGOs and scholars but also from within the UN human rights system.\textsuperscript{573}

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\item This is Lines’ basic thesis. Lines, \textit{Drug Control and Human Rights}.
\item Boister, ‘Suppression Conventions’, p. 224. See also Lines, \textit{Drug Control and Human Rights}.
\item An opinion of the legal affairs section of the UN Drug Control Program was requested by the INCB in 2002 due to the extent of the debate. See Decision 74/10, \textit{Flexibility of Treaty Provisions as Regards Harm Reduction Approaches, prepared by UNDCP’s Legal Affairs Section, UN Doc No E/INCB/2002/W.13/SS.5 (Restricted), 30 September 2002.}
\item Bewley-Taylor, \textit{Consensus Fractured}, pp. 100-151.
\item For an overview see D. Barrett and P. Gallagher, ‘Harm Reduction and Human Rights, 16 \textit{Interights Bulletin} 4, 2011, pp. 188-194. This has been somewhat effective in convincing the INCB to agree at least with regard to drug dependence treatment, if not harm reduction, which the Board is still reluctant to endorse. See \textit{Annual Report for 2017}, UN Doc No E/INCB/2017/1, 2018, paras 30-37.
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The normative hierarchy upon which the human rights position rests is not accepted by those adopting the drug control position, however. In the pursuit of coherence, where there does appear to be a tension in need of resolution, human rights law and the drug control treaties are given equal weight. For example, Dahlgren and Stere, reject any clear hierarchy. ‘Without denying the relevance of human rights for the drug control regime’, they argue, the horizontal nature of international law precludes a clear hierarchical relationship as some have claimed.\(^{574}\) Sven Pfeiffer has addressed this problem with regard to the specific problem of the ban on coca chewing under articles 4(c) and 49 of the Single Convention and related indigenous rights. ‘The rules in question’ he argues ‘can be harmonized only by restricting the right of indigenous peoples to their customs and traditions’ (emphasis added).\(^{575}\) Where the flexibility in the drug control treaties is not sufficient, it is the more flexible human rights law that must bend, a direct contradiction to Lines’ argument above.\(^{576}\)

The INCB has gone further. Responding in 2018 to Canada’s plans to legalise and regulate the Cannabis market, the Board asserted that the general obligation of the Single Convention to restrict controlled substances to medical and scientific purposes (Article 4(c)) is ‘absolute’ and has become a ‘peremptory norm’ of international law.\(^{577}\) In the same document the Board also set out its


\(^{575}\) S. Pfeiffer, ‘Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing’ *5 Goettingen Journal of International Law* 1, 2013, pp. 287-324. This is despite the fact that the author recognises that the prohibition of coca ‘may be seen as a codification of an outdated attitude towards indigenous peoples that is no longer supported by any State’ at 324.

\(^{576}\) Lines, *Drug Control and Human Rights*, pp. 166-170 (addressing Pfeiffer’s interpretive approach directly)

\(^{577}\) International Narcotics Control Board, *Brief on the Conformity of Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, as Passed by the House of Commons, November 27, 2017, Submitted to the Standing Committee on Foreign Affairs and International Trade*, 13 April 2018, para 15.
view that the drugs conventions and human rights law combine to form a ‘human and proportionate’ legal framework of drug control.\footnote{International Narcotics Control Board, Brief on the Conformity of Bill C-45, An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, as Passed by the House of Commons, November 27, 2017. Submitted to the Standing Committee on Foreign Affairs and International Trade, 13 April 2018, para 12.}

Related to this is the view that the drugs conventions deliver on human rights goals. They are not mere policies compared to higher human rights principles, as suggested by the arguments above. There are therefore also disagreements regarding the balancing of potentially conflicting rights. Mirroring its more recent statement above, for example, the INCB has previously argued that freedom of expression must be balanced against other ‘essential values and rights’, these values and rights being represented by drug control strategies. And while the human rights position claims that the strategies enshrined in the treaties contribute to harmful stigma, with effects for a host of human rights, the drug control position sees the drugs conventions as fulfilling a direct human rights role by aiming to free people from addiction. ‘Drugs undermine personal and social development, inhibit critical thinking, and deaden autonomy and creative initiatives’ argues a UNODC report on the interpretation of the treaties. ‘In reality, people become dependent on drugs, slaves of drug dealers, isolated from the community, deprived of mental health and cognitive/affective abilities. This is inconsistent with basic human rights.’\footnote{See H. Ghodse, International Drug Control into the 21st Century, Ashgate, 2008, p. 79. (Ghodse was a former president of the INCB. The book is a compilation of the Board’s views).}

Similar to this line of reasoning, Takahashi is of the view that ‘ensuring that a person undergoes treatment for drug addiction, even with a level of coercion, would be the most effective way to guarantee that he is able to attain the highest possible standard of health.’\footnote{UNODC, Drug Policy Provisions, p. 14.} Here we see the potentially conflicting rights held by the same person, with added weight given to becoming drug

\footnote{Takahashi ‘By No Means’, p. 775.}
free over consent to medical treatment, or, depending on the form of treatment, a temporary deprivation of liberty. Takahashi’s view is similar to arguments made in other areas of international law but it entails a theory of the relationship between human rights, drug use and personal autonomy, and the position of the individual in drug control, that is not held by the opposing view.

4.3.4 Article 33 and its Relationship to the Drugs Conventions

4.3.4(a) Conflict and Coherence

If there are risks to human rights stemming from drug control then there are inevitably risks to child rights within these. And if one accepts the structural arguments of the human rights position, then the drugs conventions are also potentially harmful for child rights. In addition to the general human rights freedoms, these may not be seen as being in conflict as environmental law may also be understood as intended to improve human well-being and as prerequisite for the enjoyment of human rights. D. Shelton, ‘Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?’ in E. De Wet and J. Vidmar (eds), Hierarchy in International Law: The Place of Human Rights, Oxford University Press, 2012, pp. 206-235. The International Health Regulations allow for various forms of coercion in the context of a public health emergency of international concern. See L. Gostin and R. Katz, ‘The International Health Regulations: The Governing Framework for Global Health Security’ 94 Milbank Quarterly, 2016, pp. 264-313. See figure 1 for a useful summary of the balance between health, trade and human rights required by the IHR.

Takahashi is of the view that ‘the reality of drug addiction is that it destroys - or at least suspends - the free will of the addict’. Takahashi, ‘By No Means’, p. 775. Nora Volkow, Director of the National Institute on Drug Abuse in the US holds the same view, referring to addiction as a ‘disease of free will’. N. Volkow, ‘Addiction Is a Disease of Free Will’ Huffington Post, 6 December 2015. Others, leaning towards the human rights position, support the full participation of people who use drugs in policies that affect them. See “Nothing About Us Without Us”: The Greater Meaningful Involvement of People Who Use Drugs – A Public Health, Ethical and Human Rights Imperative, Canadian HIV/AIDS Legal Network and Open Society Foundations, 2008. This is not compatible with a loss of free will or choices over healthcare. Takahashi’s claim has a human rights pedigree, however, in that this was the view of the drafters of the European Convention on Human Rights in the late 1940s. Under Article 5(1)(e), the lawful detention of ‘drug addicts’ is allowed for as a limitation on liberty of the person. This, according to the European Court, is due to such persons being ‘socially maladjusted’ and ‘occasionally dangerous for public safety’. Guzzardi v Italy, Application No. 7367/76 [1980] para 98.

As Sofia Gruskin et al set out in an early paper considering youth drug use through a human rights lens, ‘Both long-term and short-term approaches to supply and demand reduction must explicitly respect, protect, and fulfil human rights. Otherwise, they risk violating the rights of
risks, however, there are issues specific to child rights, both directly and indirectly. The Child Rights Information Network, for example, has set out a range of child rights affected by drug policy, in particular for children involved in the criminal justice system, and has recommended attention to rights-based approaches to mitigate these harms. Random drug testing of school students is a good example. Depending on the model this is sometimes consensual, sometimes not, and the consequences of a positive test differ. Regardless of these differences, as Adam Fletcher argues, while there is an imperative to protect children from drugs, the child’s rights to privacy and to education must take precedence.

As such, just as with human rights law more broadly, it is argued that the CRC should also operate as a ‘normative counterweight’. The core argument is that, just as with human rights law more broadly, the CRC should operate primarily to direct State action, and to restrain it, up to and including challenging drug laws and policies. It is therefore teleological in its approach, and adopts a now traditional dynamic (or ‘evolutive’) approach to human rights treaty interpretation, honing in on protecting children from drugs as a rights-based goal, but

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586 A. Fletcher, ‘Drug Testing in Schools: A Case Study in Doing More Harm Than Good’, in D. Barrett (ed), Children of the Drug War: Perspectives on the Impact of Drug Policies on Young People, iDebate Press 2011, pp. 196-204. Emily Boyce and William Boyce argue in similar terms, focusing on the child’s right to participation in their own health decisions and the potential tension with protection from drugs. E. Boyce and W. Boyce, ‘Application of the Convention on the Rights of the Child to Adolescent Health Policy’ in W. Boyce et al (eds), Adolescent Health: Policy, Science and Human Rights, McGill-Queen’s University Press, 2009, pp. 249 – 276, at 259 and 260. They are, however, of the view that the legal requirements of the CRC are complied with once criminal laws are in place, with repercussions for dealers and users, including adolescents. They do not engage in the debate as to whether human rights law or child rights law might challenge criminalisation as an appropriate legal strategy for the purposes of the CRC.
not the specific means to do so, wherever these might be set out.\footnote{On dynamic interpretation in human rights law, see B. Schlüter, ‘Aspects of human rights interpretation by the UN treaty bodies’ in H. Keller and G. Ulfstein (eds), \textit{UN Human Rights Treaty Bodies: Law and Legitimacy}, Cambridge University Press, 2012, pp. 261-319. Applying this approach to drug control and human rights, see Lines, \textit{Drug Control and Human Rights}, pp. 126-172.} From this perspective, the CRC operates as a frame of reference through which any drug laws including international obligations should be filtered.\footnote{This is an area where my own work has featured. See Barrett and Tobin, ‘Article 33’.} It is premised on the very same broad understanding of conflict, in that two legal frames of reference may produce differing results.

However, if one rejects that structural explanation there is the possibility for coherence rather than broad conflict just as there is with wider human rights law. If human rights law and the drugs conventions are complementary, then for the drug control position it is obvious that the CRC and the drugs conventions are mutually supportive because of Article 33. Children have an explicit right to protection from drugs, after all, set out in a provision that references the drugs treaties directly. From there it is a simple to step to the kinds of obligations required. Moreover, Article 33 of the CRC and the preamble of the Vienna Convention mirror each other, focusing on drug use and involvement in the drug trade. Both treaties were developed at the same time and what was then known as the UN Drug Control Programme (now UNODC) contributed to the negotiations of Article 33.\footnote{Takahashi, \textit{False Dichotomy}, pp. 63 and 64. See further chapter 2.} Child rights and drug control are therefore part of the same system and the clearest example of the coherence between human rights and drug control. From this perspective, the CRC is not a filter for amending drug laws and policies. It sits alongside (or atop) them as normative justification and the ‘concrete benchmark’ for human rights-oriented policy.\footnote{Stere, ‘The Importance of Children’s Rights’, p.156.} As Stere argues ‘The drug conventions set out to ensure no illicit use, and to combat illicit production and trafficking. The CRC explicitly makes these three issues a mandatory special protection concern for children
by all ratifying States parties’.

Article 33, from this perspective, is ‘not only a clear reference to the international drug conventions, but an unambiguous reaffirmation of states’ obligations in drug control’ (emphasis added). The two regimes are ‘100% consistent’. This is far less dynamic (in an interpretive sense) and roots the understanding of Article 33 in the provisions of the drugs conventions. But this coherence is crucial because both regimes are seen as reflecting the need for a ‘drug free society’ as the ultimate policy objective and to which children therefore have a human right. Article 33 is not merely a means to some other social ends, but a fundamental value – a right to a drug free environment – predicated on the future of society resting on the shoulders of today’s youth. This, in turn, engages the child’s right to development under Article 6, a general principle of the CRC.

In is this way the drug control position is also teleological, but the telos is different. For the human rights position the goal of a drug free society may not be the best way to protect children, while for the drug control position that is the goal. Sweden’s official policy makes clear where it stands: ‘The UN Convention on the Rights of the Child recognises a child’s right to grow up in a drug-free environment as a human right.’

502 Takahashi, False Dichotomy, p. 63.
504 Flacks refers to this as the ‘idealisation of the drug free child’, rooted in concepts of childhood innocence. Flacks, ‘Performativity’ pp. 56-66.
506 See for example, European Cities Against Drugs, ‘International Drugs Conventions and the Rights of the Child’, Newsletter, 16 March 2012, p. 2, referring to ‘the right of children to live and develop in the drug-free communities’; IOGT-NTO ‘What’s Good for the Children is Good for the World: A Child Rights Centered Approach to the Prevention of Drug-Related Harm’ (undated) p. 5, arguing that ‘the most conducive policy goal is to ensure a drug free society’.
507 Ministry of Health and Social Affairs, Swedish Drug Policy: A Balanced Policy Based on Health and Human Rights (2015). In support of this the argument could be made that the child’s right to a drug free environment reflects the wider right to an environment adequate for health and wellbeing that has been affirmed by the General Assembly. See for example Need to Ensure
environment is therefore closely tied up with its long-standing policy goal of a drug free society. It is a view shared by others. For example, Lebanon has also reported its strategy for a ‘drug free century’ to the Committee on the Rights of the Child in its reporting on Article 33. Third Periodic Report of Lebanon to the UN Committee on the Rights of the Child, UN Doc No CRC/C/129/Add.7, 25 October 2005, para 618; Some States were also clear about this at the 2016 Special Session. See UNGASS OR 1, p. 30, ‘we have all endeavoured to build a drug-free society, not a drug-tolerant society’ (Pakistan); p. 32 (Kenya) ‘Kenya is determined to be a drug-free nation; and UNGASS OR 4 p. 8 (Viet Nam) ‘Viet Nam shares the long-term vision of the Association of Southeast Asian Nations (ASEAN) and other countries based on a “say no to drugs” policy and striving for a world free of drugs’; UNGASS OR 4 p.12 ‘We further reiterate our determination to contribute to efforts aimed at tackling the world drug problem and at actively promoting a society free of drug abuse’ (Albania).

509 Takahashi, ‘Myths and Realities’, p. 45.


4.3.4(b) The Idea of Protection: Child Rights and the Rights of Others

The human rights position adopts a broad understanding of ‘protection’, both with regard to what protection means, and target groups. For example, children should be protected from using drugs as well as health harms associated with drug use for those who have already begun using. This acknowledges that many children do use drugs, requiring drug treatment to assist. But it also recognises the value of harm reduction measures for young drug users. This is very controversial conclusion for some, going to the heart of the ‘drug free’
vision of Article 33 articulated above. Harm reduction and drug free societies are incommensurate as goals as the former is predicated on the impossibility of the latter. As the human rights position locates human rights risks in drug laws and State action, moreover, it also focuses on the effects of drug laws and policies on children throughout the supply chain, from production through to sales and use, whether or not they themselves use drugs or are involved in the drug trade. Children imprisoned with mothers convicted of drug offences, affected by crop eradication campaigns, or children affected by drug-related violence are examples, all related to the implementation of the strategies enshrined in the drugs conventions.601 This is an approach that is shared by various practitioners602 and Child Rights NGOs.603 In order to support this wider focus, a wider approach to the CRC is also taken by the human rights position within which Article 33 is just one of many articles to be considered collectively. The remaining provisions of the CRC provide normative content for how Article 33 should be understood.604 This conforms to the ‘holistic’ approach to interpretation adopted the CRC Committee.605

This wider perspective on protection also foregrounds the human rights implications of efforts to protect children from drugs given that children are a central part of the threat narrative. Thus, possible conflicts between the protection

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601 See, for example, F.H. Cardoso, ‘Children and Drug Law Reform’ 23 International Journal of Drug Policy 1, 2012, pp 1-2. ‘Consider aerial fumigation of coca, set against the experiences of the children affected in Colombia, the ongoing exposure of Mexican children to violence… What about sentencing primary caregivers of children to lengthy prison sentences for non-violent drug offences?’ ‘To protect children from drugs it is to my mind now beyond debate that drug laws need to be reformed.’ The article was framed around the implementation of the CRC.


604 Barrett and Tobin, ‘Article 33’.

605 See further chapter 5 and, for a critique, chapter 7.
of children from drugs and other human rights standards are raised. As Fernando Henrique Cardoso (now a member of the Global Commission on Drug Policy) has noted, children are ‘so often at the centre of our fears about drugs and the drug trade, and justifications for whatever responses are adopted by governments’. 606 According to this concern, the protection of children from drugs is an important goal, but also a possible risk factor in a wider human rights context. Article 33 cannot be decoupled from that reality. Human rights compliance is therefore sought for adult ‘others’ while children are being protected (or as Article 33 of the CRC is being implemented). 607 This reflects attention to the relationship between child protection and the exercise of the rights of others that have arisen in a variety of contexts. 608

Contrary to the broad approach of the human rights position, a narrower view of protection under Article 33 is adopted by the opposing view, with protection understood as ‘prevention first’. 609 This does not ignore children and parents who use drugs, or the effects on children along the supply chain, but values certain policies more highly under Article 33 specifically. 610 Prevention is

607 Barrett and Tobin, ‘Article 33’.
608 See Handyside v UK, Application No. 5493/72 [1976] ECHR 5, which produced the famous dicta of the European Court relating to freedom of expression, States’ margin of appreciation and the test of proportionality. The case was, in effect, a tension between freedom of expression and child protection. The ‘Little Red Schoolbook’ had been banned in the UK because it was seen as promoting both promiscuity and drug use. Another context in which such tensions arise is in custody proceedings. For a discussion see K. Doty ‘From Fretté to E.B: The European Court of Human Rights on Gay and Lesbian Adoption’ 18 Law and Sexuality (2009) pp. 121-141.
609 UN Commission on Narcotic Drugs, Written Statement Submitted by IOGT-NTO, UN Doc No E/CN.7/2016/NGO/1, 21 March 2016, pp. 3 and 4.
610 A debate between two NGOs in Sweden illustrates this perspective. The anti-drugs NGO RNS (Riksförbundet Narkotikafritt Samhälle) publicly criticised Save the Children (Rädda Barnen) for its support for organisations promoting harm reduction and aspects of drug law reform, claiming this was in effect a betrayal of the vision of Article 33. Save the Children responded by highlighting the reality of the lives of the children they sought to help, and their need to respond to the rights also of children that already use drugs. See P. Johansson, ‘Vill Rädda Barnen Skydda Barn Från Narkotika?’, Omvärlden, 7 November 2012 (‘Does Save the Children Want to Protect Children From Drugs?’ - author’s translation); and E. Geidenmark, ‘Missbruksande Barn Har Också Rättigheter’ Omvärlden, 14 November 2012 (‘Drug Misusing

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the object and purpose of this particular provision, whatever the wider aims of
the CRC. Thus, while the relevance of other articles of the CRC is also part of
the reasoning of the drug control position, the wider approach adopted above
is seen as undermining the core content of Article 33, and its status as a ‘spe-
cial protection measure’ within the CRC. It effectively treats Article 33 as *lex
specialis*, through which other provisions in the CRC and other human rights
must be interpreted.\textsuperscript{611}

The child’s right to protection from drugs is seen, moreover, as being in op-
position to an adult’s ‘right to use drugs’ and as valid justification for re-
strictions on the freedoms of others. As the INCB President has argued ‘…the
exercise of the individuals’ rights and freedoms does not include the right to
abuse drugs.’\textsuperscript{612} It is a view shared by commentators and expressed in UN fo-
rums by Member States.\textsuperscript{613} Here we see a mirroring of the human rights posi-
tion’s concerns about wider human rights effects, but with the focus on drug
abuse as the source of harm, rather than State action, and the potential differ-
ences in how the position of the individual is approached. The INCB President
continued, ‘Children deserve special protection from drug abuse and from be-
ing involved in the production and distribution of drugs, as outlined in Article
33 of the Convention on the Rights of the Child. This treaty obligation should
be respected at all times.’\textsuperscript{614} The child’s right to protection, in other words,

\textsuperscript{611} Dahlgren and Stere, *A Minimum Human Rights Standard*, pp. 8, 9, 21-25 and 100.
\textsuperscript{612} INCB, 2009 *Statement by Professor Hamid Ghodse*.
\textsuperscript{613} See, for example, S. Takahashi, ‘Drug Control, Human Rights, and the Right to the Highest
Attainable Standard of Health: By No Means Straightforward Issues’, 31 *Human Rights Quar-
terly* 3, 2009 pp. 748-776 (arguing that the human rights argument comes ‘dangerously close’
to saying there is a right to use drugs, to which he objects by reference to its absence from
human rights law and from the drugs conventions). A right to use drugs was has been objected
to by various States during UN debates. See, for example, the Russian Federation’s statement
at the 2016 GA Special Session on Drugs, available at http://cndblog.org/2016/04/round-table-
\textsuperscript{614} INCB, 2009 *Statement by Professor Hamid Ghodse*. 

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inevitably requires actions against others, and it ‘defies logic’ to think that the right to protection from drugs should not prevail when it does. Policies should therefore be ‘child-centred’, with a focus on the best interests of the child (Article 3 of the CRC, and a General Principle), conceptualised as being in conflict with adult drug users in particular. As the temperance organisation IOGT-NTO stated in a submission to the UN Commission on Narcotic Drugs, ‘The primacy and universality of the Best Interest (sic) principle stipulated by the Convention on the Rights of the Child means that general drug policy-making shall be child-centred as opposed to adult-centred or user-centred.’ Wider human rights outcomes are therefore less of a focus for the drug control position than the achievement of the telos of Article 33, understood as a ‘drug free environment’. When a conflict appears between the achievements of this aim and other rights, Article 33 holds a status that the human rights position may not grant it. This does not mean the drug control position ignores human rights abuses. But when conflicts arise both positions characterise and prioritise Article 33 very differently, and less weight is placed on other rights.

4.3.4(c) Approach to the Text: Opposing Stresses

In approaching the text of Article 33, the human rights position follows its above argumentation by seeking normative standards within the provision so

616 UN Commission on Narcotic Drugs, Written Statement Submitted by IOGT-NTO, UN Doc No E/CN.7/2016/NGO/1, 21 March 2016, p. 2.
617 ‘The right to use drugs’, for example, is not a claim to a new right, but a simplification of more nuanced concerns relating to already recognised human rights, including freedom of religion, cultural and indigenous rights, privacy rights, and freedom of expression, in addition to what has become known as ‘cognitive liberty’. See D. Husak, Drugs and Rights, Cambridge University Press, 2012 (first published 1992); M. Bone, How Can the Lens of Human Rights Provide a New Perspective on Drug Control and Point to Different Ways of Regulating Drug Consumption? PhD Thesis, Manchester University, 2015; On cognitive liberty see C. Walsh, ‘Psychedelics and Cognitive Liberty: Reimagining Psychedelics Through the Prism of Human Rights’, 29 International Journal of Drug Policy, 2016, pp. 80-87. Compare this to Takahashi’s approach to indigenous uses of the coca leaf. This, he argues, ‘is a relatively minor issue that affects only certain segments of the population in a small number of countries’. S. Takahashi, Drug Control and Human Rights: Frequently Asked Questions, World Federation Against Drugs, 2013, p. 5. Article 33 on the other hand represents ‘an affirmative and essential right to a drug free childhood’, at 6.
that it can function as a normative counterweight and effective ‘lens’ through which to scrutinise drug policies. From this perspective, the focus must shift from Article 33 operating as an obligation to ‘do something’ towards a drug free society, to an obligation to take due care, from a child and human rights perspective, in what is in fact done, whatever the policy vision. A central focus is therefore what is meant by ‘appropriate measures’ for its implementation.\textsuperscript{618} Thus the stress is on a vague term that might be unpacked to indicate standards around State behaviour while pursuing the goals enshrined in Article 33. In a broad sense, it is argued that any such measures must be ‘rights compliant’ (with reference to the remainder of the treaty and wider human rights law) and ‘evidence based’.\textsuperscript{619} With the normative hierarchy above in mind, a logical conclusion of this position is that it would be acceptable to consider entirely different drug policy paradigms nationally and internationally, if such changes led to more ‘appropriate measures’ for the protection of children (i.e. more rights compliant, more evidence based). The reference to the ‘relevant international treaties’ in Article 33 is merely to demarcate which substances are in question, as the drafting history appears to indicate, not the measures required by the CRC.\textsuperscript{620}

For the drug control position, however, the stress in Article 33 is elsewhere, focusing on the seemingly unambiguous and strongly worded obligation ‘shall take…measures’ to protect children from drugs and prevent involvement in the drug trade. In writing about Article 33, Stere sets this out clearly, emphasising the relevant clauses as follows: ‘States parties shall take all appropriate measures, including legislative, administrative, social and educational

\textsuperscript{618} This is an argument I have put forward. See, Barrett and Tobin, ‘Article 33’; D. Barrett and P. Veerman, \textit{A Commentary on the UN Convention on the Rights of the Child: Article 33, Protection from Narcotic Drugs and Psychotropic Substances}, Brill/Martinus Nijhoff, 2012. For a discussion of how the UN Committee on the Rights of the Child has approached the term see chapter 6.

\textsuperscript{619} Barrett and Tobin, ‘Article 33’.

\textsuperscript{620} Ibid. There is evidence from the drafting history to support this view. See chapter 2. However, see also chapter 8 where over time this original relationship may have changed.
measures, to protection 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”621 (emphasis in original). Citing the CRC Committee’s General Comment on Article 19, Stere argues that “‘Shall take’ is a term which leaves no leeway for the discretion of States parties”622 and concludes that ‘there should be no reason why this should not have an identical interpretation in the case of CRC Article 33’.623 The argument focusing on ‘appropriate measures’ to restrain and direct State action is therefore viewed as obfuscation, a distraction from the core content of the article and its strong obligatory nature.624 It is a view shared by Takahashi, who sees Stere’s as the ‘normal reading’ of Article 33, and views the focus on ‘appropriate measures’ as an effort to ‘define appropriate measures out of existence’ and ignore the connection between the drugs conventions and the CRC.625 Thus the reference to ‘relevant international treaties’ in Article 33 is not merely to set out the substances in question, as the human rights position argues. Article 33 instead solidifies existing norms in drug control and is also given expression through those norms. It is a rights-based confirmation of the international consensus around the kinds of measures that are deemed appropriate626 evidenced in the numbers of ratifications of both regimes, and the absence of reservations on Article 33.627 In es-

622 Committee on the Rights of the Child, General Comment No 13: The Right of the Child to Freedom From All Forms of Violence, UN Doc No CRC/C/GC/13, 2011, para 37 (Hereafter: CRC, GC 13).
624 This is the main objection in Dahlgren and Stere, A Minimum Human Rights Standard.
625 Takahashi, False Dichotomy, pp. 65 and 66.
626 In just the same way, juvenile justice standards provide greater detail to article 40 of the CRC and wider international law on indigenous rights supports article 30. See Dahlgren and Stere, A Minimum Human Rights Standard, pp. 20-25 (providing a range of CRC provisions and ‘companion instruments’). See also Stere, ‘The Importance of Children’s Rights’, pp. 153-154.
sence, the human rights position locates the main content of Article 33 internally to the CRC. This is its frame of reference. The drug control position locates it externally, in drug control law.

4.4 Resolution Through the VCLT and Conflict Rules?

The above arguments, it must be said, are not always made in formal legal style, nor are they always made by traditional international legal ‘actors’. A great deal of international legal discourse (and law ‘making’) is conducted in this way, by a variety of political actors, international organisations and NGOs, outside of formal processes, and in less formal styles.\(^{628}\) However, it is worth pausing briefly to consider whether a more formal approach can produce a ‘solution’. After all, core disagreements are evident above both in relation to our two research questions: the content of Article 33 and in the relationship between the two regimes.

The agreement of open-ended or vague rules in international law is in inevitable consequence of multilateral negotiation and political preference. There is nothing surprising there. Articles 31 and 32 of the Vienna Convention on the Law of Treaties were drafted in recognition of inevitable variance in interpretations of treaty provisions, recognising the possibility of ambiguous or obscure meaning, and potentially absurd outcomes.\(^{629}\) The well-known general rule of interpretation under Article 31(1) of the VCLT is that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

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purpose’.630 Article 31(2) fleshes out the ‘context’ to include the wider text within which the provision sits and agreements adopted in connection with the conclusion of the treaty. Under Article 31(3), subsequent agreements on the interpretation or application of the treaties, and subsequent State practice which establishes agreement regarding interpretation should also be considered. If these methods lead to ambiguous or absurd results, recourse may be had to ‘supplementary means’, including the preparatory works (Article 32). The literature on these provisions is extensive. As John Tobin notes, however, they may be helpfully summarised as including various forms of interpretation: ‘textual, contextual, teleological, and historical’.631 While there is a clear hierarchy between Articles 31 and 32 (the latter explicitly seen as ‘supplementary’), the International Law Commission sees the methods in Article 31 as a ‘single combined operation’ to give ‘the legally relevant interpretation’.632 Tobin, however, is critical of the ILC’s confidence on the ability to reach ‘the’ relevant interpretation through these methods.633 Alone, they are not capable of this, and even if supplemented by other factors to strengthen a given view, they are merely formal patterns of argumentation that frame our attempts to persuade others that we are correct. Thus, interpretation is not a practice of objective legal reasoning as to ‘the’ correct interpretation, but persuasion as to ‘a’ preferred interpretation.634

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630 Allott refers to this as a ‘bolting together of conflicting ideas’ about interpretation. One is open ended, the other is more closed. P. Allott, ‘Interpretation – An Exact Art’, in A. Bianchi, D. Peat and M. Windsor (eds), Interpretation in International Law, Oxford University Press, 2015, pp. 374-392, at 377.
631 Tobin, ‘Seeking to Persuade’, at 17. There is some debate about this, as Tobin outlines. Some scholars focus first on the text and then other methods. Others reject this overly stringent approach.
633 Others are more critical. See P. Allott ‘Interpretation – An Exact Art’ in A. Bianchi, D. Peat and M. Windsor (eds), Interpretation in International Law, Oxford University Press, 2015, pp. 374-392, referring to the relevant provisions of the Vienna Convention as ‘worse than useless’ for interpretation, at 374.
634 Tobin suggests four criteria other than the VCLT rules to strengthen any given interpretive argument – it must be principled, practical, coherent with international law and context sensitive. These may be used to better craft the above ‘positions’ into stronger legal arguments. But
This is especially pertinent to human rights law and is readily apparent in the disagreements above. Both, for example, adopt teleological arguments. But they disagree on the *telos*. They see different objects and purposes for Article 33 – child protection (via a drug free environment and existing drug laws) versus child protection (whatever the method). This is inevitable. As Philip Allott argues, the ‘object and purpose’ of a treaty is merely a ‘watchword for policy’. As such, if there is a different policy objective, there will be a different take on the object and purpose of a treaty.

Both, moreover, hone in on the text of Article 33, but place different emphasis on its ‘ordinary meaning’. For one, ‘appropriate measures’ represents the core normative criterion for the use of the CRC as a lens for scrutinising drug laws and policies. For the other it is a reaffirmation of the international drug control system. By one view the reference to the relevant treaties is about subject matter, referring to the substances under international control. By the other it is normative, referring to the appropriate measures to take.

With regard to ‘context’, of course, both differ in their perspectives on the relationship between the regimes, and the role of Article 33 within the CRC as a whole. We return to this below. It is safe to say for now that the primary means under the VCLT lead to ‘ambiguous’ results with regard to Article 33. We may then turn to the drafting history (chapter 2). But while one side may rely on this as evidence of coherence, what we see is that the drafting of Article 33 itself was brief and mostly not instructive as to a given interpretation of this provision. The drafting of the drugs conventions, moreover, demonstrates

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their character as essentially political or policy preferences transformed into legal argumentation does not change.

635 Louis spends a great deal of time on the object and purpose of the drugs conventions. Lines, *Drug Control and Human Rights*, pp. 50-73.

primarily that States did not know what to do regarding children and young people.

While there may well be disagreements and the concern about fragmentation, there remains what Shaw has referred to as ‘a powerful centralising dynamic’ in the form of a presumption against normative conflict combined with the various rules to resolve them.\textsuperscript{637} The thrust of the International Law Commission’s fragmentation study was therefore to demonstrate that an effective ‘toolbox’ is available in international law for confronting the legal conflicts and interpretive dilemmas. The report covered four types of relationship: between special and general law (\textit{lex specialis}); between successive norms (\textit{lex posterior}); between norms at differing hierarchical levels (\textit{jus cogens, erga omnes} and Article 103 of the Charter); and relations within the wider ‘normative environment’ (systemic integration\textsuperscript{638}). We shall leave aside \textit{jus cogens} and \textit{erga omnes}, the former being of limited value in this discussion, and the latter being a procedural question more than one of hierarchy.

It is well accepted, albeit with some problems and caveats, that a later law supersedes an earlier one on the same subject matter.\textsuperscript{639} The CRC is the latest in time of the four treaties under discussion, adopted long after the 1961 and 1971 Conventions. The Vienna Convention, however, was adopted in 1988 just months before the CRC, but it entered into force just months after it. Some States ratified the CRC before the Vienna Convention, some after it. Some States adopted the CRC before even the Single Convention. The \textit{lex posterior} argument could, in other words, easily go either way, and is on the face of it unhelpful in finding a suitable legal frame of reference.

\textsuperscript{638} Article 31(3)(c), Vienna Convention on the Law of Treaties.
\textsuperscript{639} ILC Fragmentation Study, paras 225-227.
Lex specialis is perhaps more interesting. That a special law derogates from a general law is a long-standing maxim, but one that is also not without its problems.\textsuperscript{640} The rule may be viewed in two ways. The first is where the special law provides further detail on the application of a general law. And the second is where a special and a general law point in different directions.\textsuperscript{641} However, ‘It is often hard to distinguish what is “general” and what is “particular”’.\textsuperscript{642} On the one hand we may argue that because children are the subject matter (for want of a better phrase) the CRC operates as lex specialis and therefore a normative counterweight to the drugs treaties. On the other hand, because the subject matter is drugs, we may similarly argue that the international consensus for appropriate measures to adopt is contained in the drug control conventions.\textsuperscript{643} These are, in effect, the human rights and drug control positions, respectively. The rule must, however, be applied in specific circumstances rather than to entire regimes ‘in the abstract’.\textsuperscript{644} But when it comes to Article 33 and policy solutions surrounding its goals, this is as specific a problem as any. Lex specialis may turn out to be whatever frame of reference happens to have been adopted, rather than an objective solution.\textsuperscript{645}


\textsuperscript{641} ILC Fragmentation Study, paras 56 and 57.

\textsuperscript{642} Ibid para 58.

\textsuperscript{643} The situation relates to ‘more favourable protection’ clauses in human rights treaties whereby ‘any pre-existing or subsequent treaties which prescribe a higher level of protection to the individual prevail over the first treaty’. See A. Rachovitsa, ‘Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties’, 16 Human Rights Law Review 1, 2016, pp. 77-101, at 77 and 78.

\textsuperscript{644} ILC Fragmentation Study, para 488.

\textsuperscript{645} During the 2016 Special Session, for example, various States referred to changes to legislation in line with alternative international legal norms and institutional recommendations. Compare, for example, UNGASS OR 1 p. 20 (Panama, referring to the Financial Action Task Force); and p. 19 (Costa Rica, referring to amendments through human rights law to reduce sentences for women); and UNGASS OR 2, p. 7 (Uruguay, referring to the human rights basis for its cannabis legalisation system in breach of the drugs conventions).
The rule may also operate within the same treaty in ways that support either of the opposing views above. Article 33 may be seen as *lex specialis* within the CRC on the topic it covers, affecting the interpretation of other provisions that may relate to it. Thus, by one argument Article 33 may carry the obligations of the drugs conventions with it, affecting the interpretation of the remainder of the CRC accordingly. Consider the child’s right to practice his or her culture under Article 30, and the obligation to abolish harmful traditional practices under Article 24(3). If the ban on coca leaf chewing under the Single Convention (Article 49) is appropriate for Article 33 of the CRC (as the drug control position would hold), then this form of cultural expression and indigenous practice is excluded for all those under the age of 18 and Article 33 operates as a limit on Article 30 rights. It is instead, due to an interpretation through Article 33, a potentially a harmful traditional practice for the purposes of Article 24(3). By the opposing view it does not operate in this way at all. Instead Article 33 brings the entire CRC to bear on the drugs conventions. *Lex specialis* is ultimately unhelpful because arguments can be made, and made well, in either direction.

As noted above, it has been argued that Article 103 of the Charter, as its ‘supremacy clause’, provides a primary status to human rights over the drugs conventions. To be sure, the outcomes of the drug control regime are seen by many as contributing to human rights abuses and that this sufficiently undermines *de facto* the human rights goals of the UN under the Charter (or inter-

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646 On *lex specialis* within a treaty, see D. Shelton, ‘International Law and “Relative Normativity”’ in M. Evans (ed) *International Law (3rd ed)* Oxford University Press, 2010, pp. 141-171, at 158-160. See also for example, *Brannigan and McBride v UK*, ECHR Ser A 258-B, IHRL 2592,1993, para 76. Here the Court held that the stricter rule relating to habeas corpus under Article 5(4) of the European Convention operated as *lex specialis* vis à vis Article 13 (effective remedy) and had been met.


648 Barrett and Tobin, ‘Article 33’.

national public order). But the counter-argument is that the drug control treaties are flexible enough to ensure that rights abuses are avoided, thus avoiding any formal legal conflict. Takahashi and others reject the article 103 argument outright on this basis. Moreover, a conflict between the Charter and the drugs treaties depends on how human rights are defined within the Charter. That the drug control treaties are seen by some (including States and UN agencies) as advancing human rights is especially relevant here. With this in mind, through Article 33 of the CRC, a legal conflict with the Charter is difficult to identify. Indeed, both human rights law and the drugs treaties may be seen as intended to contribute to ‘solutions of international economic, social, health, and related problems’ for the purposes of Article 55(b). Of course, it must be borne further in mind that Article 103 does not necessarily lean towards a hierarchy in the direction of human rights. It can serve to prioritise other values over human rights. States have long referred to the drug control treaties as having a humanitarian goal and repeatedly reaffirm their importance for State security. As such, the claimed hierarchy may go the other way.

Finally, let us consider Article 31(3)(c) of the VCLT, which states that ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account. This has been referred to as the principle of

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651 For a discussion, see Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).
652 The CRC in its entirety, meanwhile, surely also contributes to the human rights goals behind Article 55(c). Here we see some agreement between otherwise opposing views. See Lines, Drug Control and Human Rights, pp. 27-32; and Dahlgren and Stere, A Minimum Human Rights Standard, p. 46 (Both discussing drug control as a subset of Article 55 objectives). See also chapter 2).
‘systemic integration’, and a ‘master key’ for the harmonisation of rules. In basic terms all legal rules must be interpreted in the light of their wider ‘normative environment’. As part of this ‘the doctrine of “treaty parallelism” addresses precisely the need to coordinate the reading of particular instruments or to see them in a “mutually supportive” light.’ On the one hand, this is appealing with regard to the child rights and the drug control conventions. Given the proximity of their terms and similar subject matter, can’t the treaties simply be read so as to cohere? Of course they can. This is the drug control position’s argument and, to an extent, the human rights position’s too. But this can be done to lead to very different conclusions. Systemic integration, in other words, goes both ways. We must read the CRC in the light of the drugs conventions and the drugs conventions in the light of the CRC. It is a two-way street, with no way of knowing the volume of traffic going in either direction or which direction is correct. The principle, in other words, does not provide us with a preferred frame of reference or tools on how to understand that frame. Systemic integration can support an argument for the mutually supportive nature of human rights and drug control that reproduces exactly that to which the human rights position objects. And it can be used in the reverse.

Thus, there may well be a presumption against normative conflict in international law, but what of it from the perspective of this variety of actors? As has

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656 ILC Fragmentation Study para 415. See also Oil Platforms Case (Iran v. United States of America) (Merits) ICJ Reports 2003.
657 ILC Fragmentation Study, para 417. Alan Boyle has set out the importance of this approach, arguing that ‘One of the most important approaches to the integration of different bodies of law is based on techniques of interpretation, taking account of one treaty or legal norm in order to assist in the interpretation or application of another treaty or norm. The idea that treaties can in this way have a dynamic or living interpretation is an important contribution to coherence in international law.’ A. Boyle, ‘Relationship Between International Environmental Law and Other Branches of International Law’, in D. Bodansky et al (eds), Oxford Handbook of International Environmental Law, Oxford University Press (2008) pp. 125-148 at 128.
658 This is illustrated by the differing approaches to interpretation in the ICJ’s Oil Platforms case which dealt with Article 31(3)(c). See ILC Fragmentation Study, paras 455-457.
been well observed, ‘Legal instruments cannot overcome contradictions between different social rationalities’.\textsuperscript{659} Indeed, ‘For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so’.\textsuperscript{660} This is equally true for either side of the debate.

4.5 Conclusion

This chapter has set out the opposing views of NGOs, scholars, UN entities and States with regard to the interactions and requirements of international drug control, human rights and child rights law. It has shown that the theoretical conflicts raised by fragmentation proposed in chapter 3 do play out in real-world debates and it has set out the main tenets of the positions adopted on each side. Across the two positions we see fundamental differences regarding the theoretical interactions between the treaty regimes. The human rights position has had far more to say about the structural human rights problems in drug control that indicate broad conflict, whereas the drug control position has focused far more on demonstrating the compatibility of the regimes and in particular on the child’s right to protection from drugs in this regard. There are basic disagreements about Article 33 specifically, in terms of text, context and telos.

Depending on their frames of reference, each position will have a view as to which branch of law they would prefer intruding into national domains. Because of these preferences they are each caught between universality and sovereignty. From one perspective, there is ‘shared responsibility’ and the universally accepted drugs conventions, within which States should be free to take certain decisions that affect human rights (a domestic concern) but not to


\textsuperscript{660} ILC Fragmentation Study, para 491.
liberalise drug laws (an international concern).661 From the other, there are universal human rights norms (an international concern) which must allow intrusion into national affairs up to and including such reforms (a domestic concern). The statement of the European Union the 2016 Special Session is illustrative of this dilemma: ‘We welcome the rebalancing of global drug policies in the direction of a sound, multidisciplinary public health and human rights approach…’ it said, before reiterating its ‘strong commitment to the United Nations drug control conventions, which form the cornerstones of the global response to the world drug problem. They provide sufficient scope and flexibility to accommodate a wide range of approaches in accordance with national and regional specificities.’662 Both human rights and drug control law, in other words, are not just ‘flexible’ in terms of interpretation, but flexible in the service of political preferences. 663

The oscillations between ascending (concrete) and descending (normative) justifications predicted by the indeterminacy thesis are evident. The drug control position is, from the outset, ascending. It begins with the threat posed by drugs and the drug trade. International consensus and State action for the achievement of a drug-free societies are the focus. The human rights position begins in a descending posture, from human rights norms as values to scrutiny of State practice. In response to human rights abuses on the ground, however,

661 For example, UNGASS OR 1, p. 21 (China) ‘The fundamental role of the three conventions in the international drug control system needs to be solidified and brought into full play. Any form of legalization of narcotics should be resolutely opposed’. However, in the very next sentence China stated that ‘We need to respect and support countries in introducing laws, policies and strategic measures in the light of their respective conditions. China’s statement opened, moreover, with the following call: ‘It is important that countries honour the principle of sovereign equality, as enshrined in the Charter of the United Nations, and avoid injecting political factors into anti-narcotics efforts or using drug control as a pretext to interfere in the internal affairs of other countries.’ ‘Political factors’, here, refers to human rights.

662 UNGASS OR 1, p. 24

663 Takahashi rejects the overstretching of human rights arguments for pre-existing political ends. Takahashi, False Dichotomy, pp. 186-188. He addresses his own subjectivities in an addendum to his book, which is admirable, but it is unclear why his own legal arguments are then any less political.
the drug control position turns to human rights arguments (including the CRC) to provide normative human rights support for its concrete argument. And in response to the concrete drug control objectives, the human rights position looks to actual outcomes, framed as rights violations, to bolster its normative arguments. Each position is ultimately a self-reinforcing loop. Each principle that is asserted or defended (whether drug free societies or the advancement of human rights) is reinforced by various claims based on the evidence or action on the ground. And that action in turn reaffirms the principle.

Critically, article 33 of the CRC is a specific point of disagreement. The drug control position holds that through article 33, children have the right to a ‘drug free environment’ as an inherent value. This is descending, beginning with the norm or value in question. But it in turn justifies existing State actions and the strategies of the drugs conventions. This is descending. The human rights position’s response is that the instrumental means of drug control do not achieve the normative telos of protecting children, and that laws, policies and practices put in place pursuant to article 33 should not only be rights compliant (normative), but also ‘evidence-based’ (concrete). Within this, article 33 is either a check and balance against State action or a licence for it. It is potentially a child rights stamp of approval for existing laws and policies, or it is potentially a challenge to them. Alternatively, it is both at once.
Part III: Structural Bias - Periodic Reporting as a Dialogue on the Child’s Right to Protection from Drugs.
5. The Committee’s Concluding Observations: Content, Balance and Normative Framing

5.1 Introduction

How has the child’s right to protection from drugs been understood? And what has been the relationship between this provision and the UN drugs conventions? This thesis has already shown that the drafting process of the two systems exposed fragmentation and a superficiality to the connection between the regimes. It has argued that there are at least potentially deeper inconsistencies of subject matter, ethos and background principles between to the two. And it has set out the differing conclusions that may be adopted about the relationship between child rights and drug control, and about Article 33, with very real legal and policy consequences. Irrespective of the possibilities presented by the debates set out in the previous chapter, however, ‘structural bias’ predicts that legal forums will still ‘prefer’ certain outcomes. What, then, if anything, is ‘preferred’ through the periodic reporting process to the Committee on the Rights of the Child? Despite the potential for incommensurate approaches to the two main research questions, is there nonetheless a ‘bias’ that tends towards particular outcomes?

The following chapters focus in depth on the periodic reporting process to the Committee on the Rights of the Child. This chapter begins by providing a more in-depth rationale for a focus on the CRC Committee, a discussion of the periodic reporting process as ‘constructive dialogue’, and the methods used for the analysis. It goes on to consider whether a ‘dialogue’ is in fact
taking place through which State party and Committee understandings of obligations arising from the child’s right to protection from drugs may develop, and provides an analysis of the content and balance of the Concluding Observations of the Committee from 1993-2015, as well as their normative framing. It concludes by summarising five key findings that help to introduce the chapters that follow.

5.2 The Focus on the Committee on the Rights of the Child

The Committee on the Rights of the Child is not the only legal forum in question. Why not, for example, focus on the International Narcotics Control Board, which is the treaty body for the drugs conventions, or the Commission on Narcotic Drugs, the political body for the UN drug control system? With regard to the INCB, the main reason is empirical deficiency. Apart from press statements and presentations at UN meetings, the Board operates in private. Correspondence with States is retained as confidential. All meetings of the Board are closed, and no minutes are made public, though on occasion representatives of a given State party are invited. We have only its annual reports and speeches to go on, and no information from States to the Board. The annual reports attempt to cover all States parties and contain only brief reference to specific States. Conversely, the CRC Committee process has produced a large amount of public documentation over more than two decades. It is a far better record of an ongoing dialogue than what is available from the INCB. A review of all annual reports of the INCB from 1981 to 2015 was, however, conducted. There is little direct attention to children and youth, and less to child rights. Various relevant statements of the Board have been

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664 As Emberland found in his study of structural bias relating to the ICJ and companies. Emberland, ‘Structural Bias’.
665 This is explicitly provided for in relation to a particular and rarely used mechanism, but not with regard to general correspondence. See Article 14(1)(a), Single Convention.
666 The Board has been referred to as one of ‘the most closed and least transparent of any entity supported by the United Nations’. J. Csete, ‘Overhauling Oversight: Human Rights at the INCB’ in J. Collins (ed), Governing the Global Drug Wars, LSE IDEAS, 2012, pp. 6-68, at 67.
667 These are the years for which reports are available online and served as a sufficient sample.
included elsewhere in the thesis, in particular chapter 4. As may be seen from that chapter, the INCB has been consistent in its view of the relationship between human rights law and the drugs conventions, placing itself firmly on a particular side of an open debate. For this reason there is little need to investigate structural bias within the INCB. As for the Commission on Narcotic Drugs, its relevant resolutions are addressed in chapter 2, from which its relatively limited attention to child rights is apparent. More importantly, as a consensus-based political forum, it will not focus on individual States.

The CRC Committee is by far the main legal forum in which the child’s right to protection from drugs has been discussed, even if it exists outside of the drug control framework. Indeed, it is important precisely because it is outside of the drug control system. This is why fragmentation and structural bias are so important to consider, and not necessarily negative phenomena. Through the periodic reporting process, we can see how the CRC Committee, the main international body for child rights, has addressed the drugs question over the

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669 David Bewley-Taylor, in any case, has already carried out this work, albeit from a different theoretical perspective (Bewley-Taylor, Consensus Fractured, pp. 219-278). His work has shown clearly how the Board ‘defends the regime’ and is key to the operation of the regime as an ‘autonomous variable’ (p. 220). He demonstrates how the Board has ‘exceeded its mandate’ in order to defend the ‘centrality of punitive prohibition against normative attrition’ as various States considered reform and reform-minded NGOs made their cases in ever stronger ways (p. 220). This took the form of often aggressive posturing through its annual reports, characterised by a. inconsistent positions on policy questions; b. selective use of available evidence; c. selective focus of subject matter or ‘selective reticence’ (p. 229, see further chapter 7). Combined, these lead to the Board ‘distorting reality in order to legitimize its own interpretation of the treaties’ (p. 228). Bruun et al had reached the same conclusion thirty years earlier, finding in the Board’s ‘polemics’ ‘a certain insularity; a failure to see things in their proper proportions’ (Bruun et al, The Gentleman’s Club, p. 85). This leads Bewley-Taylor to describe the Board as shifting over time from a ‘watchdog’ of the conventions (identifying challenges and dilemmas) to their ‘guardian’ (defending them against alternative ideas) (Bewley-Taylor, Consensus Fractured, p. 228. See also D. Bewley-Taylor, The International Narcotics Control Board: Watchdog or Guardian of the UN Drug Control Conventions, Beckley Foundation, 2006).
course of more than twenty years outside of the centralised drug control sys-
tem. The Committee will have its own child rights context, and its own ethos, 
distinct from the drug control system. What, then, does the drugs question 
look like when filtered through a child rights forum? This has been entirely 
overlooked by drug policy ad child rights scholars and is therefore a signif-
cant contribution of this research.

5.2.1 The Periodic Reporting Process as ‘Constructive Dia-
logue’

As Nigel Rodley has observed, ‘the one procedure common to all the [human 
rights] treaty bodies and obligatory for all states parties to the treaties is the 
periodic review process’. This process has been described by Michael

\[670\] An example of this was evident in its debates on child marriage between with the CRC 
Committee and the Committee on the Elimination of Discrimination Against Women. In draft-
ing a joint General Comment, the CRC Committee, concerned with protection for all children 
under the age of 18, wanted to call for an end to child marriage for all under this age. The 
CEDAW Committee was concerned also with autonomy and empowerment of girls and there-
fore supported marriage over the age of 16. A heavily cavedated compromise was ultimately 
agreed. Joint General Recommendation No. 31 of the Committee on the Elimination of Discrim-
inution Against Women/General Comment No. 18 of the Committee on the Rights of the Child 
on Harmful Practices, UN Doc No CEDAW/C/GC/31-CRC/C/GC/18, 5 March 2015, see para 
20. Discussing the debates see K. Sandberg, ‘The UN Committee on the Rights of the Child: 
Working Methods and Dilemmas’, Speech delivered at Emory University, 18 November 2014.

\[671\] The ILO Committee of Experts on the Application of Conventions and Recommendations 
also has a mandate with regard to the protection of children from drugs, as has the African 
Committee of Experts on the Rights and Welfare of the Child. Both are also outside of the drug 
control framework. However, the mandate of the ILO Committee is more limited, as the re-
levant provision of ILO 182 focuses on sufficient penalties for the involvement of children in the 
illicit drug trade. Moreover, the ILO Committee tends to follow the CRC Committee as ‘lead’ 
on various rights issues, frequently citing its Concluding Observations. As part of the current 
research a supplementary analysis of the work of the ILO Committee of Experts was, however, 
undertaken. This was ultimately published separately (D. Barrett, ‘International Child Rights 
pp. 205 – 229). As for the African Committee of Experts, at the time of writing the process of 
issuing Concluding Observations is still relatively new, despite the age of the Charter, and the 
Committee has said almost nothing about Article 28. Drugs issues have also arisen in reporting 
under to the UN Committee on Economic Social and Cultural Rights in recent years (under 
Article 24 of the Covenant), and over time at the European Committee on Social Rights (under 
Article 11 of the European Social Charter). Neither focuses on children explicitly, and neither 
has an explicit drugs mandate.

(eds), UN Human Rights Treaty Bodies: Law and Legitimacy, Cambridge University Press, 
O’Flaherty as the ‘backbone’ of the UN human rights treaty system\(^673\) and the issuing of Concluding Observations ‘the single most important activity of human rights treaty bodies’.\(^674\) The Concluding Observations represent authoritative, though non-binding, guidance on interpretation of the treaty and State compliance.\(^675\) Geir Ulfstein has gone as far as to refer to this as part of ‘law-making in a wider sense’.\(^676\) Indeed, their persuasive authority is evidenced in their use in the reasoning of the International Court of Justice\(^677\) the European Court of Human Rights, the Inter-American Court of Human Rights, and national courts of various levels and from a range of jurisdictions.\(^678\) Concluding Observations also contribute to Universal Periodic Review at the Human Rights Council.\(^679\) As the ICJ stated in Diallo, the findings of treaty bodies should be given ‘great weight’ as they were established for the supervision of the application of specific human rights treaties.\(^680\) Concurrently, what the State claims in its periodic reports indicates its own understanding of compliance with a given right, and national courts have referred to these reports as


\(^{677}\) See, for example, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136, at para 110.


\(^{680}\) Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), ICJ Reports 2010, pp. 639-694, para 66 (referring to the communications procedure under the ICCPR).
evidence of such understanding. It has also been recognised that State party reactions to human rights treaty body recommendations can indicate ‘subsequent practice’ for the purposes of Article 31 of the Vienna Convention on the Law of Treaties.

It is important to understand, however, that the Committee is not an adjudicatory body. A ‘chastising and reprimanding control system’ was not set up. It is not about declaring violations and seeking binding redress. It is nonetheless a very important function because both legal and policy elements are involved in the interactions between States and the treaty bodies. The Committee’s role was to be that of a ‘constructive dialogue’ with the States parties towards the implementation of the Convention. As such, the periodic reporting process may have more diverse function beyond finding violations or filling the implementation gap. It potentially plays other roles, including the communication of ideas, value-declaration, and justification or legitimation.

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681 See, for example, R (on the application of G) v London Borough of Barnet [2003] UKHL 57, at para 68, relating to the UK’s initial report under the CRC as indication of the State’s intention that aspects of the Children Act 1989 were intended to give effect to Article 18(2) of the Convention.
686 The idea of a ‘dialogue’ and a non-confrontational approach was raised in drafting the CRC. See UN Doc No E/CN.4/1988/28, 1988, para 141; and UN Doc No A/C.3/44/SR.40, para 5.
Recently there has been a turn to empirical study of human rights treaty bodies.688 This tends to revolve around the effectiveness of human rights treaties and the treaty body system in producing certain desired outcomes.689 Effectiveness studies, however, either implicitly support what the mechanism has recommended or take no view on it. They seek to resolve the ‘implementation gap’ discussed in chapter 1. But taking the idea of a ‘constructive dialogue’ seriously suggests a constructivist perspective, which we may understand as ‘the building of norms through interaction’.690 Any process over time focused on implementation must necessarily include a developing understanding of what the CRC requires, or, put another way, its content.691 From this perspective, the periodic reporting process is a long-term interaction between States parties and the relevant treaty body through which the understanding of norms or the content of a given right may develop through ‘dialogue’, including in ways not evident or even possible to extract from the face of the text.

690 J. Brunee and S. Troope, ‘Constructivism in International Law’, in J. Dunoff and M. Pollack (eds) Interdisciplinary Perspectives on International Law and International Relations, Cambridge, 2012, pp. 119-145, at 120. This, of course, is a simple take for present purposes on a very rich field of international relations and philosophy.
This aspect of the research is influenced by Carol Bacchi’s ‘what is the problem represented to be?’ approach.\(^{692}\) For Bacchi, policies are not responses to problems. Instead, ‘policies create representations of “problems” that take on lives of their own because they affect materially and symbolically how we are governed and how we live’ (emphasis in original).\(^{693}\) The right to protection from drugs may therefore also be conceptualised as a problem representation. And the periodic reporting process may be understood not necessarily as a problem ‘solving’ mechanism to fill implementation gaps, but as a forum in which certain problem representations are produced and reproduced, determining what is taken into account and what is not. Critically, the approach includes a focus not only on what is said, but also is not said, or unproblematised ‘silences’.\(^{694}\) What is ‘not regulated’, in other words, is also of interest.\(^{695}\)

5.3 Methods

Structural bias is not a formula and there are no set methods to uncover it any given legal forum, if in fact it is identifiable at all.\(^{696}\) Doctrinal legal research could be employed as part of such an analysis, but a study of structural bias may involve alternative uses of legal documentation\(^{697}\) and other methods. As

\(^{692}\) Bacchi, *Analysing Policy*. Bacchi’s six step method has not, however, been followed systematically. Rather, this research coincides in various ways with that method, in particular in its historical research and consideration of the ways in which the issues have been framed or problematised in the periodic reporting process.

\(^{693}\) Ibid p. 263

\(^{694}\) Taking a similar approach to the CRC’s periodic reporting process, see R. Thorburn Stern, *The Child’s Right to Participation: Reality or Rhetoric?*, Phd Thesis, Uppsala University, 2006, p. 19 (Discussing her analysis of ‘not only the straightforward information provided by the material but also the way it is presented – and, equally interesting, what is left out.’)


\(^{697}\) Such documents are, as Lisa Webley notes, underutilised in legal research, but can be a rich source of data. L. Webley, ‘Qualitative Approaches to Empirical Legal Research’, in P. Cane
noted above, structural bias may also involve looking at latent issues and what is not said by the relevant forum or mechanism when presented with certain facts or information; those ‘silences’, in other words, that are not problematised.698 In the absence of a formula or standard set of questions, in other words, a *sui generis* explanation of what is taking place may be required for each legal forum, even each issue.699

The documentary output of the periodic reporting process represents evidence both of the Committee’s and States parties’ perspectives on compliance and their approach to the child’s right to protection from drugs.700 The documents themselves are credible and reliable, being the official reports of States parties and the official conclusions and records of the Committee. Every State party report to the Committee on the Rights of the Child and every set of Concluding Observations from 1993 (when reporting began) to the end of 2015 were collected from the treaty bodies database of Office of the High Commissioner for Human Rights. From these documents, all of the Committee’s commentaries and recommendations specific to drug use and the drug trade were extracted as were all of the relevant sections from State party reports. Relevant passages from the ‘Lists of Issues’ from the Committee in reply to the State report, ‘Written Replies’ in return from the State party, and, more importantly, the ‘Summary Records’ of the meetings between the Committee and the State party delegation were also included. These extracts were compiled into an Excel spreadsheet. In total, extracts from more than 1400 documents were included. This involved 453 reporting processes from 193 States parties (of

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698 Bacchi, *Analysing Policy*.
699 A general theory of structural bias could perhaps be developed to include basic elements applicable across issues and forums, but such a task is not undertaken here.
700 Committee Member 3 interviewed for this research confirmed that the process is firmly rooted in the documents produced through it, far more so than the in-person meeting with the delegation.
196) across seventy sessions of the Committee. This provides a comprehensive picture of the discussions between the Committee and States parties about illicit drugs from 1993 to the end of 2015. Extensive references from the documentation have been used to fully demonstrate the empirical support for the findings. Indeed, a benefit of the documentation used is that it is public and each referenced statement may be located by paragraph number.

As a first step, in keeping with the constructivist perspective, a specific analysis was undertaken to see if the documents in fact demonstrate a ‘dialogue’ taking place. If the periodic reporting process is indeed such a dialogue then we should see some ‘back and forth’ taking place between successive reports. For this purpose, thirteen States parties reporting in 2015 were selected based on two criteria. First, each State party was chosen because it was reviewed in the most recent sessions in 2015. Second, each was on at least its third periodic reporting process, with some on their fourth or fifth. Those on less than their third process were excluded. This resulted in forty-seven reporting processes covering the entire twenty-three year period under review, and a random geographic spread. Through this method the Committee’s recommendations and State responses could be traced in order to determine if the periodic reporting process influences States parties’ responses. It also provided a useful immersion in the documents and a ‘first pass’ of content.

A content analysis of all Concluding Observations was undertaken based on the frequency of the occurrence of specific issues. Codes were developed, aiming to capture the wide range of common policy concerns relating to children, drugs and drug control that could conceivably arise through discussions of Article 33. These were: Drug use (children); Drug use (parents); Prevention; Treatment and rehabilitation; Harm reduction; Criminalisation; Policing;

701 The Occupied Palestinian Territory, South Sudan and Somalia had yet to report by the end of 2015.
Involvement in the drug trade; Drug related violence; Rural production; Access to controlled medicines; Prescription concerns; Alcohol, tobacco and other licit substances; Data collection; Resources and Budgeting; and Law reform. Further codes were added and some refined as the material was re-read. For example, ‘school-based prevention’ and ‘life skills education’ were included as sub-sets of the ‘prevention’ code as these recommendations became more consistent. Similarly, ‘pregnancy’ became a sub-set of ‘drug use (parents)’, and ‘youth friendly’ treatment and ‘parental consent’ developed from ‘treatment and rehabilitation’. Some, on the other hand, became less important and were dropped. This provided a clear indication of the focus of the Committee’s attention over time. Of itself this contributes to an understanding of how Article 33 has been approached.

Frequency searches, however, risk overlooking context; in this case the normative context of the recommendations the Committee has made. Two approaches were used to address this. ‘Internal normative framing’ focused on the standard language adopted by the Committee and the context (i.e. overall recommendation) within which the above issues arose. This involved reading and re-reading the texts to observe patterns and changes over time in relation to the language used and the thematic headings under which the drugs recommendations were made (e.g. as one of drug policy specifically or health, exploitation, violence etc.). Any references to the Committee’s General Comments were also recorded and used as a marker for further discussion as to if and how these references affected content. The ‘external normative framing’ adopted by the Committee was also analysed. The purpose was to look into whether the Committee makes use of international standards or legal obligations (‘hard’ or ‘soft’) outside of the CRC but related to the drugs question. In particular, if and in what ways the Committee has drawn upon the international drug control conventions or their monitoring mechanisms was a focus, speaking directly to the relationship between the two systems.
States parties’ reports were analysed throughout, in keeping with the idea of a constructive dialogue. This provided further important context for the Committee’s recommendations, and was approached inductively and in the light of the Committee’s work; i.e. to what was the Committee responding? Legal and policy frameworks were the primary focus given their central importance to the topic and the debates presented in chapter 4.

Finally, a thematic analysis was undertaken to bring together the above findings.702 Through reflection upon those findings, patterns were identified that could explain the Committee’s approach or ‘preferences’ overall. In the absence of existing criteria, this process had to be flexible and inductive. Ultimately three main themes and four sub-themes were settled upon that provided a succinct narrative of the ‘big picture’, and an explanation of structural bias for this particular process.703

The documents, however, could not answer certain questions about the functioning of the CRC Committee, so any explanations based upon them would be incomplete. Semi-structured interviews were therefore carried out with three Committee members – two current and one former. These were in turn supplemented with a review of secondary resources as to the working practices of human rights treaty bodies. Further interviews were not necessary. This is primarily because the aim was not to study interview texts for ‘meaning’, in a qualitative sense, or the motivations of Committee members. The interviews were instead of an investigatory nature regarding the day-to-day practice of the Committee, which it was assumed would play an important

703 As Braun and Clarke explain, a theme ‘captures something important about the data in relation to the research question, and represents some level of patterned response or meaning within the data set.’ V. Braun and V. Clarke, ‘Using Thematic Analysis in Psychology’, *3 Qualitative Research in Psychology* 2, 2006. pp. 77-101.
role. The interviews were conducted based on a protocol developed from the above document analysis and took place after the majority of that analysis had been undertaken.\textsuperscript{704}

5.4 Is a ‘Dialogue’ Taking Place?

For the production of State party reports, various questions are asked in guidance issued by the Committee.\textsuperscript{705} In each case requests for information are connected to a specific article. This is vital as it provides the treaty basis for the requested information.\textsuperscript{706} From this starting point it is instructive that States parties almost always include a section in their reports detailing the measures undertaken to comply with Article 33. At the very least, then, States parties appear to accept that the information requested represents a legitimate discussion about their Article 33 obligations.\textsuperscript{707} From there we may delve deeper to see if specific recommendations of the Committee affect how States parties view their obligations. Based on the criteria already set out above, thirteen States parties were selected from all of those reporting in 2015. These were

\textsuperscript{704} Informed consent was obtained via email and confirmed orally at the beginning of each interview. The interviews were conducted on Skype due to the location of the Committee members. They were recorded and saved on a storage device offline for security. The interviewees have been anonymised as Committee Members 1, 2 and 3. These conditions were stipulated in the requests for consent.


\textsuperscript{707} There are far too many to list. Almost any periodic report taken at random will be illustrative. See for example, all under the heading of Article 33: Second Report: Trinidad and Tobago, UN Doc No CRC/C/83/Add.15 15 November 2004, paras 1275-1288; Third Report: Pakistan, UN Doc No CRC/PAK/3-4, 19 March 2009, paras 609-613; Third Report: Sao Tome and Principe, UN Doc No CRC/C/STP/2-4, 15 November 2011, paras 176-178.
Bangladesh, Chile, Colombia, Dominican Republic, Ethiopia, Ghana, Honduras, Jamaica, Kazakhstan, Mauritius, Poland, Sweden and Uruguay. From this selection there is good evidence of Concluding Observations affecting the information provided by States parties. We can also see the Committee responding actively to information in States parties’ reports.

Ghana, Colombia, Sweden and Ethiopia serve as good examples. In 1997, following very limited information from Ghana, the Committee made a general recommendation that the State party ‘take all appropriate measures to prevent and combat drug and substance abuse among children, such as public information campaigns’, ‘support rehabilitation programmes dealing with children victim of drug and substance abuse’, and seek assistance from WHO.708 Ghana’s second report all but ignored this709 and an almost identical recommendation was again made by the Committee in response.710 In its joint third-fifth report, on the other hand, Ghana expressly responded to the Concluding Observations, resulting in far more detailed information being provided than in previous sessions.711

Similarly, the Committee has consistently raised concerns about children’s involvement in coca production in Colombia, to which the State party has responded, leading to further inquiries and concerns by the Committee.712 Importantly, this had not been a feature of earlier reports from Colombia before the Committee raised it, despite lengthy sections on drug control and on child labour.713

708 Concluding Observations: Ghana, UN Doc No CRC/C/15/Add.73, 18 June 1997, para 46.
709 Second Report: Ghana, UN Doc No CRC/C/65/Add.34, 14 July 2005, paras 63 and 64.
711 Third Report: Ghana, UN Doc No CRC/C/GHA/3-5, 6 August 2014, paras 163-166.
712 Third Report: Colombia, UN Doc No CRC/C/129/Add.6 24 August 2005, paras 683 and 684 (referring to ‘raspachines’ and ‘mules’); Concluding Observations: Colombia, UN Doc No CRC/C/COL/CO/3, 8 June 2006, para 88 (referring also to these roles). See also Concluding Observations: Colombia. UN Doc No CRC/C/COL/CO/4-5, 6 March 2015, para 59.
713 This issue did not appear in Colombia’s initial report in 1994, nor in its second report under review in 2000. The latter contained detailed information drug control (paras 360-403) and on
Following very little information from Sweden in 1993 no Concluding Observations relating to drugs were issued in this first session.\textsuperscript{714} In 1999, however, after Sweden indicated that rates of use were rising,\textsuperscript{715} a concern about this was raised by the Committee, which focused on the need for better data collection.\textsuperscript{716} Sweden’s next report responded directly to the Committee’s remarks,\textsuperscript{717} which in turn encouraged the State party to continue with its prevention efforts.\textsuperscript{718} In 2009 the Committee focused on gaps in data and services, including for children of drug using parents, and produced fairly detailed recommendations.\textsuperscript{719} Sweden’s fifth periodic report addressed these specific concerns directly in a very lengthy section.\textsuperscript{720} Indeed, it was so detailed that it appears to have left the Committee with nothing more to say.\textsuperscript{721}

child labour (paras 290-359) but nothing on child labour on coca plantations. Second Report: Colombia UN Doc No CRC/C/70/Add.5, 5 January 2000. See, however, Concluding Observations: Colombia, UN Doc No CRC/C/15/Add.137, 16 October 2000, para 62. ‘The Committee is further concerned at the situation of children working in the coca-leaf plantations’ (albeit in relation to Article 32, rather than Article 33). However, Colombia also ignored the Committee’s explicit call for an environmental and rights based impact assessment of aerial fumigation of coca in 2006. The Committee recommended that Colombia ‘carry out independent, rights-based environmental and social-impact assessments of the sprayings in different regions of the country and ensure that, when affected, prior consultation is carried out with indigenous communities and that all precautions be taken to avoid harmful impact of the health of children’. Concluding Observations: Colombia, UN Doc No CRC/C/COLO/COL/3, 8 June 2006, paras 73. Colombia’s response makes no mention of this and is very brief on drugs issues in general. Fourth Report: Colombia, UN Doc No CRC/C/COL/4-5, 25 October 2013, para 408. The Committee did not follow up on this in 2015, but did again raise concerns about children on coca plantations.

\textsuperscript{714} Concluding Observations: Sweden, UN Doc No CRC/C/15/Add.2, 18 February 1993.
\textsuperscript{716} Concluding Observations: Sweden, UN Doc No CRC/C/15/Add.101, 10 May 1999, para 21.
\textsuperscript{718} Concluding Observations: Sweden, UN Doc No CRC/C/15/Add.248, 30 March 2005 para 34.
\textsuperscript{719} Concluding Observations: Sweden, UN Doc No CRC/C/SWE/CO/4, 26 June 2009 para 48 and 49.
\textsuperscript{720} Fifth Report: Sweden, UN Doc No CRC/C/SWE/5, 5 May 2014, paras 298-319.
\textsuperscript{721} Concluding Observations: Sweden, UN Doc No CRC/C/SWE/CO/5, 6 March 2015, paras 43 and 44. The Committee moved on to the use of amphetamines for the treatment of ADHD.
Ethiopia’s initial and second reports included no mention of drugs or Article 33. In both cases there were no Concluding Observations on this topic. However, in its third periodic report the State party explained that HIV biobehavioural surveillance had indicated high rates of drug use, which the Committee then raised as a concern based on the information it had received. It recommended increased prevention efforts to address the problem and drug prevention was subsequently included in Ethiopia’s fourth periodic report for the first time. A similar process was evident with Bangladesh, which included prevention for the first time in its fifth report after repeated Committee recommendations.

We can see the potential here for Concluding Observations to move the conversation forward. The Dominican Republic, Honduras, Kazakhstan, Mauritius, Poland and Uruguay have also all answered the Committee’s Concluding Observations directly in their sections on Article 33, producing new information based on the Committee’s concerns and recommendations. The 2015

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Concluding Observations on Bangladesh, Chile and Uruguay are all very similar,729 as are those of Mauritius and Ghana.730 But all refer to harm reduction (a relatively new recommendation for the Committee, as we shall see below) and call for ‘accurate and objective’ information (a criterion that did not appear in earlier Concluding Observations to these States parties). Despite the overall general nature of the Concluding Observations, these are specifics that States parties may focus upon, and against which they may be assessed in later reports if the Committee follows up.

Asked if, through the reporting process, our understanding of CRC obligations improves or develops, Committee Member 3 said that in their view it ‘absolutely’ did. Committee Member 2 agreed that this was ‘definitely the case’ and provided the example of improved child participation and the role of the periodic reporting process in that development.731 Meier et al have recently shown that Concluding Observations can change the attention to given issues in State party reports, indicating a recognition also of a certain understanding of compliance based on the Committee’s views.732 From the above analysis, this finding is (tentatively) supported. There is some evidence, at least, that States parties respond directly to the Committee’s Concluding Observations about drugs in ways that develop or increase the information they provide. This lends sup-

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729 Concluding Observations: Bangladesh, UN Doc No CRC/C/BDG/CO/5, 30 October 2015, para 61; Concluding Observations: Chile, UN Doc No CRC/C/CHL/CO/4-5, 30 October 2015 para 63; Concluding Observations: Uruguay, UN Doc No CRC/C/URY/CO/3-5, 5 March 2015 para 52.
730 Concluding Observations: Mauritius, UN Doc No CRC/C/MUS/CO/3-5, 27 February 2015, para 54(c); Concluding Observations: Ghana, UN Doc No CRC/C/GHA/CO/3-5, 9 June 2015 para 52(f).
731 At the meetings with delegations, however, a dialogue can be difficult due to delegations having simply prepared statements rather than responding to the Committee’s questions, or due to delegations being unwilling to answer questions at all. Committee Member 1 also recounted their experience of the meeting with certain difficult delegations to make this point.
port to the view that States parties’ understanding of their obligations can develop through the periodic reporting process. This is not to say that it was the reporting process that led to the legal or policy change in question (nor was this claimed by Meier et al). The important point is that States parties report such efforts as an indication of compliance with Article 33 and with the Committee’s recommendations on their CRC obligations. Let us look more closely, then, at the content and balance of the Concluding Observations.

5.5 The Content and Balance of Concluding Observations

5.5.1 Drug Use, Data Collection and Prevention

Of the 453 Concluding Observations reviewed, almost 70% (317) raise concerns or make recommendations relating to drugs, which far exceeds the attention to this topic within the UN drug control system and justifies a focus on this Committee. The recommendations range from very general statements of concern about rates of drug use, to more specific points across various issues. Of the 317 Concluding Observations about drugs, 292 raise concerns or make recommendations about drug use among children specifically. Recommendations to address drug use among parents or pregnant mothers are far

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733 In the view of one Committee Member 2 even the process of gathering the information for the State party reports is itself helpful in this way as various departments of ministries need to be involved.

734 Such information may become increasingly important as evidence of State practice as the Committee begins hearing individual and collective communications under the third optional protocol to the CRC.

735 Compare, for example, Concluding Observations: Dominican Republic, UN Doc No CRC/C/DOM/CO/2, 11 February 2008, para 64(c) and, one session earlier, Concluding Observations: Marshall Islands, UN Doc No CRC/C/MHL/CO/2, 19 November 2007, para 55 (a)-(d).

736 For examples of Concluding Observations about drugs but not about drug use among children, see Concluding Observations: New Zealand, UN Doc No CRC/C/NZL/CO/3-4, 11 April 2011, para 31 (Assistance to families affected by drugs); and Concluding Observations: Colombia, UN Doc No CRC/C/15/Add.15, 7 February 1994, para 5 (threat of ‘drug-related terrorism”).
less frequent but are consistently made through the entire period. This latter issue was also addressed in an early General Comment, which connected parental drug use to Article 33 directly.

In many cases, however, the situation on the ground as regards drug use is not clear from States parties’ reports. As noted in chapter 1, data are frequently unavailable in low- and middle-income countries, and regularly omitted by States in their reports. Appropriate data collection is therefore requested in approximately one out of every four of the recommendations about drug use, with the addition, though not all that frequent, that this should be adequately disaggregated in line with positive obligations flowing from the Convention’s general principle of non-discrimination. The lack of frequency of this recommendation regarding drug use may be due to the fact that disaggregation of data across all aspects of the CRC is a standard recommendation of the Committee.

The need for improved prevention efforts has been identified on 164 occasions. This is often no more than a call for measures to be undertaken to prevent or ‘combat’ drug use, effectively restating one of the main reasons for Article 33 to exist. On the one hand this may seem pointless as it does no more

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737 See, for example, Concluding Observations: Dominican Republic, UN Doc No CRC/C/DOM/CO/2, 11 February 2008, para 64(c); Concluding Observations: Moldova, UN Doc No CRC/C/MDA/CO/3, 20 February 2009, para 55(f); Concluding Observations: Finland, UN Doc No CRC/C/FIN/CO/4 3 August 2011, paras 31, 32(b), 42 and 43.


739 For example Concluding Observations: Yugoslavia, UN Doc No CRC/C/15/Add.49, 13 February 1996, para 40; Concluding Observations: Jordan, UN Doc No CRC/C/15/Add.125, 28 June 2000, paras 47 and 48; Concluding Observations: Uzbekistan UN Doc No CRC/C/UZB/CO/2, 2 June 2006, paras 50 and 51; Concluding Observations: Italy, UN Doc No CRC/C/ITA/CO/3-4, 31 October 2011, para 54; Concluding Observations: Mexico, UN Doc No CRC/C/MEX/CO/4-5, 2 June 2015, para 50(d).

740 The Committee explicitly associated disaggregation of data in general with the principle of non-discrimination GC 5, para 12.
than to reaffirm or restate an overarching concern States already clearly share. In recommending prevention efforts in a general sense, the Committee is asking States parties to continue or improve their performance on interventions they have already reported. Few State reports omit prevention efforts, even if the efficacy of those measures is very rarely discussed. Such recommendations may, however, also be viewed as a push for States to do better and to keep the issue visible in child rights implementation. This hinges on the details of the recommendations. In this regard, school-based efforts are commonly sought, appearing in one of three of these recommendations, and since 2010 prevention recommendations have included regular calls for ‘life skills education’ (an important aspect of prevention), ‘healthy lifestyles’ promotion (which is less clear), or both.

An important feature since 2000, moreover, has been the need for prevention information, whether in schools or in campaign materials, to be ‘accurate and objective’. This speaks to the fact that scare tactics and exaggeration have

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741 Examples omitting prevention were usually in the early years. For example, First Report: Romania, UN Doc No CRC/C/15/Add.16, 7 February 1994; First Report: Mauritius, UN Doc No CRC/C/15/Add.64, 30 October 1996; First Report: Yemen, UN Doc No CRC/C/15/Add.102, 10 May 1999. There are, however, recent examples. See Third Report: Guatemala, UN Doc No CRC/C/GTM/CO/3-4, 25 October 2010, para 159 (omitting prevention); Second Report: Monaco, UN Doc No CRC/C/MCO/CO/2-3, 29 October 2013 para 222 (omitting prevention); Fourth Report: Yemen, UN Doc No CRC/C/YEM/CO/4, 25 February 2014 (omitting the drug issue entirely); Fourth Report: Eritrea UN Doc No CRC/C/ERI/CO/4, 2 July 2015 (omitting the drugs issue entirely).

742 For example, Concluding Observations: Lithuania, UN Doc No CRC/C/15/Add.146, 21 February 2001, para 50; Concluding Observations: Germany, UN Doc No CRC/C/DEU/CO/3-4, 25 February 2014, para 61. See further UN Office on Drugs and Crime, Schools-based education for drug abuse prevention, UNODC 2004.


744 See for example, Concluding Observations: St Lucia, UN Doc No CRC/C/LCA/CO/2-4, 8 July 2014, para 49.

745 See for example, Concluding Observations: India, UN Doc No CRC/C/15/Add.115, 23 February 2000, para 73; Concluding Observations: Bangladesh, UN Doc No CRC/C/BGD/CO/5, 30 October 2015, para 61.
been shown to not work, but are still widely used.\textsuperscript{746} In early recommendations the Committee called for ‘public information campaigns’ and ‘media campaigns’ without this qualification as to content.\textsuperscript{747} But mass media campaigns are now known to be of limited value, and possibly counter-productive (recalling concerns about ‘propaganda’ that were raised in drafting the drugs conventions).\textsuperscript{748} More recently, recommendations about media campaigns tend to sit alongside the call for ‘accurate and objective’ information, showing the Committee’s own changes over time.\textsuperscript{749} What the Committee means by ‘accurate and objective’, however, is not clear. States, for their part, focus on the broad aims and approach of prevention efforts, rather than on the content of their messaging.

5.5.2 Victims not Criminals
The Committee has been clear that children who use drugs should be seen as ‘victims and not criminals’, or variations thereof.\textsuperscript{750} This is an important recommendation for three reasons. First, it focuses attention on health and social

\textsuperscript{746} As the UN Drug Control Programme (now UNODC) stated as early as 1999, the evidence shows that ‘There is an openness among youth to information, if it is factual and does not contrast too sharply with their personal experience of drugs...’ Commission on Narcotic Drugs, \textit{Youth and drugs: A global overview. Report of the Secretariat}, UN Doc No E/CN.7/1999/8, 11 January 1999, para 65(f).

\textsuperscript{747} For example, \textit{Concluding Observations: Ghana}, UN Doc No CRC/C/15/Add.73, 18 June 1997, para 46; \textit{Concluding Observations: Romania}, UN Doc No CRC/C/15/Add.199, 18 March 2003, para 47(a).

\textsuperscript{748} For a meta-analysis finding no effect on rates of drug of such campaigns in Europe see European Monitoring Centre on Drugs and Drug Addiction, \textit{Perspectives on Drugs: Mass Media Campaigns for the Prevention of Drug Use in Young People}, May 2013.

\textsuperscript{749} For example, \textit{Concluding Observations: Philippines} UN Doc No CRC/C/15/Add.259, 21 September 2005, para 82(b); \textit{Concluding Observations: Iraq}, UN Doc No CRC/C/IRQ/CO/2-4, 3 March 2015, para 69.

interventions for children. Second, it extends beyond the juvenile justice recommendations under article 40 because it focuses on the removal of a specific sanction rather than general standards. And third, with regard to the relationship with the drugs conventions, there are no age-related mitigating circumstances in the Vienna Convention’s requirement to criminalise personal possession.\footnote{As such, this call from the Committee may add a dimension not provided explicitly under the drugs conventions and a critique not received from other international mechanisms. It is an example of the potential alternative view provided by the CRC as a frame of reference.} However, two points of caution are required. First, its consistency is questionable. This recommendation was most prominent around 2004-2005 but appeared less frequently thereafter, disappearing entirely between 2007 and 2011.\footnote{Rather than a response to specific issues, it was primarily standard language adopted during these periods. More importantly, while the attempt to shift the narrative from criminals to victims is in some ways important, the victim label may also have a negative side. Throughout the Committee’s recommendations children are consistently referred to as ‘victims’, indicating representation of the problem rooted in exploitation. Indeed, this was such a recurring concept that it became a theme that is discussed in more detail in chapter 7.} Rather than a response to specific issues, it was primarily standard language adopted during these periods. More importantly, while the attempt to shift the narrative from criminals to victims is in some ways important, the victim label may also have a negative side. Throughout the Committee’s recommendations children are consistently referred to as ‘victims’, indicating representation of the problem rooted in exploitation. Indeed, this was such a recurring concept that it became a theme that is discussed in more detail in chapter 7.

\footnote{Article 3(2), Vienna Convention} 731 Concluding Observations: Afghanistan, UN Doc No CRC/C/AFG/CO/1, 8 April 2011, para 52(d). See also B. Conner, “First, Do No Harm”: Legal Guidelines for Health Programmes Affecting Adolescents Aged 10–17 Who Sell Sex or Inject Drugs’, \textit{Journal of the International AIDS Society} 18, Supp 1: 19437, 2015 (referring to the ‘principle of non-criminalization’).} 732 Concluding Observations: Marshall Islands, UN Doc No CRC/C/MHL/CO/2, 19 November 2007, para 55(c); Concluding Observations: Ukraine, UN Doc No CRC/C/UKR/CO/3-4, 21 April 2011, para 61(b) (recommending that the State party amend ‘laws that criminalize children for possession or use of drugs’) 733 It has, however, recently been reconfirmed in a General Comment and so is certainly part of the Committee’s current approach. \textit{General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence}, UN Doc No CRC/C/GC/20, 6 December 2016, para 64, ‘Alternatives to punitive or repressive drug control policies in relation to adolescents are welcome’. (Hereafter: CRC, GC 20)
5.5.3 Treatment and Harm Reduction

The most common recommendation in this entire area is to scale up drug treatment, rehabilitation or counselling, which has been made 181 times. Like prevention, this is often stated in general and without additional standards, and may again be seen to reaffirm what States already readily report. There is no disagreement that those who in need must have access to treatment. But important qualifications or guidance have also been provided that might be seen to challenge State actions. The Committee has, for example, strongly condemned human rights abuses in detention centres operating under the guise of drug treatment. In other words, drug treatment itself must be compliant with basic rights protections. Moreover, the Committee has made clear on almost fifty occasions, that treatment services should be ‘youth-sensitive’ or ‘child-friendly’. The precise meaning of this is not set out, but this is arguably not important. The point being made is that existing services tend to be designed around the larger, adult, mostly male drug using population, and may not be well-suited to younger people who are the focus of the CRC. It is a request for their specific needs and rights to be taken into consideration. In this regard, parental consent should not be required when it is in the best interests of the child to receive confidential counselling and children and young people

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755 The Committee’s General Comment on HIV/AIDS made this point in 2003 regarding injecting drug use specifically. General Comment No. 3: HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3, 17 March 2003, para 39. ‘In most countries, children have not benefited from pragmatic HIV prevention programmes related to substance use, which even when they do exist have largely targeted adults.’ (Hereafter: CRC, GC 3)

756 For example, Concluding Observations: Marshall Islands, UN Doc No CRC/C/15/Add.139, 26 October 2000, para 51; Concluding Observations: Latvia, UN Doc No CRC/C/15/Add.142, 21 February 2001, para 40.
should be involved in the design of policies and services.\textsuperscript{757} Here we see the general principles of the Convention coming through. In this case, the child’s right to be heard (Article 12)\textsuperscript{758} and the best interests principle (Article 3).\textsuperscript{759} This also conforms to well-known legal reasoning in relation to sexual and reproductive health.\textsuperscript{760} Again we see the potential for the CRC to offer a frame of reference the drugs conventions may not provide. As we saw from chapter 2, such considerations were actively avoided in their drafting. Conversely, using the CRC as a frame of reference, one cannot but focus on those aspects.

Today, few would disagree that drug treatment must be tailored to young people’s needs, however unclear that idea might be in practice. But a contrary example is harm reduction. As we have seen in chapter 4, this has been a flashpoint of debates around appropriate approaches to drug policy because it fundamentally challenges the theories underpinning the drugs conventions. Prior to 2011 the term was never used by the CRC Committee, even though it came to prominence in the early 1990s. Since 2011, however, the Committee has recommended harm reduction alongside prevention and treatment twenty-two times, usually with the requirement that this too be ‘youth-friendly’.\textsuperscript{761} It


\textsuperscript{758} \textit{General Comment No. 12 on the Right of the Child to be Heard}, UN Doc No CRC/C/GC/12, 20 July 2009, paras 101 and 102 (Hereafter: CRC, GC 12).

\textsuperscript{759} \textit{General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration}, UN Doc No CRC/C/GC/14, 29 May 2013, paras 77 and 78 (Hereafter: CRC, GC 14).

\textsuperscript{760} Perhaps the best known decision is that of \textit{Gillick v West Norfolk and Wisbech AHA} [1985] UKHL 7 which produced ‘Gillick competence’.

\textsuperscript{761} It
is now one of its most common recommendations within a fairly recent standard formulation of language (discussed further below). The Committee has not, however, been clear about what such services might entail, and specific harms facing children who use drugs rarely arise in its recommendations.\textsuperscript{62} Contrary to prevention and treatment, none of these twenty-two States reported such services for children and young people in their reports. This, then, is quite different from the Committee reaffirming general prevention and treatment measures that have already been reported to it. None of these States parties have as yet returned for a follow-up review, so we cannot know their responses. But such services remain a point of controversy for other mechanisms and in international diplomacy. Many States reject them outright for adults, let alone children, seeing them as contrary to the goal of a drug free society and the vision of the drugs conventions. Knowingly or unknowingly, the Committee has stepped into controversial territory with these recommendations. The International Narcotics Control Board, for example, has never recommended such services for minors.

Doc No CRC/C/MAR/CO/3, 14 October 2014, para 57(c); Concluding Observations: Mauritius, UN Doc No CRC/C/MUS/CO/3, 27 February 2015, para 54(d); Concluding Observations: Iraq, UN Doc No CRC/C/IRQ/CO/2, 3 March 2015, para 69; Concluding Observations: Uruguay, UN Doc No CRC/C/URY/CO/3-5, 5 March 2015, para 52; Concluding Observations: Mexico, UN Doc No CRC/C/MEX/CO/4, 2 June 2015, para 50(d); Concluding Observations: Netherlands, UN Doc No CRC/C/NLD/CO/4, 8 June 2015, para 47(b); Concluding Observations: Ghana, UN Doc No CRC/C/GHA/CO/3, 9 June 2015, para 52(f); Concluding Observations: Honduras, UN Doc No CRC/C/HND/CO/4, 3 July 2015, para 63; Concluding Observations: Brazil, UN Doc No CRC/C/BRA/CO/2, 30 October 2015, para 64(a); Concluding Observations: Bangladesh, UN Doc No CRC/C/BDG/CO/5, 30 October 2015, para 61; Concluding Observations: United Arab Emirates, UN Doc No CRC/C/ARE/CO/2, 30 October 2015, para 58(c); Concluding Observations: Chile, UN Doc No CRC/C/CHL/CO/4, 30 October 2015, para 63.

\textsuperscript{62} For example, the first and only time overdose among adolescents was raised was in 2010. Concluding Observations: Norway, UN Doc No CRC/C/NOR/CO/4, 3 March 2010, para 40. This may be a level of detail too far for the Committee. The request that States parties give due consideration to harm reduction and report back as part of the constructive dialogue may suffice at this stage. On the other hand, the evidence for the effectiveness of harm reduction interventions tends to be based on adult participants.
5.5.4 Resources and Budgeting

The Committee has frequently requested that States parties dedicate the appropriate resources to the prevention and treatment efforts they have outlined. This is often in the wider adolescent health context in which drugs issues regularly arise, but also specific to Article 33 (see further the discussion of ‘internal normative framing’ below).\(^{763}\) Funding for drug treatment is very poor, far worse for harm reduction,\(^{764}\) and such services for young people are often scarce.\(^{765}\) With these recommendations the Committee may be reaffirming positive obligations with regard to budgeting under Article 4 of the Convention, which has clear implications for Article 33.\(^{766}\) This is an important area and also subject to considerable controversy. The overwhelming majority of resources in drug control go to supply reduction (law enforcement, criminal justice systems, interdiction etc) in line with the focus of legal frameworks, including the international treaties.\(^{767}\) The UN Office on Drugs and Crime has referred to this as the ‘policy displacement’ effect, with resources focusing away from health and towards law enforcement in line with the balance of the

\(^{763}\) See, for example, Concluding Observations: Switzerland, UN Doc No CRC/C/15/Add.182, 13 June 2002, para 55 ‘The Committee… further recommends that the State party allocate more resources to the child welfare service system for prevention, treatment therapies and services for recovery and social reintegration specifically tailored for children and adolescents’; Concluding Observations: Colombia UN Doc No CRC/C/COL/CO/4-5, 6 March 2015, para 48 ‘The Committee recommends that the State party… adopt a targeted policy, adequately resourced...’.


\(^{766}\) This flows from States parties’ Article 4 obligations to progressively realise economic, social and cultural rights ‘to the maximum extent of their available resources’. CRC, GC 5, paras 7, 8, 51 and 52.

obligations under the drugs conventions. In its frequent calls for resource allocation towards health and social care the Committee is arguably viewing the issues through the perspective of adequate spending to protect children as opposed to adequate spending to reduce the scale of the drugs market. The finer details of this may be debated but in each case the Committee hones in on adequate resources for services, not enforcement. Again, we see the potential for an alternative legal lens, in this case akin to the role of human rights law as a ‘counterweight’ envisaged by the human rights position, and speaking to the supply-side imbalance of the drug control system.

5.5.5 Alcohol, Tobacco and other Licit Substances

Article 33, as we have seen, was drafted in such a way as to define which substances were captured. Citing the ‘relevant international treaties’ within the text was for this purpose. From the outset this meant that the substances children and young people most often use were omitted from the text, namely alcohol, tobacco and solvents. But what we see from the reporting process is that such legal distinctions, albeit intentional in drafting, have been paid little or no regard in practice. From the earliest reports States parties have included all substance use, including alcohol, solvents and tobacco, within their sections dedicated to Article 33. States will very often include all substance

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768 UNODC, *Fit for Purpose.*
769 As we have seen from chapter 4, however, there are strong arguments that there is also a normative connection between the two.
771 For examples throughout the period under review see *Initial Report: Bolivia*, UN Doc No CRC/C/3/Add.2 14 September 1992, paras 51 and 52; *Second Report: Russian Federation*, UN
use in national strategies, even if this crosses legal boundaries. Thus, States have been consistently reporting on measures they have taken and laws they have adopted pursuant to international obligations they do not strictly have, and which were not taken on board in drafting.

For its part, the Committee has included alcohol and tobacco in 169 recommendations, and within this has called for age limits for purchase,\textsuperscript{772} controls on harmful ‘misinformation’,\textsuperscript{773} and bans on tobacco and alcohol advertising.\textsuperscript{774} Mostly this occurs under the heading of ‘adolescent health’, and as such could arguably be a component of article 24. But alcohol and tobacco have also been included by rewording Article 33,\textsuperscript{775} in paragraphs beginning with ‘in the light of Article 33’,\textsuperscript{776} and in many recommendations dedicated to ‘drug

\textsuperscript{772} For example, \textit{Concluding Observations: Dominica}, UN Doc No CRC/C/15/Add.238, 30 June 2004, paras 44 and 45; \textit{Concluding Observations: East Timor}, UN Doc No. CRC/C/TLS/CO/2-3, 30 October 2015, para 51(c).


\textsuperscript{774} For example, \textit{Concluding Observations: Kyrgyzstan} UN Doc No v CRC/C/15/Add.127, 9 August 2000 para 58 (‘comprehensive restrictions on tobacco advertising’); \textit{Concluding Observations: Seychelles}, UN Doc No CRC/C/SYC/CO/2-4, 23 January 2012, para 57 (‘legal prohibition on tobacco and alcohol advertising by privately owned media and advertising companies’).

\textsuperscript{775} \textit{Concluding Observations: Grenada}, UN Doc No CRC/C/15/Add.121, 28 February 2000, para 27. ‘…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.’ \textit{Concluding Observations: Palau}, UN Doc No CRC/C/15/Add.149, 21 February 2001, para 57 (similar wording).

\textsuperscript{776} \textit{Concluding Observations: Grenada and Palau}, ibid; \textit{Concluding Observations: East Timor}, UN Doc No CRC/C/TLS/CO/1, 14 February 2008, para 80 ‘In the light of Article 33 of the Convention, the Committee recommends that the State party conduct research on prevailing patterns of substance abuse among children for the purpose of developing a national policy on prevention; take all appropriate measures to raise children’s and parent’s awareness with regard to the health risks related to smoking; and review and update national legislation with a view to preventing the sale of alcoholic drinks, including palm wine, to children.’
abuse’. It has, moreover, used Article 33 to recommend action on betel nut\(^{77}\) and khat,\(^{78}\) which are both outside of international controls. In this way the Committee has, strictly speaking, been making *ultra vires* recommendations if we hold to the wording of Article 33. But on the other hand, it has been responding to States parties’ reports as part of an ongoing ‘dialogue’. Over time, therefore, the reporting process seems to have resulted in an agreement between States parties and the Committee that the intended delimitation of the substances represented by the reference to the drugs conventions in Article 33 is not that significant. It is a good issue-specific example of the dialogue taking place and ‘the building of norms through interaction’.\(^{79}\)

5.5.6 Neglected Areas

The above are the most consistent recommendations of the Committee and represent in some cases good guidance on what the Committee considers the right to protection from drugs to entail. But there are also areas that have been neglected and here we begin to look at what the Committee has *not* said, or has focused upon far less.

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5.5.6(a) Access to Essential Controlled Medicines

The enormous issue of access to medicines controlled under the international drug control system has never been raised, either by States parties or the Committee. To date the only Concluding Observation on paediatric palliative care was to Belarus in 2011, but it did not address access to medicines in this regard.\(^{70}\) The lack of attention to this issue in relation to Article 33 may be seen as appropriate. It may be argued, for example, that Article 33 does not refer to illicit uses of controlled substances, only ‘illicit use’. But the Committee has paid considerable attention to the over-prescription of Ritalin to treat attention deficit hyperactivity disorder (ADHD). This has been a prominent concern since 2010,\(^{71}\) including with specific regard to the ‘abuse of psychostimulant drugs’\(^{72}\). It could also be argued that access to essential medicines is recognised as core a component of the child’s right to health under article 24, so attention to it under Article 33 is not needed.\(^{73}\) But the specific issue of controlled medicines has not been addressed under article 24 either, and there are

\(^{70}\) *Concluding Observations: Belarus*, UN Doc No CRC/C/BLR/CO/3-4, 8 April 2011, paras 55 and 56.

\(^{71}\) This became a concern of the Committee in 2005, but largely disappeared until 2010 when it again became a focus. See, for example, *Concluding Observations: Finland*, UN Doc No CRC/C/15/Add.272, 20 October 2005, paras 38 and 39; *Concluding Observations: Australia*, UN Doc No CRC/C/15/Add.268, 20 October 2005, paras 49 and 50; *Concluding Observations: Denmark*, UN Doc No CRC/C/DNK/CO/3, 23 November 2005, paras 44 and 45; *Summary Records: Norway*, UN Doc No CRC/C/SR.1480 17 March 2011, para 48; *Concluding Observations: Belgium*, UN Doc No CRC/C/BEL/CO/3-4, 18 June 2010, para 59(e); *Concluding Observations: Japan*, UN Doc No CRC/C/JPN/CO/3, 20 June 2010, para 60 and 61; *Concluding Observations: Australia*, UN Doc No CRC/C/AUS/CO/4, 28 August 2012, paras 64 and 65 (following up on its 2005 recommendations).

\(^{72}\) *Concluding Observations: Finland*, UN Doc No CRC/C/FIN/CO/4, 3 August 2011, para 45(c) (following up on its 2005 recommendations, ibid). Methylphenidate (Ritalin) is controlled under the 1971 Convention, but this connection between the two systems has not arisen. The INCB has also raised concerns about medication for ADHD in its annual reports. See, for example, ten years before it arose with the CRC Committee, *Annual Report for 1995*, UN Doc No E/INCB/1995/1, 1995, paras 90-94. The INCB has not referred to the CRC in this regard.

\(^{73}\) *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)* UN Doc No CRC/C/GC/15, 17 April 2013, para 37 (Hereafter: CRC, GC 15). See also para 2 in which palliative care is expressly included in this right ‘The Committee interprets children’s right to health as defined in Article 24 as an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services…’
distinct challenges with controlled medicines that set them apart from the intellectual property, research and supply chain challenges regarding other medicines. Fears about addiction, in particular, are one of the main reasons for the lack of access to opiates for pain. It is what deters policy change and generates discomfort among doctors to prescribe. Critically, these medicines are subject to a legal framework geared primarily towards supply and demand reduction through the criminal law, and one that is explicitly cited within Article 33.

5.5.6(b) Supply Side Issues

The production, transit and supply-side enforcement of the equation are very under-represented in the Committee’s work. Concerns about drug related violence are raised eleven times. Rural production makes only six appearances, and within this, State efforts to eradicate crops just once. Eradication of crops, however, is a specific requirement of the Vienna Convention and the relevant provision contains the only explicit reference to human rights in any of the three drugs conventions.

Children’s involvement in the illicit drug trade is addressed twenty-two times. There is also one reference to the use of minors as part of military

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784 International Narcotics Control Board, Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes, UN Doc No E/INCB/2010/1/Supp.1, 2010. Based on a survey of States parties the Board found that concerns about addiction was the most common concern. See fig 29, p. 44.
785 For a detailed study of these challenges see Gispen, Human Rights and Drug Control.
786 For example, Concluding Observations: Colombia, UN Doc No CRC/C/15/Add.15, 7 February 1994, para 2 (referring to drug related terrorism and violence); Concluding Observations: Bolivia, UN Doc No CRC/C/15/Add.95, 26 October 1998, para 26 (‘…children living in the Chapare region, who are constantly exposed to the side effects of anti-narcotics interventions and live in a violent environment which has a negative impact on their development.’); Concluding Observations: Maldives, UN Doc No CRC/C/MDV/CO/3, 13 July 2007, para 89(e) (gang violence related to drugs).
787 Concluding Observations: Colombia UN Doc No CRC/C/COL/CO/3, 8 June 2006, paras 72 and 73.
788 Art 14(2), Vienna Convention.
789 For example, Concluding Observations: Switzerland UN Doc No CRC/C/15/Add.182, 13 June 2002, para 54 (sales of drugs by children); Concluding Observations: Armenia, UN Doc
responses to the drug trade, albeit with reference to the optional protocol on the involvement of children in armed conflict. This frequency may match certain elements of drug treatment and prevention above, but it differs because it represents a distinct right in the CRC, not a sub-set of recommendations stemming from a right. The vast majority of the Committee’s attention has been on the demand side of the drug policy equation to the exclusion of supply side questions, where the majority of State action is directed.

5.5.6(c) The Effects State Efforts for the Implementation of Article 33

Directly related to the above issues, the Committee rarely discusses the effects of drug policy efforts carried out for the implementation of Article 33. In other words, what the implementation of Article 33 produces. In this way it falls into the ‘implementation gap’ critique (see chapter 1) by assuming that implementing Article 33 will produce positive outcomes. For example, the recommendations focus on asking States to do more, but what we do not see is a recognition of the charged, contested and potentially risky policy environment in which Article 33 will be implemented. This is crucial, including for the content of Article 33 and its relationship to the drugs treaties. Supply reduction, for example, is the primary focus of the drugs conventions and national drug laws, and within which a wide range of human rights and child rights issues are at least potentially raised. Critically, it is also a main focus of States

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No CRC/C/15/Add.22526 February 2004, para 62 (increasing use of children in drug trafficking); Concluding Observations: Russian Federation, UN Doc No CRC/C/RUS/CO/3, 23 November 2005, para 59 (children involved in trafficking); Concluding Observations: Slovenia, UN Doc No CRC/C/SVN/CO/3-4, 8 July 2013, para 69 (Roma children involved in drug sales); Concluding Observations: Afghanistan, UN Doc No CRC/C/AFG/CO/1, 8 April 2011 para 72 (children involved in smuggling); Concluding Observations: Jamaica UN Doc No CRC/C/JAM/CO/3-4, 10 March 2015, para 58(c) (absence of a law prohibiting the use of children in the drug trade, related to ILO 182).

790 Concluding Observations: Mexico, UN Doc No CRC/C/MEX/CO/4, 2 June 2015, para 72(e).
5.6 Normative Framing

5.6.1 Internal Normative Framing: Instructive or Arbitrary?

Despite the specific article on protection from drugs in the CRC, the issue of drugs appears across varying provisions in the Committee’s work, often without reference to any one provision in particular. This is a result of the structure for periodic reports and Concluding Observations the Committee has adopted, based on the nine ‘clusters’ of rights set out in chapter 3. States parties are requested to organise their reports along these lines, and they almost always do so. In each case they are asked in general terms for an explanation of measures undertaken and for statistical information.791 This is a practical way of dealing with the wide array of issues that are contained in the CRC, and it allows for comparison of State reports and for follow-up over time.792 It also reflects the Committee’s holistic approach, through which all of these rights are to be read together, rather than each one in isolation.

Article 33, for its part, now appears across two clusters relating to the two forms of protection involved: basic health and welfare (for measures to protect children from drug use), and special protection measures (for the prevention of their use in the drug trade). In earlier reporting guidance Article 33 was

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791 Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc No CRC/C/58/Rev.3, 3 March 2015, paras 35(e) and 40(d)(ii), and Annex, para 21.

792 Committee Members 1 and 2 both noted the practical value of this structure.
entirely within the ‘special protection measures’ cluster, reflecting its placement alongside articles addressing forms of exploitation. Splitting the provision into two separate normative clusters first appeared fairly late, in the 2010 reporting guidance.793 On the one hand this is more focused. The blurring of the lines between health and exploitation was identified in a critique of the draft CRC which recommended moving drug use to the draft provision on health, where it had originally begun.794 Conversely, the later decision to split the right in this way was strenuously objected to by those who felt it undermined the ‘drug free’ vision of the entire provision, and therefore the nature of the right.795 From this perspective, drug use among children and the use of children in the drug trade are both situations of exploitation to be brought to an end. By this reasoning, the ‘special protection measures’ cluster is more appropriate, placing Article 33 alongside child abuse, economic exploitation and other forms of harm.796 The normative ‘framing’ of the drugs question within the CRC therefore can matter a great deal.

There have developed three general ways in which the Committee addresses the question of drugs. The first, of course, is to not address it at all. In the first years of reporting the Committee hardly ever dealt with this topic. But this is less of an issue today.797 The second is to craft wording to respond directly to the information received from the State or from NGO reports. Some of these, which focus on particular situations, are discussed in detail in chapter 6. By

795 One shared by various States parties reporting. For an example from one of the very earliest reports see Initial Report: Sweden UN Doc No CRC/C/3/Add.1 23 September 1992, para 247.
797 The majority of the 136 Concluding Observations that did not address the drugs issue were in the early years. Seventy-five of them were in the first seven years of reporting.
far the most common approach, however, is for the Committee to choose from variations on agreed standard language.

In practice, the Committee’s work on the protection of children from drugs has arisen under a variety of issue-based headings that are used within the clustered structure. These include ‘adolescent health’,798 ‘health and health services’,799 ‘right to health and healthcare’,800 ‘environmental health’,801 ‘children in street situations’,802 ‘torture and cruel inhuman or degrading treatment’803 and ‘juvenile justice’.804 There are also headings specific to Article

800 See for example Concluding Observations: Egypt UN Doc No CRC/C/15/Add.145, 21 February 2001, paras 43 and 44; Concluding Observations: Slovakia, UN Doc No CRC/C/15/Add.14, 23 October 2000, paras 41 and 42.
801 Concluding Observations: Colombia, UN Doc No CRC/C/COL/CO/3, 8 June 2006, paras 72 and 73.
802 For example, Concluding Observations: Bolivia, UN Doc No CRC/C/BOL/CO/4, 16 October 2009, para 75; Concluding Observations: Egypt, UN Doc No CRC/C/EGY/CO/3-4, 15 July 2011, para 80; Concluding Observations: Tanzania, UN Doc No CRC/C/TZA/CO/3-5, 3 March 2015, para 69(d).
803 Concluding Observations: Cambodia, UN Doc No CRC/C/KHM/CO/2-3, 3 August 2011, paras 38 and 39; Concluding Observations: Viet Nam, UN Doc No CRC/C/VNM/CO/3-4, 22 August 2012, paras 43 and 44.
804 For example, Concluding Observations: Jamaica, UN Doc No CRC/C/JAM/CO/3-4, 10 March 2015, para 65(d); Concluding Observations: Former Yugoslav Republic of Macedonia, UN Doc No CRC/C/MKD/CO/2, 23 June 2010, paras 79(e) and 80(f) (relating to compulsory drug testing in correctional facilities).
33, such as ‘drug abuse’,805 ‘drug and alcohol abuse’,806 ‘drug and substance abuse’,807 ‘drug, tobacco, alcohol and other substance use’,808 ‘illicit use of drugs and substances’,809 and ‘illicit use of narcotic drugs and psychotropic substances’.810 Various recommendations are expressly made ‘in the light of Article 33’.811 In some cases, recommendations about drugs extend across multiple clusters of rights, which makes sense given the breadth of the drugs question and the various rights it can engage.812 But this is most often a combination of standard formulations of language across the policy areas in which the drugs issue happens to have appeared, rather than subjective scrutiny of

805 For example, Concluding Observations: India, UN Doc No CRC/C/15/Add.115, 23 February 2000, paras 72 and 73; Concluding Observations: Armenia, UN Doc No CRC/C/15/Add.119, 24 February 2000, paras 52 and 53. Both adopt the heading ‘Drug abuse (art. 33)’. The recommendations made are identical. More recently, see for example Concluding Observations: Bangladesh, UN Doc No CRC/C/BDG/CO/4, 26 June 2009, paras 65 and 66; and Concluding Observations: Bangladesh, UN Doc No CRC/C/BGD/CO/5, 30 October 2015, paras 60 and 61.
806 For example, Concluding Observations: Sweden, UN Doc No CRC/C/SWE/CO/4, 26 June 2009, paras 48 and 49.
807 For example, Concluding Observations: Venezuela, UN Doc No CRC/C/VEN/CO/3-5, 13 October 2014, paras 58 and 59; Concluding Observations: Uruguay, UN Doc No CRC/C/URY/CO/3-5, 3 March 2015, paras 51 and 52.
808 For example, Concluding Observations: Bulgaria, UN Doc No CRC/C/BGR/CO/2, 23 June 2008, paras 49 and 50.
809 Concluding Observations: St Vincent and Grenadines, UN Doc No CRC/C/15/Add.184, 13 June 2002, paras 50 and 51. This is the only use of this formulation.
810 Concluding Observations: Maldives, UN Doc No CRC/C/MDV/CO/3, 13 July 2007, paras 88 and 89.
812 See for example Concluding Observations: Afghanistan, UN Doc No CRC/C/AFG/CO/1, 8 April 2011, paras 51, 52, 68 and 72 (Health and health services; children in street situations; sale, abduction and trafficking); Concluding Observations: Colombia, UN Doc No CRC/C/Col/CO/3, 8 June 2006, paras 72, 73, 82, 83, 88 and 89 (Environmental health; economic exploitation; drug abuse).
the State report resulting in targeted suggestions.\textsuperscript{813} There appears to be no pattern indicating that the Committee amends its approach to drugs or that it adopts given wording depending on the thematic headings used. On some occasions we see the same language appearing across different headings\textsuperscript{814} and on others we see different language under the same heading during the same session. But this does not seem to be in response to specific information received from States parties that might explain the difference.\textsuperscript{815} It appears to be the available standard language that matters most, not necessarily the requirements of the specific provisions in question, including Article 33. We therefore do not get a sense of how the treaty is being interpreted or how the various rights interact.

A similar observation may be made with regard to references to General Comments in the Concluding Observations. General Comments are intended to provide guidance on the interpretation of particular provisions, important principles, or the application of a human rights treaty to a given topic. As noted in

\textsuperscript{813} See for example, Concluding Observations: Cote D’Ivoire, UN Doc No CRC/C/15/Add.155, 9 July 2001, paras 41 and 58; Concluding Observations: Germany, UN Doc No CRC/C/15/Add.226, 26 February 2004, paras 43 and 59(c); Concluding Observations: Tanzania, UN Doc No CRC/C/TZA/CO/2, 21 June 2006, paras 62(d) and 68; Concluding Observations: Liberia, UN Doc No CRC/C/LBR/CO/2-4, 13 December 2012, paras 67 and 80(e) (all standard language on adolescent health or substance use and children in street situations, but without specific detail). There are, however, some notable exceptions, where it is clear that the Committee has paid close attention to national dynamics set out in the State party report. Contrast, for example, Concluding Observations: Maldives, UN Doc No CRC/C/MDV/CO/3, 13 July 2007, paras 7, 24, 27, 59, 60, 71, 72, 88 and 89; and Concluding Observations: Pakistan, CRC/C/PAK/CO/3-4, 15 October 2009, paras 65, 66, 67, 91, 92. In relation to Maldives there is a clear connection between each of the areas addressed (including concerns about previous recommendations not being followed up, challenges of data collection, drug use as a risk factor for HIV and problems of prevention and treatment) and the information provided by the State. None read as overly formulaic. With regard to Pakistan the drugs issue appears across various areas, but all are standard and the drugs issue appears to be incidental.

\textsuperscript{814} Compare, for example, the recommendations made to Netherlands and Chile in 2015. Concluding Observations: Netherlands, UN Doc No CRC/C/NLD/CO/4, 8 June 2015 para 47(b) (‘adolescent health’); Concluding Observations: Chile, UN Doc No CRC/C/CHL/CO/4-5 30 October 2015, para 63 (‘drug and substance abuse’).

\textsuperscript{815} Compare, for example, Concluding Observations: United Arab Emirates, UN Doc No CRC/C/ARE/CO/2, 30 October 2015, para 58(c); Concluding Observations: East Timor, UN Doc No CRC/C/TLS/CO/2-3, 30 October 2015, para 51(c).
chapter 1, there is no General Comment to date on Article 33, but the Committee has included drugs issues to varying extents in its General Comments on HIV, the child’s right to health, adolescent health, early childhood (parental drug use), juvenile justice (albeit in a footnote) and the rights of the child during adolescence. Since 2003 the Committee has made use of General Comments in recommendations relating to drugs frequently. However, such references are usually a preface to some formulation of standard language. In this regard the large majority refer to General Comment No. 4 on adolescent health, one of the weaker of the General Comments in terms of substantive content. Overall the Concluding Observations appear unaffected in any substantive sense. Standard language prevails.

It is not unusual, however, for human rights treaty bodies to develop formulaic Concluding Observations on specific rights or issues. This is necessary given their workload and the breadth of issues in front of them. There is, on the

817 CRC, GC 15, paras 65 and 66.
819 CRC, GC 7, paras 24 and 36(f).
820 General Comment No. 10: Children’s Rights in Juvenile Justice, UN Doc No CRC/C/GC/10, 25 April 2007, p. 5, fn 1 ‘Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.’ (Hereafter: CRC, GC 10)
821 CRC, GC 20.
822 For example, from the final session reviewed see, for example, Concluding Observations: East Timor, UN Doc No CRC/C/TLS/CO/2-3, 30 October 2015, para 51 (referring to General Comment No. 3); Concluding Observations: United Arab Emirates UN Doc No CRC/C/ARE/CO/2, 30 October 2015 para 58 (Referring to General Comments 3 and 15)
823 Concluding Observations can vary in approach, detail and quality. Compare, for example, the policy orientation of General Comment 20 on rights in adolescence and the far more legal doctrinal General Comment 19 on public budgeting. Both are high quality, but both approach their task very differently.
824 As one Committee member noted, however, standard language may also have to do with poor information from the State and the need to raise the issue in general to build the dialogue in the first place. But it can also be due to a poor understanding of the subject. Interview with Committee Member 2, on file.
one hand, the risk that such recommendations cannot speak to the specific situations on the ground. They may result in bland recommendations related to very specific problems, and using standard language necessarily means that identical recommendations are made for widely varying national contexts. But on the other hand, standard recommendations, made consistently, can potentially solidify and/or develop norms over time, and there is some evidence of this with regard to the ‘back and forth’ between States and the Committee above.

As soon as the Committee began making regular recommendations about drug use, it began formulating standard wording that would largely endure throughout the years. Its 1997 Concluding Observations on Ghana recommended:

‘…all appropriate measures to prevent and combat drug and substance abuse among children, such as public information campaigns, including in schools. It also encourages the State party to support rehabilitation programmes dealing with children victim (sic) of drug and substance abuse. In this regard, the Committee encourages the State party to consider seeking technical assistance from competent international organizations, such as the World Health Organization (WHO).’

Almost identical wording was use for Togo, Lao, Federated States of Micronesia, Japan, Maldives and Fiji closely thereafter. The foundations of more

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825 See for example, Concluding Observations: Afghanistan, UN Doc No CRC/C/AFG/CO/1, 8 April 2011, paras 51(d) and 52(d). The Committee raises the concern that ‘one third of women who do not have access to health services use narcotic drugs to treat themselves and their children, resulting in addiction’, but the recommendation is a standard call for the State party to, inter alia, adopt a strategy to ‘prevent and end’ drug use.
826 Concluding Observations: Ghana, UN Doc No CRC/C/15/Add.73, 18 June 1997, para 46.
827 Concluding Observations: Togo, UN Doc No CRC/C/15/Add.83, 21 October 1997, para 52; Concluding Observations: Federated States of Micronesia, UN Doc No CRC/C/15/Add.86, 4 February 1998, para 40; Concluding Observations: Japan, UN Doc No CRC/C/15/Add.90, 24 June 1998, para 47; Concluding Observations: Maldives, UN Doc No CRC/C/15/Add.91, 24 June
recent recommendations are already evident here, with the defining features being prevention, treatment, technical assistance, and children as ‘victims’ of drug abuse, which, as noted above, still recurs frequently.

A parallel early formulation locates the drugs issue within wider adolescent health concerns:

‘The Committee is particularly concerned over the absence of data on adolescent health, including on teenage pregnancy, abortion, suicide, violence and substance abuse… The Committee further suggests that a comprehensive and multidisciplinary study be undertaken on adolescent health problems. The Committee also recommends that further efforts, both financial and human, be undertaken to develop child-friendly, prevention, care and rehabilitation facilities for adolescents.’

This, too, has proven to be enduring language, influencing recommendations throughout the period under review, albeit changing in certain ways over time.\(^{828}\) It will be noted that its defining features include a call for adequate data collection, resources and ‘child/youth friendly’ services - elements which are missing from the other version. The concept of victimhood is also missing. It was in place again, however, in yet another variation, this time also reiterating the wording of Article 33:

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829 See for example, Concluding Observations: Ecuador, UN Doc No CRC/C/15/Add.93, 26 October 1998, para 23; Concluding Observations: Malawi, UN Doc No CRC/C/15/Add.174, 2 April 2002, para 46; Concluding Observations: Rwanda, UN Doc No CRC/C/15/Add.234, 1 July 2004, para 51; Concluding Observations: Bolivia, UN Doc No CRC/C/BOL/CO/4, 16 October 2009, para 56.
‘The Committee is particularly concerned at the high and increasing incidence of drug and substance abuse among youth; the lack of legal provisions in relation to narcotic drugs and psychotropic substances; and the limited social and medical programmes and services available in this regard. In the light of Article 33 of the Convention, the Committee recommends that the State party take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from being used in the illicit production and trafficking of such substances. It also encourages the State party to support rehabilitation programmes dealing with children victims of drug and substance abuse. In this regard, the Committee encourages the State party to consider seeking technical assistance from, *inter alia*, UNICEF and WHO."}

From these three we can see the consistent themes the Committee has adopted, albeit across differing formulations and with variations from time to time.\(^{30} 31\)


\(^{31}\) However, other language has been utilised during short periods, then fallen into disuse, including some carefully drafted examples that captured all of the above elements and others of potential importance. See for example, *Concluding Observations: Bolivia*, UN Doc No CRC/C/15/Add.256, 11 February 2005, para 62. ‘The Committee recommends that the State party:
(a) Formulate a rights-based plan of action for the protection of children and adolescents from the dangers of drugs and harmful substances, and involve children in its formulation and implementation;
(b) Provide children with accurate and objective information about the harmful consequences of substance abuse;
(c) Ensure that children using drugs and harmful substances are treated as victims and not as criminals;
(d) Develop recovery and reintegration services for child victims of substance abuse;
(e) Seek cooperation with and assistance from WHO and UNICEF’ [Emphasis added]. For the other examples of this wording see *Concluding Observations: Mexico*, UN Doc No CRC/C/MEX/CO/3, 8 June 2006, para 67; *Concluding Observations: Kiribati*, UN Doc No CRC/C/KIR/CO/1, 29 September 2006, para 49; *Concluding Observations: Marshall Islands*, UN Doc No CRC/C/MHL/CO/2, 19 November 2007, para 55.
More recent formulations reflect these long-standing characteristics. Some use fairly brief versions, merely calling for states to prevent or ‘combat’ drug abuse and provide treatment. But others reflect two potentially different approaches that speak to some of the differing positions set out in chapter 4. For example, the Committee has recommended that Monaco:

‘…strengthen its measures to prevent drug, alcohol and tobacco abuse among adolescents by the way of education on life skills, and engage the mass media to ensure the promotion of healthy lifestyles by children and adolescents. The State party should also provide rehabilitation, reintegration and recovery programmes specifically designed for child victims of drugs and substance abuse.’

This might be seen as the ‘healthy lifestyles and recovery’ formulation. But at around the same time the Committee recommended that Indonesia:

‘…allocate all the necessary human, technical and financial resources to address drug use by children and adolescents by, inter alia, providing children and adolescents with accurate and objective information aimed at avoiding and preventing substance abuse, including tobacco and alcohol, and develop accessible and youth-friendly drug dependence treatment and harm reduction services as well as life skills education.’

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832 See for example, Concluding Observations: Austria, UN Doc No CRC/C/15/Add.251, 31 March 2005, para 42; Concluding Observations: Bangladesh UN Doc No CRC/C/BGD/CO/4, 26 June 2009, para 66.
833 Concluding Observations: Monaco UN Doc No CRC/C/MCO/CO/2-3, 29 October 2013, para 42.
834 See also Concluding Observations: Portugal, UN Doc No CRC/C/PRT/CO/3-4, 25 February 2014, para 54 (with the addition of restrictions on tobacco advertising); Concluding Observations: Croatia, UN Doc No CRC/C/HRV/CO/3-4, 13 October 2014, para 47 (with the somewhat inexplicable omission of treatment and rehabilitation).
835 Concluding Observations: Indonesia, UN Doc No CRC/C/IDN/CO/3-4, 10 July 2014, para 54.
This might be referred to as the ‘harm reduction formulation’. Both of these are standard formulations reflecting earlier themes. The influence of earlier Concluding Observations is clear. What is of interest is that while these two recommendations share some elements, they are also substantively different, just as the earlier versions were. Both refer to alcohol and tobacco (as discussed above). Both refer to prevention and to treatment (again common to most Concluding Observations on this issue). But there are important differences in tone and approach between the two. The ‘healthy lifestyles and recovery’ formulation refers to the child as ‘victim’, and recommends including the mass media in promoting healthy lifestyles. Alongside the call for ‘recovery’ (itself a politically charged term in drug policy often indicating a rejection of or ambivalence towards harm reduction), this is far closer to the vision of the drug free society. The ‘harm reduction’ formulation, meanwhile, enters into controversial territory, as discussed above. It also omits the word victim and includes the qualifier that information should be ‘accurate and objective’. It is far more pragmatic and functional in its tone and approach. In other words, here we have two generally framed recommendations that, once unpacked, speak to, and can be seen to take sides on, politically contested areas.

836 See also Concluding Observations: Morocco, UN Doc No CRC/C/MAR/CO/3-4, 14 October 2014, para 57(c) and (d); Concluding Observations: Mauritius, UN Doc No CRC/C/MUS/CO/3-5, 27 February 2015 para 54(c) and (d) (with the specific inclusion of methadone maintenance therapy).
837 See, however, Concluding Observations: St Lucia, UN Doc No CRC/C/LCA/CO/2-4, 8 July 2014, para 49 (very similar wording to Monaco, but omitting the language of ‘victims’).
838 The Committee’s 2016 General Comment on the rights of the child in adolescence is noteworthy in bringing together many of the above elements. It arguably shows more support for the harm reduction formulation, and is a good indication of the Committee’s current position: ‘...States parties have an obligation to protect adolescents from the illicit use of narcotic drugs and psychotropic substances. States parties should ensure adolescents’ right to health in relation to the use of such substances, as well as tobacco, alcohol and solvents, and put in place prevention, harm-reduction and dependence treatment services, without discrimination and with sufficient budgetary allocation. Alternatives to punitive or repressive drug control policies in relation to adolescents are welcome. Adolescents should also be provided with accurate and objective information based on scientific evidence aimed at preventing and minimizing harm from substance use.’ CRC, GC 20, para 64.
5.6.2 External Normative Framing: Assuming Complementarities?

There are various examples of the Committee looking to external norms to influence its recommendations under the CRC, especially when these are other human rights treaties.\(^{839}\) For example, the Committee has long incorporated juvenile justice standards into its recommendations on Article 40,\(^{840}\) and it has called for legislation to be ‘in conformity’ with ILO 182 when discussing economic exploitation under Article 32 of the Convention.\(^{841}\) It has related CRC obligations under Articles 20 (family environment) and 21 (adoption) with the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993.\(^{842}\) The Committee has been clear, moreover, that States parties must consider their CRC obligations when acting as members of international trade organisations such as the WTO or IMF, suggesting an

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\(^{839}\) An example is its 2014 joint General Comment with the Committee on the Elimination of Discrimination Against Women. Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc No CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014. In its later General Comment on budgeting for child rights, we can see the Committee interpreting Article 4 of the CRC in line with resolutions of the General Assembly and the Human Rights Council to produce principles for public budgeting that would not easily emerge from the wording of the CRC itself. CRC, GC 19, para 7. Earlier, it had incorporated General Comment No. 14 on the right to health from the Committee on Economic Social and Cultural rights into its own General Comment on adolescent health. See CRC, GC 4, paras 40 and 41.

\(^{840}\) See, for example, Concluding Observations: Latvia, UN Doc No CRC/C/LVA/CO/2, 28 June 2006, para 62. ‘The Committee recommends that the State party ensure the full implementation of juvenile justice standards, in particular Articles 37, 40 and 39 of the Convention, in the light of the recommendations adopted by the Committee on its day of general discussion on juvenile justice (CRC/C/46, paras. 203-238) and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, and the Vienna Guidelines for Action on Children in the Criminal Justice System’. See also CRC, GC 10, para 4.

\(^{841}\) Concluding Observations: Slovenia, UN Doc No CRC/C/SVN/CO/3-4, 8 July 2013, para 70(d).

\(^{842}\) Concluding Observations: Iran, UN Doc No CRC/C/15/Add.254, 31 March 2005, para 50.
attention to potential tensions with other treaty regimes.\(^{843}\) However, it very rarely refers directly to treaties other than the CRC, to soft law standards, or to the jurisprudence of other mechanisms in its Concluding Observations about drugs.

There are two references to Special Procedures among the more than 300 Concluding Observations on this topic. One related to extrajudicial killings in the Philippines\(^{844}\) and the other to the arbitrary detention of ‘child drug addicts’ in Brazil.\(^{845}\) There have been thematic reports from Special Procedures in 2009 and 2010 focusing on drug policy and human rights, but these have not to date been referred to.\(^{846}\) The Committee regularly refers to other human rights treaty bodies to support its other findings, but only once in relation to a recommendation about drugs.\(^{847}\) Such commentary from other treaty bodies is not very common, it must be noted, so there may be little upon which the Committee can rely. But as we shall see in chapter 6, on occasion the Committee’s work risks incoherence with recommendations of other human rights treaty bodies.

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\(^{843}\) General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, UN Doc No CRC/C/GC/16, 17 April 2013, paras 47 and 48 (Hereafter: CRC, GC 16).

\(^{844}\) Concluding Observations: Philippines, UN Doc No CRC/C/PHL/CO/3-4, 22 October 2009, para 51. The Concluding Observation did not refer to those involved in the drug trade, but this was discussed in the meeting with the State party. See Summary Records: Philippines, UN Doc No CRC/C/SR.1429 23 September 2009, para 32 ‘...the Committee had received a recent, well documented report from Human Rights Watch stating that a high percentage of victims of extrajudicial executions were teenagers, and citing a pattern whereby death squads targeted persons involved in drug trafficking or suspected of criminal activity.’

\(^{845}\) Concluding Observations: Brazil, UN Doc No CRC/C/BRA/CO/2-4, 30 October 2015, para 88(g) ‘Expeditiously implement the recommendations made by the Working Group on Arbitrary Detention regarding the confinement of child drug addicts (see A/HRC/27/48/Add.3, para. 148 (d) and (j))’. This was included among recommendations on juvenile justice, but such compulsory treatment is not in fact conducted within the criminal justice system.


\(^{847}\) Concluding Observations: Jamaica, UN Doc No CRC/C/15/Add.210, 4 July 2003, para 43 (referring to the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of the Discrimination Against Women).
bodies to the same countries, which speaks to existing concerns expressed during debates about treaty body reform.

Guidance on demand reduction has been adopted at the UN level, and which refers to adolescents. This has been available to the Committee since 1998 when its recommendations about drugs became more common. Various other principles and goals were contained earlier in the World Programme of Action for Youth, adopted in 1996, and much later in the 2009 Political Declaration and Plan of Action on drug control. All are declarations adopted by the General Assembly after major summits or special sessions. Such standards, however, have never been referred to by the Committee as influencing State obligations to protect children from drugs under the CRC. Thus, it is not that such guidance is unavailable, as could be argued with some human rights mechanisms, just that the Committee has not used it. ⁴⁴⁸ This suggests that the Committee is not closed to including external norms, but its reasoning around the protection of children from drugs has not been guided in a substantive way by them.

While never referring to any specific recommendations made by the International Narcotics Control Board, the Committee has recommended that States parties seek its assistance ‘in the light of Article 33’. ⁴⁴⁹ The Board also reviews national drug policies and conducts missions to States parties to the drugs conventions. We can see the crossovers in the reports of both mechanisms. In


2009, for example, the CRC Committee recommended that the Democratic
People’s Republic of Korea (DPRK) strictly enforce its drug laws.\textsuperscript{850} The State
party had reported that its recent legislative changes had been undertaken on
the advice of the INCB after its 2006 mission to the country.\textsuperscript{851} Implicit in this
recommendation is that the relevant States parties should heed the recommenda-
tions of this other treaty body as a component of compliance with Article
33, reflecting a form of inter-regime monitoring. By this assumption, what the
INCB recommends would by definition be in line with CRC obligations, and,
moreover, what it recommends would affect the content of the right.

The ratification of human rights treaties, adoption and family law conventions
and other international instruments is regularly called for.\textsuperscript{852} Similarly, the rat-
ification of the UN drugs conventions appears in the Committee’s General
Comment on the child’s right to health,\textsuperscript{853} and in repeated guidance for peri-
odic reporting.\textsuperscript{854} This is relevant because it again asks the question as to what
these concurrent obligations suggest, just as one might ask what the INCB in
fact recommends (especially in view of the relative secrecy of its dealings with
States). Here, the Committee has not gone further, but the clear implication,
or assumption, is that the regimes are complementary. There is no evidence

\textsuperscript{850} Concluding Observations: DPRK, UN Doc No CRC/C/PRK/CO/4, 27 March 2009, para 63.
\textsuperscript{851} Fourth Report: DPRK, UN Doc No CRC/C/PRK/4 15 January 2008, para 242. See also
Report of the International Narcotics Control board for 2006, UN Doc No E/INCB/2006/1,
2006 paras 463-466. This may have been to deflect attention from actual problems on the
ground. Increasing penalties suggests a large problem, which DPRK denied.
\textsuperscript{852} It is too common to list examples. Taking at random a set of Concluding Observations from
2015 see Concluding Observations: Gambia, UN Doc No CRC/C/GMB/CO/2-3, 20 February
2015 para 52(d) ‘Ratify the Convention on the Recognition and Enforcement of Decisions rel-
lating to Maintenance Obligations, the Convention on the Law Applicable to Maintenance Ob-
ligations, and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and
Co-operation in respect of Parental Responsibility and Measures for the Protection of Children’
\textsuperscript{853} CRC, GC 15, para 66.
\textsuperscript{854} This has been the case since the early days. See Treaty-Specific Guidelines Regarding the
Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44,
Paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc No CRC/C/58, 20
November 1996.
from the documents of reflection on the concurrent application of the drugs conventions, or any specific aspects of them, and the CRC.

5.7 Conclusion

The Committee’s Concluding Observations show that there is the potential for CRC, through Article 33, to operate as a more critical frame of reference for a child-focused assessment of drug policy. There is evidence, for example, that a ‘dialogue’ is in fact taking place. States parties are willing to report the efforts they have undertaken as means to comply with the Committee’s recommendations under Article 33. In turn, the Committee sometimes responds directly to the information in States parties’ reports. With this in mind, the Committee has made some consistent recommendations to States parties that may inform an understanding of the content of the child’s right to protection from drugs independent of any other international agreements. In some cases this has been very challenging and has entered into controversial territory. This is especially the case with recent recommendations for harm reduction, and that children should not be criminalised for their use of drugs. At the very least the Committee is of the view that States parties have clear positive obligations relating to data collection (including adequate disaggregation), prevention (including school-based measures and life skills education), drug treatment and harm reduction (which must be youth friendly and accessible without parental consent if in the best interests of the child), technical assistance and appropriate budgeting. Importantly, this includes guidance that is not present in the international drug control system. Recommendations such as harm reduction for minors or decriminalisation of their behaviours have never risen in the annual reports of the INCB\(^{855}\) nor in resolutions of the Commission on Narcotic Drugs. They are far too controversial. Meanwhile, any

critique of specific States, which the Committee has the ability to do, will obviously not occur through a forum such as the CND, and such critiques from the INCB tend to lean towards holding back reforms that challenge the drugs conventions.\textsuperscript{856}

However, while the above recommendations may have this potential, and have from a certain perspective already added to the international discourse, there is a certain legal arbitrariness to them. This is something for which human rights treaty bodies have been challenged already.\textsuperscript{857} The Committee’s recommendations appear unaffected by the specific articles against which they are made, or the specific rights in question (i.e. their normative framing). Standard language tends to prevail. Even if this may demonstrate the holistic approach the Committee has adopted, it also demonstrates a certain lack of legal reflection as to State obligations stemming from the dedicated right in question, which essentially extends the lack of such discussion we saw in the drafting process. For example, in making what appear to be \textit{ultra vires} recommendations relating to substances not under international control, the Committee has not apparently reflected on what the reference to the ‘relevant international treaties’ within the provision was intended to do. It is unsurprising, then, that there is a wider lack of reflection on the relationship between the regimes.

There are, moreover, considerable gaps that go to the heart of both the content of Article 33 and the CRC and the drugs conventions. The Concluding Observations, viewed as a whole, lean overwhelmingly towards the first clause of Article 33 and have largely not focused on the prevention of the involvement

\textsuperscript{856} Bewley-Taylor, \textit{Consensus Fractured}, pp. 224-245.

of children in the drug trade. Access to controlled medicines is entirely omitted. These are core issues that may raise internal tensions within the Convention, within Article 33 itself, and between the CRC and the drugs conventions.

Finally, while the Committee does look to external norms, it has not often done so with regard to Article 33 beyond recommendations to ratify the UN drug control conventions, and to seek assistance from the INCB, implying that this other treaty body’s recommendations should be heeded as part of compliance and that the two regimes are, without more, complementary.

6.1 Introduction

This chapter focuses on legislative measures, drug strategies and State actions in drug control reported to the Committee pursuant to their CRC obligations. It begins by looking at the concept of ‘appropriate measures’ in the practice of the Committee. This, it will be recalled, was a key disagreement regarding Article 33 in the debates set out in chapter 4. Thereafter, based on the documentation from the periodic reporting process, it considers the legislative measures and drug strategies adopted by States and how these have been received by the Committee. Finally, it looks more closely at examples of reported State policies or actions that raise human rights concerns, and how the Committee has responded.

6.2 ‘Appropriate Measures’

‘Appropriate measures’ is a common phrase in international law\(^{858}\) and arises throughout the CRC, including Article 33.\(^{859}\) It is used also in the drugs conventions, for example in reference to crop eradication and demand reduction

\(^{858}\) See for example, Article 2(1), International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; throughout the Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13.

\(^{859}\) Articles, 2.2 (non-discrimination); 18.3 (children of working parents); 19.1 violence against children; 21(d) (inter-country adoption not resulting in financial gain); 22.1 (protection for refugee children); 24.2 and 24.3 (provision of health services and abolition of harmful traditional practices); 27.3 and 27.4 (assistance to parents and maintenance payments); 28.1.b, and 28.2 (access to secondary education and ensuring school discipline conformity with dignity and the CRC); 33 (drugs); 39 (recovery and rehabilitation of victims).
efforts.\textsuperscript{860} The term has been seen as relating to State obligations of due diligence,\textsuperscript{861} itself designed to be flexible in interpretation.\textsuperscript{862} We see this in the general obligation contained in Article 4 of the CRC, requiring ‘appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention’. The question, then, is whether ‘appropriate measures’ has any normative content beyond the general obligation of due diligence when it comes to protecting children from drugs.\textsuperscript{863} This recalls fundamental differences in approach between the human rights and drug control positions. It is therefore important to look more closely at how the Committee has approached the term.

The Committee has issued a General Comment on Article 4 of the Convention, setting out a range of legal and structural ‘general measures of implementation’.\textsuperscript{864} It does not, however, delve into ‘appropriate measures’ for a given goal, such as that contained in Article 33. However, Article 19 of the CRC (freedom from all forms of violence) is very similar in wording to Article 33 and the Committee has issued a General Comment on this provision. In its view, ‘The term “appropriate” refers to the broad range of measures cutting across all sectors of Government, which must be used and be effective in order to prevent and respond to all forms of violence.’\textsuperscript{865} It continued that ‘legislative measures’ include not only the law on the books but also the ‘implementing

\textsuperscript{860} Article 14(2) and (3), Vienna Convention.
\textsuperscript{861} International Law Association, \textit{Study Group on Due Diligence in International Law, First Report}, 7 March 2014.
\textsuperscript{862} I. Kulesza, \textit{Due Diligence in International Law}, Brill, 2016, p 1.
\textsuperscript{863} Early critics of the CRC were not convinced. See W. H. Bennett, ‘A Critique of the Emerging Convention on the Rights of the Child’, 20 \textit{Cornell International Law Journal} 1, 1987, pp. 1-64 arguing at 37 that ‘It will be difficult for such vague language ever to “crystallize” into binding international law’ and that the CRC ‘provides no guidelines, nor does it refer to any international standard of appropriateness’.
\textsuperscript{864} CRC, GC 5 addresses such measures.
\textsuperscript{865} CRC, GC 13, para 39.
and enforcement measures’. The Committee was also clear that ‘appropriate’ cannot be interpreted to mean acceptance of some forms of violence.’ A long list of approximately forty measures considered ‘appropriate’ followed. These ranged from treaty ratification to large-scale development, such as ‘child-friendly cities planning’ and poverty reduction strategies, to more specific interventions. Thus we can identify both normative and instrumental elements of the term. ‘Appropriate measures’ here involves general measures, specific interventions and enforcement actions, and to some extent scrutiny of the implementation of those interventions.

It has been argued that the wording in Article 19 and 33 must mean the same thing. If ‘appropriate’ cannot be interpreted to mean acceptance of some forms of violence, then ‘appropriate measures’ under Article 33 cannot be interpreted to mean acceptance of some forms of drug use and involvement in the drug trade. Through this argument harm reduction measures for this age group would be controversial as they are premised on ongoing drug use, hence the disagreement with the Committee’s recommendations in this regard. But in a later General Comment on Article 4 (budgeting for the realisation of children’s rights), the Committee was more nuanced than in its Article 19 commentary. It stated that ‘[m]easures are considered appropriate when they are relevant to directly or indirectly advancing children’s rights in a given context…’ (emphasis added). This makes sense given the range of provisions

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866 Ibid, para 40.
867 Ibid, para 39.
868 John Tobin has criticised the lack of a clear interpretive methodology from human rights treaty bodies in developing such long lists of requirements. Tobin, ‘Seeking to Persuade’, at 25 and 26.
869 CRC, GC 13, paras 41(a), 43(a) iii, vi and vii.
870 The Committee challenged heavy-handed ‘zero-tolerance’ approaches to violence. This may seem contradictory to its own zero tolerance statement, but the Committee was referring to children and young people involved in violence and how State responses can further cause them harm. Ibid, para 15(c).
872 CRC, GC 19, para 22.
and issue-areas within the CRC with which the term is associated. Article 19
and 33 are good examples. Drug use among children, for example, is a behav-
iour. Violence against children is an act committed against them. These and
the other provisions calling for ‘appropriate measures’ are all very different.
In this way the simple equation of the wording of Article 19 with Article 33 is
at least questionable. It may well be that no drug use is ‘accepted’ but this
does not answer what to do about and for those children and young people
who do use drugs, or the relevance of scientific evidence in this regard.

In a general sense, then, the term is unclear as regards Article 33. But what
about its use ‘in context’ through the periodic reporting process? A review of
the Concluding Observations shows that the Committee does not appear to
place much importance on the meaning of the term. This is evidenced in the
fact that it is frequently amended. Alongside calls for ‘appropriate measures’
(often a mere restatement or a version of Article 33),871 the Committee has

871 For example, Concluding Observations: Mali UN Doc No CRC/C/15/Add.113, 2 November
1999, para 35 (‘In the light of Article 33 of the Convention, the Committee recommends that
the State party take all appropriate measures, including educational measures, to protect chil-
dren from the illicit use of narcotic drugs and psychotropic substances and to prevent the use
of children in the illicit production and trafficking of such substances.’) See also Surinam UN Doc
No CRC/C/15/Add.130, 28 June 2000 para 56; Seychelles UN Doc No CRC/C/15/Add.189, 19
October 2002, para 53(a); Maldives UN Doc No CRC/C/MDV/CO/3, 13 July 2007, para 89(b);
Iceland UN Doc No CRC/C/ISL/CO/3-4, 23, January 2012, para 45.
called for ‘effective measures’,874 ‘relevant measures’,875 ‘firm measures’876 and, on various occasions, ‘all necessary measures’.877 On occasion, moreover, the Committee’s wording moves beyond merely ‘all necessary measures’ to ‘all necessary measures to fight...’878 or all necessary measures (or simply ‘measures’) to combat...”879 (emphasis added). Arguably, it is not all that instructive which general words the Committee uses so long as the specifics are helpful. Sometimes calls for ‘all necessary measures’ to fight or eliminate drugs are followed by specific interventions, such as prevention and treatment, but not always.880 These recommendations, moreover, cannot be read in isolation from the dialogue that is taking place the context of existing national responses. Consider, for example, the Committee’s recommendation that Nepal

874 For example Concluding Observations: Colombia, UN Doc No CRC/C/15/Add.137, 16 October 2000, para 66; Eritrea, UN Doc No CRC/C/15/Add.204, 2 July 2003 para 42; Ecuador UN Doc No CRC/C/15/Add.262, 13 September 2005, para 56(c); Bolivia, UN Doc No CRC/C/BOL/CO/4, 16 October 2009, para 56(b). On occasion the Committee has also referred to ‘effective measures’ or ‘strengthening’ of measures, but has specified interventions for which there is no evidence of effectiveness, in particular ‘awareness campaigns’ or ‘mass media campaigns’. Concluding Observations: Slovenia, UN Doc No CRC/C/SVN/CO/3-4, 8 July 2013, para 55 ‘It is further recommended that the State party take effective measures to decrease and prevent adolescents’ tobacco and alcohol consumption as well as drug and substance abuse, by launching awareness-raising programmes targeting youth on the detrimental impact these habits may have on their healthy lifestyle.’ See also Monaco, UN Doc No CRC/C/MCO/CO/2-3, 29 October 2013, para 42, calling for the State party to ‘strengthen measures’ including mass media campaigns.

875 Concluding Observations: Italy, UN Doc No CRC/C/ITA/CO/3-4, 31 October 2011, para 54. In this case the Committee specified that such measures were ‘communication programmes and campaigns, the provision of life-skills education to adolescents, and the training of teachers, social workers and other relevant officials.’

876 Concluding Observations: Nepal, UN Doc No CRC/C/15/Add.57, 7 June 1996, para 35.

877 For example, Concluding Observations: Guyana UN Doc No CRC/C/15/Add.224, 26 February 2004, para 44; Bahamas, UN Doc No CRC/C/15/Add.253, 31 March 2005, para 50; Yemen, UN Doc No CRC/C/15/Add.267, 21 September 2005, para 70; Serbia, UN Doc No CRC/C/SRB/CO/1, 20 June 2008, para 57; Bulgaria, UN Doc No CRC/C/BGR/CO/2, 23 June 2008, para 50; Netherlands, UN Doc No CRC/C/NLD/CO/3, 27 March 2009 para 58; Romania UN Doc No CRC/C/ROM/CO/4, 30 June 2009 para 71; Spain, UN Doc No CRC/C/ESP/CO/3-4, 3 November 2010, para 51.

878 For example, Concluding Observations: Honduras, UN Doc No CRC/C/HND/CO/3, 3 May 2007, para 61(b); Kazakhstan, UN Doc No CRC/C/KAZ/CO/3, 19 June 2007, para 52(a); Peru, UN Doc No CRC/C/PER/CO/3, 14 March 2006, para 55.

879 Concluding Observations: Germany, UN Doc No CRC/C/15/Add.226, 26 February 2004, para 43; St Lucia, UN Doc No CRC/C/15/Add.258, 21 September 2005, para 69.

take ‘firm measures’ for the protection of children from ‘drug related activities’.\textsuperscript{881} The State party had already indicated that it would be taking ‘radical’ and increasingly stringent enforcement measures.\textsuperscript{882} But what does this mean in human rights terms, and what does a ‘firm measure’ in child rights contribute?

If ‘appropriate measures’ could operate as the normative grounding of Article 33, as the human rights position holds, this is not evident yet in the Committee’s work. It may equally operate in the opposite direction to provide a seal of approval on State actions. The term is underdeveloped, and potentially still entirely subjective. The following sections therefore look more deeply into the context of the periodic reporting process, focusing on laws, policies and enforcement practices to further understand the information provided to the Committee and its responses over time.

6.3 Drug Laws and Policies

6.3.1 ‘Appropriate’ Legislative Measures

A wide variety of laws have been reported to the Committee, from general child protection legislation or children’s acts to constitutional provisions relating to drugs.\textsuperscript{883} By far the most common are criminal drug laws. In total, 151 of the 193 States parties included in this study reported their criminal drugs laws and the various sanctions imposed as evidence of legislative compliance with Article 33. Some did so in successive reports, with the result that

\textsuperscript{881} Concluding Observations: Nepal, UN Doc No CRC/C/15/Add.57, 7 June 1996, para 35.
\textsuperscript{882} Initial Report: Nepal, UN Doc No RC/C/3/Add.34, 10 May 1995, para 376(d).
\textsuperscript{883} Constitutional provisions relating to drugs take various forms, such as limitations on rights, drug control as an aim of the State, and constitutional amendments to strengthen criminal enforcement. See, for example, Article 71 of the Constitution of Paraguay, 1992, as revised; and Article 7, Constitution of Afghanistan, 2004. See also second periodic report of Mauritius, indicating a change to the Constitution to allow denial of bail in relation to repeat drug offences. UN Doc No CRC/C/65/Add.35, 19 July 2005, para 139. See Article 3A.a.i of the Constitution of Mauritius, 1968, as revised.
almost one out of every two reports the Committee has received during this period referred to criminal drug laws as fulfilling Article 33 obligations. In most cases, but not all, these are set alongside various other measures, primarily prevention and treatment efforts. But from this legislative framework flows the majority of State effort.

On the one hand, this focus on criminal laws from States is inevitable. Almost all States, pursuant to the UN drugs conventions, have adopted criminal legal frameworks for suppressing the drug supply chain, from production through to use. The interesting aspect of this finding is that the majority of States parties view the punitive suppression model as commensurate with the appropriate legislative measures required under the CRC, and explicitly report that as such. For example, Qatar has described its criminal laws in pursuit of a society free from drugs as being implemented ‘pursuant to Article 33’.

Bulgaria has reported in similar terms that ‘…the Bulgarian Penal Code, pursuant to Article 33 of CRC, explicitly prohibits the use and production of and trafficking in harmful narcotic drugs and psychotropic substances and provides for severer (sic) penalties in case the offences are committed against juveniles and minors’. Draft legislation has also been reported in this way. East Timor, for example, has described legislation in development as aiming to use CRC principles ‘to guide the drafting’ to ensure ‘a consistent legislative framework to protect children’. What was described, however, was again a standard crim-

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884 See for example, Initial Report: Jordan, UN Doc No CRC/C/8/Add.4, 26 November 1993, paras 170-176 (setting out only the criminal code).
inal framework developed pursuant to transnational criminal law, but described commensurate with child rights for the attention of the Committee. It is noteworthy, moreover, that this equation by States of Article 33 with criminal legal frameworks includes those that have not ratified the drugs conventions. These States are therefore referring to their understanding of CRC obligations independent of those under the drugs treaties.

This places the Committee in a difficult position, as the majority of tensions between human rights and drug control are in the implementation of these kinds of criminal laws. Here we see them justified not only with reference to the international drug control obligations, but with child rights law.

6.3.1(a) Severity of Response as Child Protection

As illustrated by Bulgaria above, many States point specifically to increased penalties when drug offences involve minors, or where children are ‘encouraged’, ‘induced’ or ‘incited’ to use drugs (which recalls the discussion on this

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888 Second Report: East Timor, ibid para 249 ‘When implemented, this act will provide a specific detailed regime for the treatment of offences involving drugs and other harmful substances.’

889 See for example Initial Report: Palau, UN Doc No CRC/C/51/Add.3 23 March 2000, para 246; Initial Report: Papua New Guinea, CRC/C/28/Add.20, 21 July 2003, paras 387 and 388 (noting that the legislation dates from colonial times and it out of date, and that new legislation is forthcoming); Initial Report: Solomon Islands, CRC/C/51/Add.6 12 July 2002, para 477 (stating under the section on Article 33 that the Dangerous Drugs Act and Penal Code were implemented to protect individual rights); Initial Report: Tuvalu, UN Doc No CRC/C/TUV/1, 10 October 2012, para 342 (indicating that supply offences were criminalised but drug use itself was not subject to legal regulation). The others that have ratified the CRC but not the drugs conventions are Equatorial Guinea, Kiribati, South Sudan and State of Palestine. Kiribati and Equatorial Guinea included very little or nothing about drugs in their reports to the Committee. The State of Palestine and South Sudan have yet to report.

issue in chapter 2). This includes States in which the possession and use of drugs itself is not a crime. The offences in question, though contained in drug laws, are against children. In this way States parties are signalling their fulfilment of Article 33’s legislative requirements, even though both stringent penalties and incitement were removed from the earlier drafts of Article 33. What they are also demonstrating, moreover, is that their national legislation conforms to the relevant provisions of the Vienna Convention where simultaneously these provisions were agreed (on this form of norm transfer, see chapter 8).

These laws may seem unproblematic but they do raise important challenges. While incitement is well known in criminal law, including in transnational and international criminal law, so too are problems with it, in particular proving a causal connection between the alleged incitement and the offence. The official commentary to the Vienna Convention notes that the relevant provision is ‘widely drawn’ and that the wording of encouragement ‘by any means’ is very broad. It was borne of a concern ‘about magazines and films glorifying drug

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use”. A footnote in the commentary recognises, it could cover websites. Freedom of expression concerns are therefore clear, and arose, as we have seen, in drafting the 1972 Protocol amending the Single Convention.

A further concern is proportionality. In most cases already stringent sentences for certain drug offences are increased, in some cases doubled, when minors are involved. They can amount to several decades. The Committee, for its part, has on occasion appeared to endorse such stringent measures. The Republic of Korea’s initial report to the Committee, for example, noted that it imposed ‘penal servitude’ of ten years upon those who sell drugs to juveniles under the age of fourteen. In discussion with the Committee the State party was asked if it ‘intended to amend that law to provide the same protection for minors under 18 years of age’. Whether or not this was actually a protective measure was not questioned. Mostly, however, severity of response is silently accepted. In its initial report, the Islamic Republic of Iran explained to the

803 Vienna Convention Commentary, p. 74, paras 3.72 and 3.73. Interestingly, during the drafting of the Vienna Convention the ‘Parents Music Resource Center’ was established in the US to increase controls over song lyrics including sexual, violent or drug-related content. Two of the fifteen ‘filthy’ songs the PMRC highlighted as indicating their concerns were listed because of drug and alcohol content. John Denver’s ‘Rocky Mountain High’ had been banned on many radio stations. It obviously had nothing to do with drugs.

804 This arose recently when Russian authorities shut down a HIV prevention website after explaining the benefits of methadone (two years later the Committee welcomed Russia’s drug strategy). ‘Russia: Government Shuts HIV-Prevention Group’s Website. Move is an Assault on Freedom of Expression’, Human Rights Watch, Article 19, International Centre for Science in Drug Policy (Press Release), 8 February 2012.

805 From the UK, see for example John Calder Publications v Powell [1965] 1 QB 509 (relating to the novel Cain’s Book by Alexander Trocchi), Handyside v UK, App No 5493/72, [1976] ECHR 5 (relating to an educational book discussing drug use) and R. v Skirving [1985] 1 QB 819 (relating to a pamphlet entitled ‘Attention Coke Lovers: Freebasing, the greatest thing since sex’).


807 Initial Report: Republic of Korea, UN Doc No CRC/C/8/Add.21, 30 November 1994, para 199.


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Committee that, in the context of drug control, it applied ‘the severest punishment stipulated in law…for cases involving the exploitation of children’. The Committee’s recommendations did not address this, placing its remarks about drugs instead within broader adolescent health concerns. While the reasons for Iran’s approaches were reaffirmed, in other words, the meaning of ‘severest punishment’ was not queried in Concluding Observations or in the meetings with the State party delegation.

While Iran’s report specified exploitation, States parties also frequently report to the Committee that ‘severe’, ‘stringent’ or ‘harsh’ penalties or punishments are applied for general drug offences and to drug users, absent exploitation, but still with a view to protecting children. Greece’s first report, for example noted that ‘In order to protect minors against drugs, Greek legislation on narcotics lays down very severe punishments…’ Such laws include, and in some cases focus solely or primarily, on punishments for drug use or personal

90 Concluding Observations: Iran, UN Doc No CRC/C/15/Add.123, 28 June 2000, paras 43 and 44.
possession, i.e. targeting users as distinct from those exploiting children.\textsuperscript{904} In its 2014 section on Article 33, for example, the United Arab Emirates set out ‘a number of legislative measures to protect children from substance abuse’. This involved, mainly, ‘the promulgation of Federal Act No. 1 of 2005 on combating narcotic drugs and psychotropic substances. The act criminalizes the illicit use of narcotic drugs.’\textsuperscript{905} But even where this is not stated explicitly, the criminalisation of users is necessarily incorporated into the broad criminal laws presented by most countries.\textsuperscript{906} General production and trafficking offences, without the need for exploitation, are in most cases reported within the overall heading of Article 33. Malawi, for example, has remarked that forthcoming drug trafficking legislation ‘will be of great benefit to children, as it will make it more difficult for them to be exposed to drugs’.\textsuperscript{907}

As such we see a general equation by many States parties of severity of response, or stringency of drug laws, with protection; something we saw also in the drafting of the drugs conventions, particularly the Vienna Convention. Dominica captured this sentiment in its 2004 report, stating that it remained ‘committed to eradicate, through every means possible, this menace from society. In so doing, children would be protected from the ill effects of the drug


\textsuperscript{905} Second Report: United Arab Emirates, UN Doc No CRC/C/ARE/2, 3 November 2014, para 139.

\textsuperscript{906} Approximately 30 States or territories have some form of decriminalisation of drug use/possession. See A. Rosmarin and N. Eastwood, \textit{A Quiet Revolution: Drug Decriminalisation Policies and Practice Across the World}, Release, 2011.

abuse scourge’ (emphasis added). In an early report Syria explained that its new drug law was adopted to provide the ‘highest degree of protection’ to children. The Government claimed that through stringent penal provisions, including the death penalty, ‘Syrian law protects children from any harm that might be caused by any type or form of narcotic substances’ and that the ‘effectiveness of this protection is illustrated by the absence of drug addiction among children of all ages.’ This claim was not substantiated, nor was it queried by the Committee. Similarly, Iraq’s initial report to the Committee in 1998 noted the ‘severe penalties’ adopted under the heading of Article 33. Like Syria, Iraq claimed, without any data, to be free from ‘the widespread use of narcotic drugs’, and to be ‘clean in this regard’. The Committee raised concerns about the lack of health data in its Concluding Observations, but did not challenge the claims made about drug use in the absence of that data, and upon which such stringent measures were justified.

Clearly, where severe penalties or heavy-handed enforcement measures are applied to children under the age of 18 various provisions of the Convention are directly applicable. But the application of criminal laws directly to children


911 Ibid, para 264.


914 Ibid, para 123.

is only part of the picture. The situation is more complicated from the perspective of the CRC when the criminal laws in question target adults with the aim of protecting children and, crucially, of implementing CRC provisions.

6.3.2 Challenging Drug Laws

A problem identified above is the prima facie determination by States of the ‘appropriateness’ of their own behaviour. But it is the content of their laws, as well as the effects of their enforcement, that must matter, not their mere existence. As may be expected, however, States parties are rarely critical of their own drug laws and strategies. Periodic reports, it has been noted, can paint a ‘deceptively rosy’ picture of the state of child rights in the relevant State party.916 There are some examples of States raising concerns about the effectiveness of criminal drug laws.917 Luxembourg, for example, after explaining that 1% of the population used cannabis, stated that ‘experience shows that the consumption of an item does not decline when it is declared illegal’.918 Other States have been open about potential child rights and human rights consequences of drug control.919 But these self-critical reports are exceptions

917 Initial Report: Macedonia, UN Doc No CRC/C/8/Add.36, 27 June 1997, para 257 (after describing its criminal laws) ‘In the Republic of Macedonia, the attitudes towards drug abuse are still burdened with criticism, rejection, and with the demand for more repressive measures, in other words, the prohibitionist attitude prevails. The gradual transition towards decriminalization and depenalization of drug abuse, or gradual replacement of the policy of prosecution and punishment with the attitude of tolerance, assistance and guidance, is the only way to the resolution of this problem’; Second Report: Burundi, UN Doc No CRC/C/BDI/2, 7 January 2010, para 322 ‘Proposed preventive and punitive legislative measures do not get to the root of the problem’.
918 Initial Report: Luxembourg, UN Doc No CRC/C/41/Add.2, 11 April 1997, para 810. This appears to have been met with some concern by one Committee member. See Summary Records: Luxembourg UN Doc No CRC/C/SR.471, 23 September 1998, para 9.
that prove the rule. It therefore falls to the Committee to scrutinise the appropriateness of the legislative measures adopted in accordance with its mandate.

On thirty-three occasions the Committee has critiqued or challenged in some way the legal frameworks for drugs reported by a State party. Of these, eleven were concerns about the absence of drugs legislation.\textsuperscript{920} While critiquing the legislative framework in a certain way, the Committee went on to recommend the development of such legislation without qualification as to content. For example, the Committee raised concerns about the absence of specific legislation protecting children from drugs in Antigua and Barbuda in 2004,\textsuperscript{921} and recommended such legislation in its meeting with the State party.\textsuperscript{922} The Committee had already been informed that the State was waging a 'war on drugs' and had described already its broad criminal legal framework.\textsuperscript{923} Similarly, in 2005 the Committee urged Nepal to adopt the 'necessary legislation' to protect children from involvement in the drug trade.\textsuperscript{924} The question, then, is what type of legislation the Committee wished to see. As such the critique is weak, possibly even a permissive endorsement of whatever legislation the State may wish to adopt.

\textsuperscript{920} \textit{Concluding Observations: Federated States of Micronesia}, UN Doc No CRC/C/15/Add.86, 4 February 1998, para 19; \textit{Belize} UN Doc No CRC/C/15/Add.99, 10 May 1999, para 29; \textit{Guinea} UN Doc No CRC/C/15/Add.100, 10 May 1999, para 33; \textit{Benin} UN Doc No CRC/C/15/Add.106, 12 August 1999, para 31; \textit{Papua New Guinea} UN Doc No CRC/C/15/Add.229, 26 February 2004, para 61; \textit{Antigua and Barbuda} UN Doc No CRC/C/15/Add.247, 3 November 2004, para 62; \textit{Nigeria} UN Doc No CRC/C/15/Add.257, 13 April 2005, para 67; \textit{Nepal} UN Doc No CRC/C/15/Add.261, 21 September 2005, para 84; \textit{Trinidad and Tobago} UN Doc No CRC/C/TTO/CO/2, 17 March 2006, para 63; \textit{Swaziland} UN Doc No CRC/C/SWZ/CO/1, 16 October 2006, para 65; \textit{Cook Islands} UN Doc No CRC/C/COK/CO/1, 22 February 2012, para 51.

\textsuperscript{921} \textit{Concluding Observations: Antigua and Barbuda}, UN Doc No CRC/C/15/Add.247, 3 November 2004, para 62.

\textsuperscript{922} \textit{Summary Records: Antigua and Barbuda}, UN Doc No CRC/C/SR.993, 5 October 2004, 65.

\textsuperscript{923} \textit{Initial Report: Antigua and Barbuda}, UN Doc No CRC/C/28/Add.22, 9 December 2003, para 311 and 315.

\textsuperscript{924} \textit{Concluding Observations: Nepal}, UN Doc No CRC/C/15/Add.261, 21 September 2005, para 84.
In eleven instances the criminalisation of children who use drugs was directly
challenged. Three more related to compulsory drug treatment (discussed fur-
ther below). One sought a change to legislation to improve drug treatment for
children. 925 Only seven could be described as challenges to the overall legal
frameworks around drugs. Four, however, arose in discussion with the State
party and did not ultimately feature in Concluding Observations. Of these, one
questioned abusive practices, 926 one challenged the effectiveness of criminal
laws in reducing drug use, 927 and one queried the exclusive focus on ‘punitive’
measures. 928 Conversely, Committee members have also raised concerns about
the drug policy of the Netherlands being too ‘liberal’. 929

This means that only three Concluding Observations out of more than 300
raising drugs issues include challenges to legal frameworks for drug control.
Of these, one called for a ‘review and update’ of drug laws on the basis of
increasing rates of use. 930 But as with concerns about the absence of legislation
it was not clear what was wrong with the legislation needing review. In an-
other a legislative review was recommended in order to adopt a more ‘child-
sensitive approach’, the focus of which can be inferred from the information
presented by the State. 931 The remaining example was Ukraine in 2011. Here,
the Committee raised concerns about drugs legislation in development that

925 Concluding Observations: Colombia, UN Doc No CRC/C/CO/CO/4-5, 6 March 2015 para
48 ‘The Committee recommends that the State party amend Act 1566 on the comprehensive
care of drug users to include specific actions for the care of children who are drug users…’
927 Summary Records: Pakistan, UN Doc No CRC/C/SR.1444 6 April 2010, para 70.
928 Summary Records: Armenia, UN Doc No CRC/C/SR.604, 9 March 2000, para 70.
929 Summary Records: Netherlands, UN Doc No CRC/C/SR.928, 23 January 2004, paras 44
and 81.
930 Concluding Observations: Netherlands Antilles, UN Doc No CRC/C/15/Add.186, 13 June
2002, paras 62 and 63. However, the Committee makes obviously contradictory statements in
raising concerns about the ‘rise’ in and ‘high incidence’ of drug use alongside concerns about
an ‘absence’ of data on the issue. Clearly, without the latter the former cannot be stated. See
paras 48, 62(a) and 62(b).
931 Concluding Observations: Maldives, UN Doc No CRC/CMDV/CO/3, 13 July 2007, para
89(a), ‘Child-sensitive’ here likely referred to the Committee’s concerns about children who
use drugs being treated as criminals and the mandate of the National Narcotic Control Bureau
being restricted to those over 16. See para 88.
would decrease quantity thresholds triggering possession offences and named the relevant bill specifically. Part of the concern was not just child contact with the criminal justice system, but the effect on children due to parental criminal records.\textsuperscript{932} It is the only Concluding Observation to date with a clear challenge to criminal drug laws beyond the criminalisation of children for their own drug use. Crucially, where a later report was received from any of these thirty-three States parties during the period under review (fourteen of the thirty-three), none were followed up to uncover whether any changes had taken place based on the Committee’s concerns or the effects of any such changes.\textsuperscript{933}

Nonetheless, the strengthening of criminal laws or sanctions has been reported as having been done to implement earlier Committee recommendations. Again we see the ‘constructive dialogue’ in effect. For example, in response to a very general concern and recommendation about drug abuse,\textsuperscript{934} Ghana replied that: ‘\textit{In conformity with the recommendation on drug abuse}, the Government of Ghana has taken a stern stand on drug abuse and illicit drugs, and investigates all cases involving drugs and is quick to impose sanctions on any person found in conflict with the law.’\textsuperscript{935} (emphasis added). Note that this is not limited to traffickers or those exploiting children, but extends, as we have already seen, to people who use drugs recreationally or struggling with addiction. In 1994 the Committee had issued a very general concern about the lack

\textsuperscript{932} \textit{Concluding Observations: Ukraine} UN Doc No CRC/C/UKR/CO/3-4, 21 April 2011, paras 60 and 61.

\textsuperscript{933} For example, in 2008 the Committee again reviewed Netherlands. It referred back to its 2002 Concluding Observations on Netherlands Antilles but did not ask whether the legislative review that was recommended had been carried out. \textit{Concluding Observations: Netherlands} UN Doc No CRC/C/NLD/CO/3, 27 March 2009, para 58. The others were Belize, Guinea, Benin, Tunisia, Federated States of Micronesia, Armenia, Indonesia, Japan, Bolivia, Norway, Russia, Denmark and Nigeria.

\textsuperscript{934} \textit{Concluding Observations: Ghana}, UN Doc No CRC/C/GHA/CO/2, 17 March 2006, paras 71 and 72.

\textsuperscript{935} \textit{Third Report: Ghana}, UN Doc No CRC/C/GHA/3-5, 6 August 2014, para 165.
of measures taken to protect children from drug abuse in Belarus. Responding in its following periodic report, the State party said that ‘To step up its campaign against drug use and to strengthen the legislation in this area’ an order had been passed allowing for ‘the registration and committal to enforced isolation of drug addicts.’ The Committee did not respond, but recommended, in the context of exploitation, that Belarus ‘combat and eliminate’ drug abuse. Similarly, Hungary’s initial report stated that it ‘severely punishes any abuse of narcotic drugs’, and punishes drug abuse ‘regardless of age’. Its second periodic report indicated progress since the previous Concluding Observations by making penal provisions ‘significantly more stringent’ in this regard. This was not responded to by the Committee, which raised a further general concern about rates of drug use. In 2011 the Seychelles replied to a nine year old Concluding Observation that had simply restated the wording of Article 33. It reported that ‘appropriate legislation’ (note the wording) was ‘already in place’ with the Misuse of Drugs Act and the Children’s Act. The Seychelles’ Misuse of Drugs Act in fact criminalises carrying paraphernalia such as sterile needles and syringes (Section 7) contrary to HIV and human rights guidelines (which the Committee otherwise endorses). Section 29 prescribes forced labour as punishment, and section 38 allows for forced medical examinations and forced treatment of people who are drug dependent. The Committee did not ask any questions of the content

936 Concluding Observations: Belarus, UN Doc No CRC/C/15/Add.17, 7 February 1994, para 10.
938 Concluding Observations: Belarus, UN Doc No CRC/C/15/Add.180, 13 June 2002, para 52(b).
of the law the State party had reported as being implemented pursuant to its recommendations and merely repeated its earlier recommendation.\footnote{Concluding Observations: Seychelles, UN Doc No CRC/C/SYC/CO/2-4, 23 February 2012, para 57.}

There are examples, though rare, of the Committee attempting to direct the State party’s attention to other issues, even if the legislation itself is not questioned.\footnote{In 2002, for example, Georgia replied to earlier Concluding Observations by setting out its stringent criminal laws. While not querying these laws, the Committee’s Concluding Observations stated their regret that Georgia had not given attention to the earlier Concluding Observations, which focused on social and educational measures. Second Report: Georgia, UN Doc No CRC/C/104/Add.1, 28 April 2003, paras 279 and 280; Concluding Observations: Georgia, UN Doc No CRC/C/15/Add.222, 27 October 2003, para 66.} But aside from these there is a clear reticence to issue challenges to legislative measures adopted to protect children from drugs. This is despite the fact that this information is required by Article 33, requested by the Committee, and sometimes described as having been implemented pursuant to the Committee’s recommendations. Thus, the understanding of punitive suppression as an appropriate legislative measure under Article 33 goes largely unchallenged.

6.3.3 Welcoming Drug Laws and Strategies

The Committee has welcomed both national drugs laws and strategies on forty-nine occasions relating to forty-six states parties.\footnote{Russian Federation has had its anti-drugs efforts welcomed three times and Mauritius twice.} These are situations where the Committee has expressly welcomed a drug law or strategy, or where the enforcement of an existing law or the strengthening of existing efforts has been recommended. In ten instances the Committee simply welcomed new
national institutions relating to drugs. Twelve were cases where the Committee welcomed broad State efforts or specific practices. Twelve related to enforcing existing laws or to new legislation or amendments, and in fifteen cases the Committee welcomed the adoption of a national drug strategy, or encouraged its implementation.

948 Concluding Observations: Kenya, UN Doc No CRC/C/15/Add.160, 7 November 2001, para 7; Cape Verde, UN Doc No CRC/C/15/Add.168, 7 November 2001, paras 63 and 64(a); Congo UN Doc No CRC/C/COG/CO/1, 20 October 2006, paras 77 and 78; Dominica, UN Doc No CRC/C/15/Add.238 30 June 2004, para 44; Jordan UN Doc No CRC/C/JOR/CO/3, 29 September 2006, para 64; Mauritius, UN Doc No CRC/C/MUS/CO/2 17 March 2006, paras 62 and 63; Papua New Guinea, UN Doc No CRC/C/15/Add.229, 26 February 2004 para 61; Sri Lanka, UN Doc No CRC/C/15/Add.207, 2 June 2003, paras 40 and 41; Nicaragua, UN Doc No CRC/C/NIC/CO/4, 20 October 2010, para 65(c).

949 Concluding Observations: United Kingdom (Isle of Man), UN Doc No CRC/C/15/Add.134, 16 October 2000, para 38; Albania, UN Doc No CRC/C/15/Add.249, 31 March 2005, para 75; Russian Federation, UN Doc No CRC/C/RUS/CO/3, 23 November 2005, para 76; Sweden, UN Doc No CRC/C/15/Add.248, 30 March 2005, para 33; Nigeria, UN Doc No CRC/C/15/Add.257, 13 April 2005, para 67; Liechtenstein, UN Doc No CRC/C/LIE/CO/2, 16 March 2006 para 24; Mexico, UN Doc No CRC/C/MEX/CO/3, 8 June 2006, para 67(a); Tanzania, UN Doc No CRC/C/TZA/CO/2, 21 June 2006, paras 67 and 68; Trinidad and Tobago, UN Doc No CRC/C/TTO/CO/2, 17 March 2006, paras 63 and 64; Norway, UN Doc No CRC/C/NOR/CO/4, 3 March 2010 para 40; Uzbekistan, UN Doc No CRC/C/UZB/CO/3-4, 10 July 2013.

950 Concluding Observations: Thailand, UN Doc No CRC/C/THA/CO/2, 17 March 2006, para 53 (welcoming changes that now treat children who use drugs as patients, rather than criminals. See, however, the discussion of compulsory drug treatment below). Also, Concluding Observations: Cameroon, UN Doc No CRC/C/15/Add.164, 6 November 2001, para 3(c); Georgia, UN Doc No CRC/C/15/Add.222, 27 October 2003 para 3(c); Togo, UN Doc No CRC/C/15/Add.255, 31 March 2005, para 66; Slovakia, UN Do No CRC/C/SVK/CO/2, 10 July 2007, para 65; Saint Lucia, UN Doc No CRC/C/15/Add.258, 21 September 2005, paras 6, 68 and 69; Philippines, UN Doc No CRC/C/15/Add.259, 21 September 2005, paras 81 and 82(a); DPRK UN Doc No CRC/C/PRK/CO/4, 27 March 2009 para 63; Venezuela, UN Doc No CRC/C/VEN/CO/3-5, 13 October 2014, paras 58 and 59. Two were not Concluding Observations. See Summary Records: Republic of Korea, UN Doc No CRC/C/SK/278, 26 March 1996, para 29 (asking if stringent penalties would be expanded for greater protection); Summary Records: Russian Federation, UN Doc No CRC/C/RU/565, 30 September 1999, para 38 (welcoming information on increased penalties).

951 Concluding Observations: Mexico, UN Doc No CRC/C/15/Add.112, 10 November 1999, para 8; Spain UN Doc No CRC/C/15/Add.185 13 June 2002, para 39(a); Iran UN Doc No CRC/C/15/Add.254, 31 March 2005, para 67; El Salvador, UN Doc No CRC/C/SLV/CO/3-4, 17 February 2010, para 60; Costa Rica UN Doc No CRC/C/CR/CO/3, 3 August 2011, para 64; Egypt UN Doc No CRC/C/EGY/CO/3-4, 15 July 2011, para 6; Bosnia and Herzegovina, UN Doc No CRC/C/BIH/CO/2-4, 29 November 2012, para 4(c); Cyprus, UN Doc No CRC/C/CYP/CO/3-4, 24 September 2012, para 5(b); Lithuania, UN Doc No CRC/C/LTU/CO/3-4, 30 October 2013, para 5(d); Sao Tome and Principe, UN Doc No CRC/C/STP/CO/2-4, 29 October 2013, para 48; Russian Federation, UN Doc No CRC/C/RUS/CO/3-4, 25 February 2014, para 5(c); Portugal, UN Doc No CRC/C/PR/CO/3-4, 25 February 2014, para 53; Hungary, UN Doc No CRC/C/HUN/CO/3-5, 14 October 2014,
These statements and recommendations by the Committee are more common than critiques of such laws and strategies, and raise distinct challenges. First and foremost, welcoming laws and policies or recommending their stronger enforcement offers the State party the Committee’s explicit approval. Second, while a critique must refer to an identified problem or concern, welcoming laws or policies need not. What is welcomed may be positive in terms of child and human rights, or it could be problematic. This is entirely content dependent, yet as we shall see, the Committee tends to welcome them wholesale and without qualification. Questions are therefore raised about the Committee’s understanding of the legal and policy environment in which its recommendations are made, and, again, about the normative content of ‘appropriate measures’ under Article 33 as it has developed over time.

In some cases what the Committee welcomes is on the face of it unproblematic. For example, in an early report the Committee welcomed the efforts to ‘prevent and combat’ drugs taken by Mexico.952 While the wording of ‘combat’ is perhaps unfortunate, the State report had focused almost entirely on wider economic and social factors beyond prevention, treatment and criminal law to alleviate the problems it faced.953 This is uncommon among State reports. So the Committee was evidently welcoming those kinds of efforts. In 2006 the Committee recommended that Mexico (again) continue with its efforts, including ‘accurate and objective’ prevention information, the provision of accessible treatment, and developing a ‘rights-based plan of action’.954 In

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952 Concluding Observations: Mexico, UN Doc No CRC/C/15/Add.112, 10 November 1999, para 8.
954 Concluding Observations: Mexico, UN Doc No CRC/C/MEX/CO/3, 8 June 2006, para 67(e).
this way the Committee was signalling what was being welcomed and encouraged, and again we have evidence of the dialogue in action.

However, in the same 2006 recommendation to Mexico the Committee also called for the State party to: ‘…continue its efforts to eradicate the use of drugs and abuse of alcohol within its territory, including by: (a) Strengthening existing measures to prevent drugs and other substances from being produced in the State party and from entering the State party.’ Here we see a broad endorsement of Mexico’s drug enforcement measures. This commentary, it should be noted, came earlier in the same year when President Calderón initiated Mexico’s war on drugs, in which the military has been used to fight the cartels. The result has been an explosion of violence in the following years, resulting in tens of thousands of deaths, including of children, and leaving tens of thousands orphaned. This is not to suggest, of course, that the Committee could have foreseen this or would accept such results. But it does demonstrate a willingness to welcome drug enforcement efforts on the assumption of child protection when this is, at best, far from self-evident, and a lack of understanding of the policy and human rights environment in which its recommendations are made. We see this elsewhere. In 2011, for example, the Committee commended the efforts of Lao to ‘combat illicit drug abuse’ and recommended that the State party ‘strengthen’ its strategy to do so. That strategy raised considerable human rights concerns, including arbitrary detention and the death penalty.

The Committee has welcomed both targeted legislative changes as well as the

955 Ibid para 67 (a).
956 See Human Rights Watch, Neither Rights Nor Security: Killings Torture and Disappearances in Mexico’s ‘War on Drugs’, 2012.
957 In later Concluding Observations, for example, the Committee has criticised the use of minors from military schools in the fight against traffickers, Concluding Observations (OPAC): Mexico, UN Doc No CRC/C/OPAC/MEX/CO/1, paras 17 and 18(g).
958 Concluding Observations: Lao, UN Doc No CRC/C/LAO/CO/2, 11 April 2011, paras 59 and 60.
enactment of general drug laws. In some cases this is more about limiting punitive measures (i.e. welcoming a shift to non-criminal measures for children) but in others it is about enforcing punitive responses (against adults). In addition to the early example of the republic of Korea noted above, the later Concluding Observations on the Democratic People’s Republic of Korea (DPRK) are striking. The Committee recommended that it ‘strictly enforce’ legislation prohibiting sale, use and trafficking of controlled substances by children, including opium’ (emphasis added).\footnote{Concluding Observations: DPRK, UN Doc No CRC/C/PRK/CO/4, 27 March 2009, para 63.} According to the State party’s report, legislation had recently been adopted, on the advice of the INCB, to increase penalties and now included ‘reform through labour’ ranging from five years to an ‘indefinite period’.\footnote{Fourth Report: DPRK, UN Doc No CRC/C/PRK/4 15 January 2008, para 242.}

In some cases the Committee is clear on the specific efforts that are being welcomed. For example, in relation to Uzbekistan in 2013, it noted ‘as positive’ the measures taken by the State party ‘for discouraging the use of narcotic drugs or psychotropic substances by children and providing children and adolescents affected by drug addiction and substance abuse with access to free medical services in treatment and preventive care establishments’.\footnote{Concluding Observations: Uzbekistan, UN Doc No CRC/C/UZB/CO/3-4, 10 July 2013, para 53.} But in other cases it is not clear if the Committee was aware of what it was welcoming or encouraging. For example, changes to Georgia’s Code of Administrative Offences aimed at ‘strengthening the protection of children’ from drug abuse was welcomed in 2003.\footnote{Concluding Observations: Georgia, UN Doc No CRC/C/15/Add.222, 27 October 2003, para 3(c).} At the time it included fines of up to two months’ salary for parents that fail to comply with their obligation to provide guidance to their children about drugs. While this might seem very specific and something the Committee could not have known, it was in fact reported by the State party itself.\footnote{Second Report: Georgia, UN Doc No CRC/C/104/Add.1, 28 April 2003, para 115.} Human Rights Watch has since raised due process
concerns about the Code, and while the Committee may not have understood these problems, it demonstrates again the welcoming of a legislative change, just as with general measures against drugs, simply because the State party indicated that it took place.

A further example of this was the Committee’s welcoming of the Philippines’s Comprehensive Dangerous Drugs Act. This followed the delegation’s statement that the law was adopted as part of a ‘harmonisation process’ with the CRC, and was among the principal instruments adopted for the protection of children. The Committee recommended that the Philippines ‘effectively implement’ the legislation. Human rights abuses in the context of drug law enforcement were already rife, as later NGO reports to the Committee would reveal, leading to subsequent important condemnations of State action by the Committee. While this may be an extreme example, the same lack of understanding of what such laws and policies contain is exemplified by the encouragement given to both Sweden and Albania in 2005 to ‘continue’ with their efforts to prevent drug use. These efforts may have been positive, even exemplary, but the recommendations were given without any scrutiny of what those efforts in fact were. In both cases little information was provided by the States parties on the methods adopted. The Committee had earlier urged the

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966 Summary Records: Philippines, UN Doc No CRC/C/SR.1028, 2 August 2013 (Summary Records of the 1028th meeting, 18 May 2005), para 2.
971 For example, Sweden noted that it had adopted an action plan on drugs, but did not elaborate on what it contained. See Third Report: Sweden, UN Doc No CRC/C/125/Add.1, 12 July 2004, para 596.
development of a strategy to implement the recommendations Sri Lanka’s Presidential Task Force on tobacco and drugs. Beyond banning alcohol and tobacco advertising, it had not been told what those recommendations entailed. ⁹³ This does not mean that the measures taken were problematic, just that the Committee endorsed them in the blind.

Combining the two issues of challenging and welcoming drug laws, in some cases the Committee welcomes or acknowledges the State’s efforts or legislation but raises concerns nonetheless about high rates of, or even increasing, drug use and/or involvement in the drug trade. The Committee’s remarks on Cyprus are illustrative: ‘While welcoming the State party’s National Drug Strategy 2009–2012…the Committee remains concerned at the high rate of children consuming alcohol, tobacco, drugs and other harmful substances,’ ⁹⁴ This is ambiguous. Is it a challenge to the effectiveness of such efforts and legislation, or is it a confirmation of the need for the existing strategies to be strengthened? ⁹⁴ Note that Cyprus’ strategy had already been enacted and had apparently not worked. Similarly, in relation to Venezuela in 2014, the Committee raised concerns about high rates of drug use ‘despite the implementation’ of a five-year national drugs plan that had ended in 2013. It went on to recommend the continuation of that apparently ineffective plan. ⁹⁵

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⁹² See Concluding Observations: Sri Lanka, UN Doc No CRC/C/15/Add.207, 2 June 2003, para 41; and Second Report: Sri Lanka, UN Doc No CRC/C/70/Add.17, 19 November 2002, para 115. The Summary Records reveal some discussion about the Task Force, but this focused on whether it was an ad hoc or permanent mechanism. See Summary Records: Sri Lanka, UN Doc No CRC/C/SR.872, 1 July 2003, paras 39 and 62.


⁹⁴ See also, for example, Concluding Observations: Nigeria, UN Doc No CRC/C/15/Add.257, 13 April 2005, para 67; Togo, UN Doc No CRC/C/15/Add.255, 31 March 2005, para 66; Liechtenstein UN Doc No CRC/C/LIE/CO/2, 16 March 2006 para 24; Mexico UN Doc No CRC/C/MEX/CO/3, 8 June 2006, para 66 and, calling for strengthening of enforcement, para 67(a); Similarly, Tanzania, UN Doc No CRC/C/TZA/CO/2, 21 June 2006, paras 67 and 68; Trinidad and Tobago, UN Doc No CRC/C/TTO/CO/2, 17 March 2006, paras 63 and 64.

6.4 Response to Specific Information Raising Human Rights Concerns

Aside from issues arising from the overall legal frameworks presented to it, the Committee has been informed regularly about a range of specific policies and practices that raise human rights concerns. Some have been fairly isolated cases, such as the suspension of civil rights for certain drug offences in Algeria, or school-based urine testing in Brunei Darussalam and Lithuania. Others have been more frequent. States have reported ‘stringent crackdowns’ (Thailand), ‘round-ups’ of drug users (Japan), ‘raids on ghettos’ (Sierra Leone), or, in the case of China, ‘out and out war on drugs’. These examples are illustrative of the context raised by the human rights position, but from which the drug laws and policies are exonerated as a driving force by the drug control position. In each case the Committee has not commented on these passages or inquired as to what such crackdowns and round-ups mean in practice. Thailand’s 2003 ‘crackdown’, for example, resulted in the extrajudicial killings of over 2000 people.

The Committee has, on some other occasions, raised concerns about potentially abusive measures indicating a sensitivity to these concerns. In response to Tunisia’s initial report in 2000, for example, the Chair of the Committee

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978 Initial Report: Thailand, UN Doc No CRC/C/11/Add.13, 30 September 1996, para 453 ‘There should be stringent, continuous crackdowns on drug producers, traffickers, dealers and addicts.’
980 Second Report: Sierra Leone. UN Doc No CRC/C/SLE/2, 8 September 2006, para 110.
raised concerns about the State party’s ‘extremely tough line on drug abuse’, which appeared to include ‘resorting to torture’, and contradicted child rights. These concerns, however, did not result in a recommendation to change any laws or practices in the Concluding Observations. Later, the Committee called for a child rights impact assessment of the aerial fumigation of coca plantations in Colombia. It was a rare critique of government drug policy, and still the only one regarding crop eradication. However, in 2015 the Committee did not follow up by asking if this assessment had in fact been carried out after Colombia ignored it in its report and dropped the matter entirely. Instead there was a general call to end ‘dangerous’ and ‘degrading’ child labour, including with illegal crops. Similarly, with regard to Bolivia, the Committee had raised concerns in 1998 about ‘...the situation of children living in the Chapare region, who are constantly exposed to the side effects of anti-narcotics interventions and live in a violent environment which has a negative impact on their development.’ This was not replied to by the State party or followed up by the Committee in a subsequent reporting process.

In 2009 the Committee again reviewed the Philippines. Supporting the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, it strongly condemned the death squads operating in Davao. These, it must be noted, had been in operation during the previous reporting process when the Committee had encouraged the enforcement of the State’s drug laws. This

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984 Concluding Observations: Tunisia, UN Doc No CRC/C/15/Add.181, 12 June 2002.
985 Concluding Observations: Colombia, UN Doc No CRC/C/COL/CO/3, 8 June 2006, para 73 (in the context of ‘environmental health’).
986 Concluding Observations: Colombia, UN Doc No CRC/C/COL/CO/4-5, 6 March 2015, para 59.
987 Concluding Observations: Bolivia, UN Doc No CRC/C/15/Add.95, 26 October 1998, para 26.
time the Committee directly confronted the Government about the fact that such killings had targeted those involved in drug trafficking, including adolescents.90 It was a good example of the ability of the Committee to use its meeting with the State party and its Concluding Observations to directly challenge stringent drug enforcement. But this is quite rare. Indeed, aside from two important condemnations of ‘drug detention centres’ (see below) and the concerns about treating children as criminals, these few examples are the only clear challenges the Committee has made to such State actions in drug control over the entire reporting period.91

In most of these cases NGOs were instrumental in raising the issues with the Committee.92 But sufficient information regularly comes directly from the State party itself. The following sections provide three recurring examples that get to the heart of controversies about drug control and human rights.

6.4.1 The Death Penalty

Thirty-three States or territories today retain the death penalty for drugs on the books. Its application varies among them from ‘high application’ (regular use of the death penalty) to ‘low application’ (rare use of the death penalty) to

91 In 2015 the Committee raised strong concerns with Brazil due to ‘The misuse of measures for children in conflict with the law for the compulsory confinement of child drug addicts, particularly of children in street situations as part of street “clean-ups” connected with the 2014 World Cup and 2016 Olympic Games’ The Committee recommended that the State party ‘Expedi tiously implement the recommendations made by the Working Group on Arbitrary Detention regarding the confinement of child drug addicts’. It is not included here as this was not about drug policy per se, rather the use of confinement to rid the streets of ‘undesirables’. Concluding Observations: Brazil, UN Doc No CRC/C/BRA/CO/2-4, 30 October 2015, para 87(f) and 88(d).
92 For example, on spraying in Colombia, see Alternative Report to the Report of the Government of Colombia on the Situation of the Rights of the Child in Colombia Coordinating Committee, Coalition Against the Involvement of Boys, Girls and Youths into the Armed Conflict in Colombia, 2005 pp. 49-50; On death squads in Philippines see Human Rights Watch “You Can Die at Any Time”: Death Squad Killings in Mindanao 2009 (A letter to the Committee was submitted based on these findings). See also Human Rights Watch’s work on drug detention centres in Viet Nam and Cambodia below.  

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‘symbolic application’ (the death penalty on the books but not in use).\textsuperscript{993} Between them, though estimates must be treated with caution, as many as a thousand people are executed for such offences annually.\textsuperscript{994}

During the 2016 General Assembly Special Session, Germany made clear its view that ‘the death penalty can never be a tool of human-rights- based drug policy.’\textsuperscript{995} For others, however, it can, to the extent that it is confidently reported to the CRC Committee. Over the years seventeen States parties have reported their capital drug laws as part of compliance with Article 33, both in relation to trafficking offences in general and in relation to those involving children.\textsuperscript{996} Some have done so more than once.\textsuperscript{997} This has been a consistent feature of periodic reports from the earliest sessions. The Committee had requested information on minimum penalties for the use of children in the drug


\textsuperscript{994} Ibid. Among these States and territories, only the United States and Taiwan are not parties to the CRC. The US has never used the death penalty for drugs without associated homicide, though the penalty remains on the Federal books. \textit{The Anti-Drug Abuse Act of 1988}, enacted 18 November 1988, H.R. 5210

\textsuperscript{995} UNGASS OR 3, p. 13.


trade in 1996. But on no occasion has the death penalty as a means to implement Article 33 been challenged.

The Committee’s first encounter with the death penalty was the initial report of the Republic of Korea in 1996. The State party noted, simply, that the death penalty was available for ‘habitual violators’ of the Hemp Control Act. The Committee did not address the issue of drugs at all in its Concluding Observations while the Summary Records indicate no discussion of this penalty. The same year, Syria presented its new drug law to the CRC Committee in its initial report, in which capital punishment was prescribed for offences involving minors. Amnesty International had recently raised concerns at the ‘progressive expansion of the scope of the death penalty during the past two decades’ in the country, including for drug offences. The Committee’s Concluding Observations did not address drugs issues.

At least 341 people were executed for drug offences in Saudi Arabia between 1987 (when the capital drug law was introduced) and 2001 (the year when the country reported the practice to the CRC Committee). In 2000, 113 people

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1000 Concluding Observations: Republic of Korea, UN Doc No CRC/C/15/Add.51, 13 February 1996. New legislation was adopted in the Republic of Korea in 2000 (the Narcotic Control Act). It also prescribed the death penalty for ‘habitual’ offences under Article 58(2) and this legislative framework was later reported to the Committee as evidence of the implementation of Article 33 in the State party’s third and fourth joint reports in 2011. Its inclusion of the death penalty was not this time set out explicitly. Third Report: Republic of Korea, UN Doc No CRC/C/KOR/3–4 12 January 2011, para 503.
1002 Amnesty International, Syria: Repression and Impunity: Forgotten Victims, 1995, p. 34. According to the organisation ‘The most recent decision in this regard was taken in April 1993 when the Syrian People’s Council (the parliament) approved a new law which extends the use of the death penalty to first-time drug offenders. The law officially came into force in July 1993.’
had been executed, a record high. Many of these were for drug offences. In its
initial report Saudi Arabia was clear in its connection of these measures to
Article 33, recalling the wording of the provision: ‘The State has taken all
appropriate measures to combat drugs and psychotropic substances, including
trafficking, illicit use and production. Drug traffickers and smugglers may face
capital punishment’ (emphasis added).\textsuperscript{1005} Again, the practice was not que-
ried.\textsuperscript{1006} During the same session, Egypt’s report associated capital punishment
with Article 33.\textsuperscript{1007} Both Bahrain\textsuperscript{1008} and Sudan\textsuperscript{1009} reported in similar terms in
2002, while Singapore indicated its use of the death penalty (and judicial cor-
poral punishment) the following year.\textsuperscript{1010} In 2004 Guyana reported the availa-
bility of the death penalty as a sanction in limited circumstances.\textsuperscript{1011} In none
of these cases were these measures challenged in Concluding Observations\textsuperscript{1012}
or queried in the meetings with government representatives.\textsuperscript{1013}

\textsuperscript{1005} Initial Report: Saudi Arabia, UN Doc No CRC/C/61/Add.2, 29 March 2000, para 261. As
with other State reports the section of the report was under the heading of Article 33.
\textsuperscript{1006} It did, however, raise its concerns about the possibility of the application of the death pen-
alty for any offence to juveniles. Concluding Observations: Saudi Arabia, UN Doc No
\textsuperscript{1007} Initial Report: Egypt, UN Doc No CRC/C/65/Add.9 11 November 1999, para 226.
\textsuperscript{1008} Initial Report: Bahrain, UN Doc No CRC/C/11/Add.24 23 July 2001, para 331. Status as a
minor, however, mitigated the penalty. See para 332.
\textsuperscript{1009} Initial Report: Sudan, UN Doc No CRC/C/65/Add.17, 6 December 2001, para 423(c) ‘any
person found in possession of large quantities is sentenced to death or life imprison-
ment’.
\textsuperscript{1010} Initial Report: Singapore, UN Doc No CRC/C/51/Add.8, 17 March 2003, para 513.
\textsuperscript{1011} If ‘a person is found responsible for the death of a person under 18 years old as a result of
his/her use of narcotics’ or ‘where a child dies within three months of using such narcotics
\textsuperscript{1012} Concluding Observations: Egypt, UN Doc No CRC/C/15/Add.145, 21 February 2001; Bah-
rain, UN Doc No CRC/C/15/Add.175, 11 March 2002; Sudan, UN Doc No
CRC/C/15/Add.190, 9 October 2002; Singapore, UN Doc No CRC/C/15/Add.220, 27 October
2003; Guyana, UN Doc No CRC/C/15/Add.224, 26 February 2004.
\textsuperscript{1013} Summary Records: Egypt, UN Doc No CRC/C/SR.679, 30 January 2001 and
CRC/C/SR.680, 22 January 2001; Bahrain, UN Doc No CRC/C/SR.769, 4 February 2002 and
CRC/C/SR.770, 24 November 2005 (meeting held on 28th January 2002); Sudan, UN Doc No
CRC/C/SR.817, 27 September 2002 and CRC/C/SR.818, 2 January 2003; Singapore, UN Doc
No CRC/C/SR.908, 31 January 2005 (meeting held on 26 September 2003) and
UN Doc No CRC/C/SR.909, 3 October 2003; Guyana, UN Doc No CRC/C/SR.922, 22 January 2004 and
CRC/C/SR.923, 6 March 2013 (meeting held on 14 January 2004).
Thirty people were on death row for drug offences in Indonesia in 2004. At the time Amnesty International raised concerns that there was 'an increasing willingness by the authorities to use the death penalty to address crime, in particular drug-trafficking.' In its second periodic report the government noted that new legislation had been adopted since its last report that allowed for the death penalty for various drug offences, indicating its improving implementation of Article 33. Later, Jordan reported the balance in its system between 'treatment for the addict and death for a persistent trafficker'. Its report included the death penalty for drugs in multiple paragraphs, and stated that ‘One of the most noteworthy features of the Narcotics and Psychotropic Substances Act is that it prescribes the death penalty for every person who employs a minor in the narcotics trade, even for a first offence.’ In neither case was this challenged.

In its second report reviewed in 2006 China informed the Committee that the prevention of drug use among children was ‘the basis of its interdiction efforts’ and that since its initial report, it had increased the available penalty for trafficking to include capital punishment. This was an odd remark given that China’s capital drug laws were long-standing and that executions, including in public, had been carried out to mark UN day against drugs (June 26th)

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1015 Ibid.
1018 Ibid para 315. See also para 316.
1019 See Concluding Observations: Jordan, UN Doc No CRC/C/JOR/CO/3, 29 September 2006; Summary Records: Jordan, UN Doc No CRC/C/SR.1188, 6 October 2006 and UN Doc No CRC/C/SR.1190, 6 October 2006; Concluding Observations: Indonesia, UN Doc No CRC/C/15/Add.223, 26 February 2004; Summary Records: Indonesia, UN Doc No CRC/C/SR.920, 19 January 2004 and CRC/C/SR.921, 19 January 2004. In August that year, months after the review, one person was executed for drug offences, the first in three years. In October two more from the same case were shot, with eight more facing ‘imminent’ execution for drugs. Amnesty International Indonesia: A Briefing on the Death Penalty, 2004, p. 1.
1020 Second Report: China, UN Doc No CRC/C/83/Add.9, 15 July 2005, para 353
1021 Ibid, para 345.
for years. Indeed, China executed fifty-five people in the weeks running up to June 26th 2006. The Committee’s review had taken place in September the previous year without comment on the practice.

Follow-up processes have not addressed what could be seen as initial oversights. Bahrain, for example, referred the Committee back to its earlier description of its legislative framework in its joint second and third reports in 2011. As the Committee had not queried the death penalty provisions earlier there was no apparent cause for concern, and again Bahrain’s drugs legislation went through the reporting process unquestioned. Syria’s second periodic report explicitly reaffirmed its use of the death penalty, which had in fact been extended since its initial report to remove any mitigating circumstances when children were involved, rendering the penalty mandatory. This was reiterated again in its joint third and fourth periodic report. As with the initial report, the Committee did not comment. Media reports, however, indicated executions for drugs as late as 2008. Saudi Arabia reaffirmed its use of the death penalty for the implementation of Article 33 in 2005. More

1025 Second Report: Syria, UN Doc No CRC/C/93/Add.2, 18 October 2002. After referring back to the legal framework set out in its initial report the State party went on, at para 230, ‘...the legislature, by the provisions of the Narcotics Act No. 2 of 12 April 1993, increased the penalties to be imposed on any person who exploits children for this purpose...article 39, paragraph 3, subparagraph (b), of the Act stipulates that no mitigating factors will be taken into account in cases involving the use of a minor in the perpetration of the offences of smuggling, manufacturing or peddling of narcotic substances, in respect of which the penalty of capital punishment is retained.’
1026 Third Report: Syria, UN Doc No CRC/C/SYR/3-4, 2 June 2010, para 276. ‘Syrian law prescribes harsh penalties for adults who exploit children to commit crime, especially arms and drug trafficking. These penalties are set forth in article 18 of Legislative Decree No. 51 of 2001 and article 39 of Act No. 2 of 1993, and adults who use minors to carry out drugs offences do not benefit from consideration of mitigating circumstances.’
1027 Concluding Observations: Syria, UN Doc No CRC/C/SYR/CO/3-4, 9 February 2012.
than twenty people had been executed for drugs in the years between the initial and second periodic reports.  

The issue has continued to more recent years. In its second periodic report Lao justified the death penalty by the desire to ‘protect children from the use of drugs or psychotropic substances’. The Committee noted ‘with appreciation the efforts made to combat illicit drug use’ (emphasis added) and encouraged the government ‘…to continue and strengthen its strategy to combat drug abuse, and strengthen and create, as appropriate, laws and regulations prohibiting the sale of harmful substances, cigarettes and alcohol to children.’ It must be acknowledged that the Committee referred to treatment and counselling in the efforts it explicitly welcomed, and it can be assumed that these were the intended focus of its attention (see, however, ‘compulsory drug treatment’, below). But in the State party’s report these efforts immediately follow information on the death penalty as components of the same strategy for the implementation of Article 33.

6.4.2 Drug User Registries

Drug user registries involve the keeping of official lists of people that have been identified as drug users, usually due to having attended drug treatment. It is a common practice in post-Soviet countries. The registration of those with

1031 Cuba, for example, reported its capital drug law in 2010. Second Report: Cuba, UN Doc No CRC/C/CUB/2, 5 May 2010, para 587. Cuba is abolitionist in practice and it is not known if it has ever in fact applied the death penalty for drug offences.
1032 Second Report: Lao, UN Doc No CRC/C/LAO/2, 10 August 2010, at paras 146, 153(b), 154.
1033 Ibid, at para 153(a).
1034 Concluding Observations: Lao, UN Doc No CRC/C/LAO/CO/2, 8 April 2011, at paras 59, 60. Just prior to this a death penalty case in Lao had hit the news. Samantha Orobor was nineteen when she was arrested in Laos in 2008 for trafficking 680 grammes of heroin. While in prison awaiting trial she became pregnant, yet prosecutors still sought the death penalty. After a thirty-minute trial, but with assistance from the NGO Reprieve, she was handed a life sentence. British authorities and Reprieve fought for her return to Britain, which was achieved in late 2009.
a certain health condition may sound benign, but a multi-country study on drug user registries in the region summarises the problems with this practice. ‘Drug user registration’, it found, ‘serves as a form of state control over people who are dependent on drugs and imposes restrictions on their civil rights. The process brands people as drug users for years, sometimes indefinitely, regardless of whether they quit using drugs. Those on the registry are required to pay regular visits to a doctor and to remain drug-free. They are not allowed to obtain a driver’s license, are banned from certain jobs, and are often the targets of police harassment.”

Thus, while drug user registries are purely administrative, the result of being entered on a registry has similar effects to a criminal record, as well as some distinctive effects, including compulsory drug treatment. The Office of the High Commissioner for Human Rights and the Special Rapporteur on the Right to Health have both raised concerns about the practice. In no case has the Committee asked any questions of the use of drug user registries as a means to implement CRC obligations.

In an early report to the Committee the Russian Federation reported tens of thousands of people on its drug user registry and that the numbers registered were increasing. It indicated its use of registries again in 2005, a year in which it was estimated that 343,500 people were on the registry and over

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20,000 more annually.1040 It can take five years and as many as thirty inspections at narcological clinics to be removed from the registry.1041 Russia’s chief narcologist told Human Rights Watch that people are more likely to leave the registry because they die than because they have been officially taken off of it.1042 This has been described as ‘once on the list, always on the list.’1043 People therefore avoid health services for fear of registration. Kazakhstan informed the Committee of more than 50,000 drug users registered in 20061044 and registries were reported also in Belarus, Bosnia, Kyrgyzstan, Lithuania and Moldova.1045

Beyond the rights implications for adults there are two direct implications for children themselves. The first and most obvious is that children may also be entered onto registries. Kazakhstan reported to the CRC Committee that among the 50,000 people registered over 4,000 were aged 14-17.1046 In an earlier report, also indicating the use of juvenile registries, Kazakhstan had stated that such young people were to be ‘named and shamed’.1047 Juvenile registration was also reported by Russia, Lithuania, Moldova and Kyrgyzstan.1048

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1041 Ibid p. 18 and 19.
1042 Ibid. p. 24.
1044 Third Report: Kazakhstan, UN Doc No CRC/C/KAZ/3, 23 August 2006, para 518
The second direct effect for children is that in some countries, again mostly post-Soviet, placement on the registry can be grounds for loss of custody. This too has been reported by States parties many times but it has never been queried.\textsuperscript{1049} Crucially, status as a drug user can be sufficient for removal, independent of tests such as necessity relating to abuse or neglect.\textsuperscript{1050} It is, of course, an issue that disproportionately affects mothers, many of whom cannot afford legal assistance to resist challenges to custody.\textsuperscript{1051} In practice courts have removed custody based on the status of being a drug user alone.\textsuperscript{1052} There is no doubt that it is a very challenging issue. Children experience considerable harms in the short and long term due to parental drug dependence. Some


\textsuperscript{1050} See United Nations General Assembly, Guidelines for the Alternative Care of Children, UN Doc No A/RES/64/142, 24 February 2010.

\textsuperscript{1051} Women and Drug Policy in Eurasia, Eurasian Harm Reduction Network, 2010 p. 4. See also K Burns, Women, harm reduction and HIV: Key findings from Azerbaijan, Georgia, Kyrgyzstan, Russia and Ukraine, Open Society Foundations, 2009.

\textsuperscript{1052} In Russia it has been reported that a certificate from the registry indicating that a person is listed as a chronic drug user is accepted as sufficient evidence of the need to remove a child from that parent’s care. See A. Shields, The Effects of Drug User Registration Laws on People’s Rights and Health: Key Findings from Russia, Georgia, and Ukraine, Open Society Foundations, 2009 p. 14.
form of intervention is required. But drug use alone does not equate with neglect or abuse, and the implications of removal from custody are obviously very serious for all involved.\textsuperscript{1053}

6.4.3 Compulsory Drug Treatment

Compulsory drug treatment has been high on the UN and NGO agenda in recent years following Human Rights Watch investigations of serious abuses in ‘drug detention centres’, primarily in South-East and East Asia.\textsuperscript{1054} With regard to the detention of children, at least, basic juvenile justice standards and the CRC requirement that detention be ‘a measure of last resort’ (Article 37(b) on the prohibition of arbitrary detention) are applicable. From its earliest reports the Committee has been consistent on this matter, and in its General Comment on juvenile justice in 2007 the Committee included detention for drug treatment in its definition of ‘deprivation of liberty’, albeit in a footnote.\textsuperscript{1055} So when presented with the detention of children for drug treatment, criticism has been more forthcoming than some of the above issues, given the easy recourse to pre-existing standards and the direct effect on children.

The Committee raised concerns, for example, with St. Vincent and Grenadines about the placing of children who use drugs in ‘mental health institutions’, and recommended that this not be done ‘unnecessarily’.\textsuperscript{1056} A year later the Com-

\textsuperscript{1053} The issue of custody was mostly reported to the Committee under Article 19 on protection from neglect and violence. However, this illustrates the internal relationship between Article 33 and other provisions of the CRC with which the Committee has yet to grapple. Indeed, it raises again the question of the meaning of ‘appropriate measures’, as the wording appears in both provisions.


\textsuperscript{1055} CRC, GC 10, p. 5, fn 1.

\textsuperscript{1056} \textit{Concluding Observations: St Vincent and Grenadines}, UN Doc No CRC/C/15/Add.184, 13 June 2002, paras 50(a) and 51(a).
mittee further clarified this in its Concluding Observations on Brunei Darussalam. On that occasion it stated that ‘children abusing drugs may be placed in a closed institution for a period of up to three years’ and recommended ‘non-institutional forms of treatment of children who abuse drugs’ and that the State party ‘make the placement of children in an institution a measure of last resort.’\textsuperscript{1057} In other words, voluntary community-based models were a requirement to ensure that the ‘last resort’ obligation under Article 37(b) was met.

There are estimated to be over 350,000 people detained for drug treatment in China. In 2005, following the China’s information about compulsory treatment,\textsuperscript{1058} a Committee member queried whether this required a judicial order.\textsuperscript{1059} While this was an important inquiry into safeguards, it was not followed up in a Concluding Observation, nor were conditions in detention queried, even if a judicial order were received, or why this measure is protective of children at all. Later, China reported that ‘In the case of minors who refuse to undergo community-based drug rehabilitation, or who during the course of such rehabilitation continue to take drugs, or who have a serious addiction that is difficult to cure through community-based rehabilitation, the public security organs will implement compulsory drug rehabilitation in isolation.’\textsuperscript{1060} It noted that such treatment had been imposed on 729 ‘child addicts’ in the space of approximately 18 months.\textsuperscript{1061} In this case the Committee issued strong Concluding Observations calling for the outright abolition of re-education through labour and the widespread administrative detention of children. It also called

\textsuperscript{1057} Concluding Observations: Brunei Darussalam, UN Doc No CRC/C/15/Add.219, 23 October 2003, paras 53 and 54.
\textsuperscript{1058} Second Report: China, UN Doc No CRC/C/83/Add.9, 15 July 2005, para 359.
\textsuperscript{1059} Summary Records: China, UN Doc No CRC/C/SR.1064, 3 October 2005, para 7.
\textsuperscript{1060} Third Report: China, UN Doc No CRC/C/CHN/3-4 6 June 2012, para 224.
\textsuperscript{1061} Ibid.
for rigorous due process and the removal of children from any detention centres where they were housed with adults.\textsuperscript{1062} This captures many issues raised by detention in the name of drug treatment, but not all of them. In particular, China was describing a situation which it already considered to be a ‘last resort’ in that other options were to be considered first, including those that are community based.

Following the Human Rights Watch research noted above, the Committee heavily criticised both Cambodia in 2011,\textsuperscript{1063} and Viet Nam in 2012\textsuperscript{1064} for their use of such centres.\textsuperscript{1065} For example, with regard to Viet Nam the Committee expressed its concern about ‘(a) The administrative detention system imposed on children with drug addiction; (b) Reports of child ill-treatment in the drug detention centres and lack of inspections; (c) Child detainees in these centres not being separated from adults.’ It recommended that Viet Nam ‘(a) Pursue its plan to revise the administrative detention system for children with drug addiction, and develop alternatives to deprivation of the child’s liberty in such situations…(b) Establish an effective system of monitoring of drug detention centres, including regular inspections, and investigate effectively all child abuse cases in these centres, with a view to bringing perpetrators to justice and providing child victims with a remedy; (c) Ensure that child detainees are separated from adults in all detention settings…’\textsuperscript{1066} In both cases community-based systems were recommended over detention. The same year a Committee member questioned Afghanistan as to ‘what was meant by rehabilitation’\textsuperscript{1067}

\begin{footnotes}
\textsuperscript{1062} Concluding Observations: China, UN Doc No CRC/C/CHN/CO/3-4, 29 October 2013, paras 92 and 93.
\textsuperscript{1063} Concluding Observations: Cambodia, UN Doc No CRC/C/KHM/C/2-3, paras 38 and 39.
\textsuperscript{1064} Concluding Observations: Viet Nam, UN Doc No paras 43, 44, 63, 64, 70.
\textsuperscript{1065} Viet Nam had reported such centres to the Committee in its initial report in 1992, but the Committee had not commented on them. Initial Report: Viet Nam, UN Doc No CRC/C/3/Add.4 22 October 1992, para 253.
\textsuperscript{1066} Concluding Observations: Viet Nam, UN Doc No CRC/C/VNM/CO/3-4, 22 August 2012, paras 63 and 64.
\textsuperscript{1067} Summary Records: Afghanistan, UN Doc No CRC/C/SR.1586, 21 October 2011, para 65.
\end{footnotes}
indicating more awareness of the human rights risks involved in an intervention that on the surface appears to be unproblematic.

Drug detention centres are extreme examples, albeit widely used in the region. But even in these cases, and with the knowledge it then had, the Committee has been inconsistent. For example, it asked no questions about compulsory treatment of children in Singapore in 2011, despite this being directly reported by the State party. Its recommendations have on occasion appeared to endorse existing structures. In relation to both Lao in 2011 and Thailand in 2012 the Committee encouraged the States parties to ‘strengthen’ their efforts (Lao) and to ‘continue to provide drug treatment’ (Thailand) without qualitative inquiry into those efforts or what drug treatment entailed. Thailand had provided no information on drug treatment. Lao, however, had reported the opening of the Somsanga Centre, which the Committee specifically noted ‘with appreciation’.

Human Rights Watch documented serious rights abuses and high rates of suicide at the centre later that year. The recommendations on Thailand followed the country’s notorious ‘war on drugs’ in 2003 in which, in addition to the killings, many tens of thousands rounded up for treatment. While a Committee member had raised concerns about the number of children in ‘specialized centers’ the Concluding Observations

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1068 Second Report: Singapore, UN Doc No CRC/C/SGP/2-3, 26 July 2010 (Table 41), p. 99. The State party reported children detained with adults in such centres, though indicated a significant reduction over time.
1069 Concluding Observations: Lao, UN Doc No CRC/C/LAO/CO/2, 8 April 2011, para 60.
1070 Concluding Observations: Thailand, UN Doc No CRC/C/THA/CO/3-4, 17 February 2012, para 65.
1071 Third Report: Thailand, UN Doc No CRC/C/THA/3-4, 14 September 2011.
1073 Concluding Observations: Lao, UN Doc No CRC/C/LAO/CO/2, 8 April 2011, para 59.
merely recommended, without qualification, that Thailand ‘continue to pro-
vide treatment and rehabilitation programmes for children and adoles-
cents’.1077 In both cases, it must be recognised, the standard recommendation
that detention should be a measure of last resort was made pursuant to Article
37(b) and juvenile justice standards. But like the above example of China, the
connections were not made to drug treatment. This is an important gap as drug
treatment is not often seen as a juvenile justice issue at all, but one of
healthcare. Thus, it is not clear that States parties apply juvenile justice stand-
ards automatically to this area.1078

More broadly, various types of compulsory treatment for both adults and for
minors appear in dozens of State party reports as a means for implementing
Article 33.1079 It has been a regular feature of State reports under Article 33

1077 Concluding Observations: Thailand UN Doc No CRC/C/THA/CO/2, 17 March 2006, para
54.
1078 See further the discussion of ‘holistic interpretation’ in chapter 7.
1079 See, for example: Initial Report: Norway, CRC/C/8/Add.7 12 October 1993 TABLE 3 (rec-
ords children in ‘institutions’ for drug addiction); Second Report: Norway, UN Doc No
CRC/C/70/Add.2, 18 November 1998, para 378; Initial Report: Viet Nam, UN Doc No
CRC/C/3/Add.4, 22 October 1992, para 253; Initial Report: Poland, UN Doc No
CRC/C/8/Add.11 31 January 1994, para 286 (juveniles); Initial Report: Philippines, UN doc
No CRC/C/3/Add.23 3 November 1993, para 234 (a parent may submit a ‘minor dependent’ to
‘voluntary confinement’); Initial Report: Nepal, UN Doc No CRC/C/3/Add.34, 10 May 1995,
paras 350 (children) and 376(b) (others); Initial Report: Uruguay, UN Doc No
CRC/C/3/Add.37, 13 November 1995, para 257 (court ordered); Initial Report: Bulgaria, UN
Doc No CRC/C/8/Add.29, 12 October 1995, para 262 (court ordered for juveniles); Initial Re-
port: Algeria, UN Doc No CRC/C/28/Add.4, 13 February 1996, 166 (includes juveniles); Sec-
ond Report: Algeria, UN Doc No CRC/C/93/Add.7 3 March 2005, para 372 (juveniles); Initial
Report: Ecuador, UN Doc No CRC/C/3/Add.44, 24 September 1996, para 252 (stating that
children could be detained as long as necessary); Initial Report: Georgia, UN Doc No
CRC/C/41/Add.4, 26 May 1997 (court ordered); Second Report: Paraguay, UN Doc No
CRC/C/65/Add.12, 15 March 2001, para 1206 (Compulsory detoxification for a minimum of
one year and a maximum of two); Second Report: Tunisia, UN Doc No CRC/C/83/Add.1 30
October 2001, para 603 (court ordered); Second Report: Belarus, UN Doc No
CRC/C/65/Add.15 26 September 2001, para 285 (enforced isolation); Second Report: Ukraine,
UN Doc No CRC/C/70/Add.11 18 May 2001, paras 784 and 832 (court ordered up to two years,
on the basis of parental application); Second Report: Cyprus, UN Doc No CRC/C/70/Add.16,
13 November 2002, para 162 (court ordered ‘confine in a detoxification centre’); Second
Report: Japan, UN Doc No CRC/C/104/Add.2, 24 July 2003, para 468 (rounding up and plac-
ing juveniles in protective custody); Second Report: India, UN Doc No CRC/C/93/Add.5, 16
July 2003, para 1219; Initial Report: Malaysia, UN Doc No CRC/C/MYS/1, 22 December
2006, para 351 (treatment centre for up to two years, including those under 21); Third Report:
Mongolia, UN Doc No CRC/C/MNG/3-4 9 June 2009, para 377; Initial Report: Montenegro,
since the very first report reviewed by the Committee in 1993.\textsuperscript{1080} It is, of course, not always abusive in the ways reported from detention centres. But diverse forms of compulsory treatment raise distinct human rights concerns, including issues of consent to medical treatment. Here, of course, compulsory treatment of adults is reported as protective of children. In Norway, for example, detention and compulsory treatment of pregnant women who use drugs is justified in the name of protecting the unborn child. This was reported to the Committee to no reply.\textsuperscript{1081} A few States parties have raised their own concerns about compulsory treatment\textsuperscript{1082} and dilemmas with its implementation.\textsuperscript{1083} Some are clear on their existing standards and safeguards, including ombudsmen overseeing its operation.\textsuperscript{1084} But the large majority are not so reflective. Issues such as legal and medical due process are key, as are reviews of confinement, whether such treatment can be imposed by parents, and the related

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\textsuperscript{1080} Initial Report: Bolivia, UN Doc No CRC/C/3/Add.2 14 September 1992, para 199.


\textsuperscript{1082} Initial Report: Turkmenistan, UN Doc No CRC/C/TKM/1, 5 December 2005, para 214 (indicating that this approach is rejected); Initial Report: Czech Republic, UN Doc No CRC/C/11/Add.11, 17 June 1996, para 266 (referring to the use of reformatory and in-patient treatment as ‘inadequate’).

\textsuperscript{1083} See for example, Second Report: Israel, UN Doc No CRC/C/ISR/2-4, 28 August 2012, para 917. The State party recounted a recent case in which parents, supported by social workers, had applied for the committal to a rehabilitation centre for their child. The parents feared for their child’s life due to their addiction. The Court was sympathetic given the risk the child posed to him/herself, but as there was no suitable facility available ordered the social workers to find alternative treatment. \textit{C.M 378/07 Welfare Agency v. Anonymous}, 7 August 2008.

participation rights of the (drug dependent) child. Even where treatment is intended as an alternative to punishment (e.g. drug courts) there are challenges and ongoing political debates. The Committee has not, for the most part, engaged with these complex issues. Drug treatment is instead seen as an inherently positive intervention, reflected in the sheer volume of general recommendations made by the Committee for States parties to implement it.

6.5 Conclusion

This chapter has looked more closely at laws and policies through the lens of ‘appropriate measures’. It has shown that the term itself is far from clear in a general sense. In context, through the periodic reporting process, the Committee has demonstrated a reticence in challenging drug laws and a willingness to welcome laws and policies without knowledge of content. It has also remained mostly passive when presented by States parties themselves with specific issues raising human rights concerns. Thus, while the Committee has expressed the need for various interventions relating to drug use among children, demonstrating the potential added value or different approach of a child rights frame of reference, it has said far less about the legal and policy structures surrounding this phenomenon. This, however, is where the majority of State action is directed, within which, for many States, an equation between child rights implementation and severity of response has developed.

1065 For example, Second Report: Australia, UN Doc No CRC/C/129/Add.4 29 December 2004, para 496 (Victoria drug court pilot); Third Report: New Zealand, UN Doc No CRC/C/NZL/3-4 14 June 2010, para 442 (Christchurch youth drug court).

1066 The evidence for juvenile drug courts is mixed. See for example E. Tanner-Smith et al, ‘Juvenile Drug Court Effects on Recidivism and Drug Use: A Systematic Review and Meta-Analysis’, Journal of Experimental Criminology, 2016 doi:10.1007/s11292-016-9274-y, pp. 1-37 (Meta-analysis of forty-six US studies finding no overall benefit to youth drug courts over regular courts, but that the wide variation in results shows that there may be some effective models). While there may be positive examples, drug courts usually require a guilty plea, punishment can follow if the person fails on drug treatment, and judges have ordered forms of treatment that are not in line with medical best practice. See J. Csete and J. Tomasini-Joshi, Drug Courts: Equivocal Evidence on a Popular Intervention, Open Society Foundations 2015.
7. Dynamics of Structural Bias

7.1 Introduction

The preceding chapters have provided an analysis of the periodic reporting process under the CRC from 1993 to 2015 as it relates to the protection of children from drugs. The discussion that follows discusses three main themes and four sub-themes that together provide a ‘big picture’ explanation of the process. These are set out as interconnected ‘preferences’ of the Committee, or general tendencies that may be observed in its work in the context of the information it has received from States. It then moves on to the more practical issues of the Committee’s working practices, which help to explain some of these tendencies. Together, it is argued, these provide an example and description of structural bias in the work of the Committee relating to Article 33.

7.2 The Committee’s ‘Preferences’

7.2.1 The Victim Narrative

In chapter 5 the persistence of the use of the word ‘victim’ to describe children who use drugs was noted. It appears in approximately one out of every three Concluding Observations on this topic, usually as ‘child victims of drug
abuse’ or similar formulations.\textsuperscript{1087} This has been a feature of Concluding Observations since very early sessions\textsuperscript{1088} and appears ten times more often than the use of victimhood as an antidote to criminalisation.\textsuperscript{1089} The Committee has been clear on some occasions that children who use drugs should be treated as ‘victims and not criminals’. This is obviously intended to discourage penal responses to children and to discourage their being pulled into the criminal justice system. It usually sits alongside treatment and rehabilitation as the recommended response. But the word (or concept) ‘victim’ is not value free, and speaks to a very distinct representation of the problem of drug use. In the context of a dialogue with States parties in which severity of response is so often reported as protective, and in the context of the known human rights effects of drug control, the prevalence of the victim narrative becomes more important.\textsuperscript{1090}

While it is a given that exploitation of children is to be fought, this is not an accurate representation of the phenomenon of drug use among children and young people. It is instead a complex mix of individual, social and structural factors.\textsuperscript{1091} The reality is more often far more mundane (boredom, fun, exploration and peer effects), or tougher to resolve (poverty, trauma - issues the

\textsuperscript{1087} See, for example, Concluding Observations: Federated States of Micronesia, UN Doc No CRC/C/15/Add.86, 4 February 1998, para 40; Concluding Observations: Japan UN Doc No CRC/C/15/Add.90, 24 June 1998, para 47; Concluding Observations: St Kitts and Nevis UN Doc No CRC/C/15/Add.104, 24 August 1999, para 30; Grenada UN Doc No CRC/C/15/Add.121, 28 February 2000, para 27; Concluding Observations: Georgia UN Doc No CRC/C/15/Add.124, 28 June 2000, para 65; Concluding Observations: Portugal UN Doc No CRC/C/15/Add.162, 6 November 2001, para 51(c). There are examples from each following year.

\textsuperscript{1088} Its first iteration was in 1997. See Concluding Observations: Togo UN Doc No CRC/C/15/Add.83, 21 October 1997, para 52.

\textsuperscript{1089} For some time it has also been part of the Committee’s guidance for periodic reports. Committee on the Rights of the Child, Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc No CRC/C/58/Rev.3, 3 March 2015, p. 16. The wording also appeared in the 2005 and 2010 versions. See UN Doc No CRC/C/58/Rev.1, 29 November 2005; and CRC/C/58/Rev.2, 25 November 2010.

\textsuperscript{1090} Flacks, ‘Performativity’, pp. 56-66.

\textsuperscript{1091} This has been long understood in various countries. Studies in Denmark indicated this as far back as the mid 1960s. See E. Houborg, ‘Danish Drug Policy’, in R. Colson and H. Bergeron
international community proved itself unwilling to legislate for in drug control treaties.\textsuperscript{1092} Initiation of drug use is influenced by parents and peers,\textsuperscript{1093} and ordinary interactions, not necessarily the spectral character of the schoolyard ‘pusher’.\textsuperscript{1094} The problem of drug use, represented as victimhood, is overly simplistic. The wider psychosocial factors underpinning drug use are, however, less often a focus, with such factors being left to holistic interpretation (see below).

Similarly, while there are many children in situations of exploitation in the drug trade, this too is not always a straightforward problem of adult exploitation. Street children, for example, may sell drugs as a survival strategy and to manage their own dependency.\textsuperscript{1095} Many children are involved in the drug trade through the farming of illicit crops on family land. This is an issue of poverty and tradition involving many tens of thousands of children. Here,
however, exploitation and victimhood appears to be hard-wired into treaty obligations. Alongside the Vienna Convention, the CRC also refers to the ‘use’ of children in illicit production and trafficking. The problem arises when this representation of the problem deflects from scrutiny of other State actions, which may or may not be effective in reducing opportunities for exploitation, and may or may not worsen the situations of those children and young people in fact involved.\(^{1096}\) Article 33 obligations are at the centre of this dilemma.

Recent research and various writers have challenged victim narratives for other reasons, and in a variety of contexts.\(^{1097}\) Stephen Hopgood, for example, argues that the image of young victims dominates the international legal imagination.\(^{1098}\) ‘The use of such totemic images in a binary narrative of good versus evil’ he argues ‘is about real victims only in a secondary sense’.\(^{1099}\) The narrative is about justification for the norm or strategy, regardless of the closeness or distance from the ‘social purpose or functional reality’.\(^{1100}\) David Kennedy, meanwhile, warns against a ‘human rights vocabulary that ‘makes us think of evil as a social machine, a theater of roles, in which people are “victims,” “violators,” and “bystanders.”’\(^{1101}\) In this regard, the label of ‘victim’ in relation to drug use implies a perpetrator or offender against whom action

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\(^{1096}\) In relation to Brazil, for example, see Observatório de Favelas and International Labour Office, Escape Routes: The Path of Young People in the Social Network of Drug Trafficking, International Labour Organization, 2009. The concerns about exploitation are clear, but as a negative effect of law enforcement as a response to drug trafficking, see pp. 35-42.


\(^{1099}\) Hopgood, ibid p. 59.

\(^{1100}\) Ibid. This relates to a considerable literature critiquing the ‘purity’ and ‘innocence’ of childhood as represented in health and social policy. For a discussion, see Flacks, ‘Performative’, pp. 57 and 58.

must be taken.\textsuperscript{1102} This is evident in the Committee’s frequent listing of victims of drug abuse alongside victims of sexual and physical abuse.\textsuperscript{1103} In doing so the Committee is following the structure of the CRC, in that Article 33 is sandwiched between articles 32 (economic exploitation) and 34 (sexual exploitation). The drafting history shows that this was intentional.\textsuperscript{1104} But these are obviously not the same issues unless we believe that drug abuse is something done to the child rather than a behaviour, however socially and environmentally influenced.

However, this is exactly the vision represented in the preamble to the Vienna Convention, which raises the concern that ‘children are used in many parts of the world as an illicit drug consumers market’ (emphasis added). This wording is odd and clumsy unless we recognise that drug use among children is represented here as a problem of adult exploitation. By necessity, that representation of the problem leans towards certain forms of action, in this case the ‘no-holds-barred’\textsuperscript{1105} approach of the Vienna Convention. As such we must consider what such language is producing or reproducing.\textsuperscript{1106}

The justification of repression or abusive measures is very possible through victim narratives, and this is no less possible in human rights mechanisms.

\textsuperscript{1102} On the role of ‘folk devils’ and the threat to children as an influence on sentencing, see S. Flacks, ‘Saving Kids from Drugs? Children, Folk Devils and Sentencing for Drugs Offences’ (Unpublished draft manuscript, on file with the author).

\textsuperscript{1103} This is often in relation to street children. See, for example, Concluding Observations: Morocco, UN Doc No CRC/C/15/Add.211, 10 July 2003, para 75 (c); Concluding Observations: India UN Doc No CRC/C/15/Add.228, 26 February 2004, para 77(c); Concluding Observations: Iran UN Doc No CRC/C/15/Add.254, 31 March 2005, para 65(c); Nepal UN Doc No CRC/C/15/Add.261, 21 September 2005, para 86(c); Concluding Observations: Tanzania UN Doc No CRC/C/TZA/CO/3-5, 03 March 2015, para 69(d). See, however, Concluding Observations: Belarus UN Doc No CRC/C/15/Add.180, 13 June 2002, para 52(a) placing drug abuse alongside child trafficking, and sexual and economic exploitation.

\textsuperscript{1104} For example, Commission on Human Rights, Question of a Convention on the Rights of the Child, Report of the Working Group, UN Doc No E/CN.4/1987/25, 9 March 1987, paras 78 and 92 (Venezuela and France, respectively, placing drug abuse within the wider issue of exploitation within the draft Convention).

\textsuperscript{1105} Boister, ‘Suppression Conventions’, pp. 220 and 221.

\textsuperscript{1106} See Flacks, ‘Performativity’.
The sociologists Nils Christie and Kettil Bruun have described the drug problem as a ‘good enemy’, because it represents an extraordinary threat requiring extraordinary measures in response.\footnote{N. Christie and K. Bruun, *Den Gode Fienden: Narkotikapolitik i Norden*, Rabén and Sjögren, 1985.} We see this in the preambles of the drugs conventions. In particular, the threat to children is described as a ‘danger of incalculable gravity’ in the Vienna Convention. The threat posed by a ‘good enemy’ evolves, however, so it remains current. Consider, then, the changing threats we have seen over time in chapter 2. Those perceived as being at risk from this threat are those that wield influence (for example, middle class children and their parents), whilst the action required is against those that do not (the typical drug dealer or drug user, rural farmers). And critically, a good enemy never dies, so extraordinary action is justified in perpetuity. The drugs threat has been on the political agenda for over 100 years and with regard to youth since the early 1970s. Christie has in fact referred to drugs as being ‘perfect as an enemy’ because they meet all of these criteria.\footnote{N. Christie, ‘Suitable Enemy’ in E. Barker (ed), *Abolitionism: Towards a Non-repressive Approach to Crime. Proceedings of the Second International Conference on Prison Abolition, Amsterdam*, 1985. Discussed in N. South, ‘Debating Drugs and Everyday Life: Normalisation, Prohibition and “Otherness”’, in N. South (ed), *Drugs, Cultures, Controls and Everyday Life*, Sage Publications, 1999, pp. 1-15.}

A corollary of the good enemy is an ‘ideal victim’; someone that is weak, blameless, facing a far more powerful perpetrator, and one that wields considerable influence.\footnote{N. Christie, ‘The Ideal Victim’, in E. Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System*, Palgrave Macmillan, 1986, pp. 17-30, at 18-21, (Hereafter: Christie, ‘The Ideal Victim’).} The abstract notion of children, faced with the drugs threat, fits this description. They are weaker than the threat they face but at the same time exceptionally important to wider society. Children are consistently singled out in political declarations on drugs as ‘our future’ and ‘our most precious asset’,\footnote{Preamble, UN General Assembly Resolution S-20/2, Annex. *Political Declaration adopted at the Special Session of the General Assembly Devoted to Countering the World Drug Problem Together*, 8-10 June 1998; Preamble, CND, 2009 *Political Declaration*.} reflecting what has been termed the ‘investment motive’
behind child rights.\textsuperscript{111} Moreover, unlike individual children, the concept ‘the child’ never grows up. ‘The child’ will always be especially vulnerable\textsuperscript{112} and will always require our constant protection from the perpetual threat.

The ‘ideal victim’, however, is not a description of reality. It describes a stereotype through which certain outcomes are reproduced.\textsuperscript{113} For Christie, ideal victims ‘need and create’ ideal offenders.\textsuperscript{114} And as Ezzat Fatah notes ‘Getting tough with offenders is often advanced as the central or, at least, as an essential component, of society’s obligation to the victims of crime and as a *sine qua non* for redressing the wrong done to the victim.’\textsuperscript{1115} Thus, as Flacks has argued, when it comes to drug policy, the lines between the child as victim and the user or ‘pusher’ as ‘corruptors’ is easily drawn.\textsuperscript{1116} The main efforts to respond to the victimisation of children are therefore the aggravating circumstances triggering increased penalties in article 3(5) of the Vienna Convention. These laws are then reported consistently to the Committee as commensurate with implementing Article 33.\textsuperscript{1117}

\textsuperscript{113} Christie, ‘The Ideal Victim’, p. 18, referring to the ideal victim being those accorded this status, not those most victimised, at risk or those that perceive themselves as victims. See also R. Rock, ‘On Becoming a Victim’ in C. Hoyle and R. Young (eds) *New Visions of Crime Victims*, Hart, 2002 pp. 1-22 at 11 ‘We know that victims are not always simon-pure’.
\textsuperscript{114} Christie, ‘The Ideal Victim’, p. 25.
\textsuperscript{116} Flacks, ‘Performativity’.
\textsuperscript{117} As the Committee’s first reference to child victims of drugs was in relation to Togo in 1997, it is worth noting that the State party had reported its pre-existing 20-year penalty for drug offences involving children. UN Doc No CRC/C/3/Add.42, 28 May 1996, para 106. See also para 105 for wider criminal laws reported as protective.
7.2.2 ‘Selective Reticence’

David Bewley-Taylor has identified what he described as a ‘selective reticence’ in the work of the International Narcotics Control Board between 1998 and 2008.\textsuperscript{1118} What he found was that, faced with a wide range of issues the Board could have focused upon, welcomed or critiqued, the Board’s choices demonstrated a certain bias in favour of some approaches and against others, regardless of treaty flexibility. The dynamics within the CRC Committee are not the same.\textsuperscript{1119} But the concept of ‘selective reticence’ is helpful for describing two related sub-themes in the Committee’s work: the focus on some issues to the exclusion of others, including the near absence of critique of State laws and policies in this area; and the lack of focus on the rights of adult ‘others’ in the implementation of Article 33. In this context it is worth reflecting on Margaret Davies’ view that law can be analysed not just by reference to positive actions and decisions, but also by reference to ‘a series of negative moments or exclusions’. ‘The processes of law’, argues Davies, ‘exclude a multiplicity of people and things in a multiplicity of ways and collectively these exclusions can be seen to constitute the ‘real’ positive law’.\textsuperscript{1120} The right to protection from drugs, in other words, may be as much about what it has excluded over time, as what it has included.

\textsuperscript{1118} Bewley-Taylor, Consensus Fractured, pp. 224-245.
\textsuperscript{1119} For example, the personal biases that have been evident in some prominent, long-standing INCB members are not apparent in the CRC Committee. The findings in chapters 5 and 6 show patterns over time regardless of membership turnover. Conversely, the INCB has experienced changes in tone and approach to certain issues with a new presidency. On the various positions of INCB presidents see ibid pp. 219-278; Others have also questioned the Board’s impartiality. See Bruun et al, The Gentleman’s Club, p. 86; and more recently J. Csete and D. Wolfe, Closed to Reason: The International Narcotics Control Board and HIV/AIDS, Canadian HIV/AIDS Legal Network/Open Society Institute, 2007. The CRC Committee’s impartiality is not questioned.
7.2.2(a) A Narrow Issue Focus

As we have seen from chapter 5, the Committee has issued many Concluding Observations about drug use among children, primarily capturing prevention and treatment. These may well provide important guidance. It has been shown that States do reply to them and there is some evidence that the CRC has affected the language of recent CND resolutions. In this way the CRC has the potential to act as an alternative frame of reference. Taken together, however, the Concluding Observations also demonstrate a preference for, or general tendency towards, certain aspects of the topic to the exclusion of others. This need not be an intentional ‘preference’. It is perhaps the outcome of a lack of reflection on the content of standard language. But through the periodic reporting process the problems at hand are nonetheless represented in selective ways, while other issues remain hidden.

As discussed in chapter 5, for Carol Bacchi ‘policies produce ‘problems’ with particular meanings that affect what gets done or not done’ (emphasis in original).1121 With almost 300 recommendations expressing the Committee’s concerns about drug use, and almost two hundred indicating the need for treatment and rehabilitation, it is safe to say that this has been made clear, at least in a general sense. The problem is that this adds little to the concern expressed already by States themselves consistently in their own reports. Indeed, while there have been twelve consensus-based resolutions of the CND specific to children since 2000, it is noteworthy that all but one are focused on prevention and treatment.1122 To agree to these measures in general is not in any way controversial, even in a forum as fractured as this Commission.

1122 These are set out in the final section of chapter 2. The one resolution not focusing on these areas related to internet sales.
Supply reduction, on the other hand, is the area in which the large majority of State action on drugs takes place, and within which a wide range of child rights and wider human rights issues are raised. Yet the production, transit and supply-side enforcement aspects of drug control are almost entirely missed in the Committee’s work. Poor access to essential controlled medicines for children and the relationship between this and the drugs conventions was never raised. The Committee demonstrates a further ‘reticence’ in challenging drug laws, and a passivity when faced with specific issues indicating human rights abuse or risk that flow from a punitive suppression approach. Every instance in which the Committee critiqued State actions raising human rights concerns was documented in chapter 6. They amount to a small handful, despite being told about these issues by States parties themselves on many more occasions over many more years.

In this way the periodic reporting process reproduces a certain ‘problem representation’, to use Bacchi’s phrase. To respond to the problem as represented, certain efforts are reaffirmed while other issues and efforts remain unproblematised ‘silences’.\textsuperscript{1123} It is worth reflecting on why such ‘silences’ matter. First, while silence cannot mean agreement, in the context of an ongoing ‘dialogue’ in which States repeatedly explain their laws, policies and actions and the Committee remains silent, there is the risk that the State may take this as tacit approval. This is more than a theoretical problem. India, for example, informed the Committee in 2000 that it was ‘considering a proposal to amend the Narcotics Drugs and Psychotropic Substances Act\textsuperscript{1124} to protect children from illicit use of drugs and to award the highest level of punishment … when minors are affected by the offence or minors are used for commission of the offence, and when the offence is committed in an educational institution or

\textsuperscript{1123} Bacchi, \textit{Analysing Policy}.

\textsuperscript{1124} Narcotic Drugs and Psychotropic Substances Act, 1985. Article 31A prescribes the death penalty ‘for certain offences after previous conviction’.
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. Here we see a mirroring of the wording of Article 3(5) of the Vienna Convention. The Committee asked no questions about what ‘the highest level of punishment’ might mean, though India retained a mandatory death penalty for certain drug offences. The reason why this is an important example is that India has used the lack of negative commentary from the INCB to defend against constitutional challenges to the death penalty. In its appeal against a 2011 Bombay High Court decision ‘reading down’ the mandatory death penalty, the government noted how the INCB, despite numerous visits to India, had never challenged the practice. That silence was claimed as confirmation of treaty compliance as the relevant monitor was told of the practice repeatedly and did not challenge it.

Second, silences are not only about issue-areas, but affected children. With a focus on prevention and drug treatment, while obviously important, children affected throughout the supply chain are rendered less visible. This includes not only those directly exploited in the drug trade, but those, arguably far larger in number, who experience the negative effects of drug laws and policies, and enforcement efforts. For example, those within families affected by criminal records, those imprisoned with mothers convicted of non-violent drug offences, those experiencing crop eradication campaigns, and affected by criminal market violence. These effects are inseparable from the model of punitive suppression reported to the Committee as being implemented pursuant to Article 33, but are mostly invisible in the Committee’s work on this issue.

7.2.2(b) Rights of the Child Versus the Rights of Adult Others

That there is a relationship between human rights and criminal law is self-evident. The nature of that relationship, however, is far from clear.\textsuperscript{1128} The traditional role of human rights is defensive against the criminal law. Over time, however, it has adopted also an offensive role.\textsuperscript{1129} Previously conceived solely as “brakes” on state power and limits on repression’, says Francoise Tulkens, ‘rights and freedoms may today be viewed, at the same time, as a driving force for intervention and as justification for states’ deployment of their power, in particular that of coercion.’\textsuperscript{1130} This is a problem with which human rights lawyers must grapple, and based on this research it is a conversation into which we must insert the child’s right to protection from drugs. In this regard the preference of the Committee for the rights of the child over the rights of (adult) others is an important theme, and related directly to the victim narrative discussed above.

In 2012, for example, Myanmar reported that the maximum penalty for drug offences was ‘unlimited’ imprisonment or death.\textsuperscript{1131} In its meeting with the State party the Committee challenged a passage referring to the death penalty for children for drug offences, but not its wider application or ‘unlimited’ imprisonment for the protection of children.\textsuperscript{1132} This is indicative of the wider pattern, which Committee Member I summarised as being the risk that ‘being

\begin{footnotesize}
\begin{itemize}
\item[1131] \textit{Third Report: Myanmar}, UN Doc No CRC/C/MMR/3-4 17 May 2011, para 98. See also The Narcoctic Drugs and Psychotropic substance Law, 1993, Articles 16-21 and 22(c).
\item[1132] \textit{Summary Records: Myanmar} UN Doc No CRC/C/SR.1675, 13 June 2012, para 93. In reply the representative of Myanmar stated that ‘under the current law, a child could not be sentenced to death, transportation for life or whipping.’ \textit{Summary Records: Myanmar} UN Doc No CRC/C/SR.1676, 26 January 2012, para 29.
\end{itemize}
\end{footnotesize}
so passionate to protect’, the approach of the Committee can be to ‘over pro-
tect’. The Committee is far more comfortable addressing the child’s right to
protection from drugs (understood in certain ways) and with rights abuses
against children in the context of drug control (e.g. drug treatment, albeit rare)
than with abuses against adult others in the process of implementing CRC ob-
ligations. This was very clear in the analysis in chapter 6. The lack of focus
by the Committee on the rights of others while protecting children is not of
itself a problem until the two come into conflict. But in drug control, efforts
to protect children and the wider human rights consequences of those efforts
are two sides of the same coin. The entire debate about Article 33 in a way
hinges on which side of the coin one is looking at. The Committee is not pro-
moting repressive measures, but it is looking for the most part at only one side
– children have the right to protection from drugs from which State actions
flow. But this can be reversed. States take actions relating to drugs from which
human rights and child rights problems may arise. This again captures the drug
control and human rights positions, and the Committee, through the periodic
reporting process, leans towards the former.

This preference of the Committee towards the rights of the child over the
rights of others is perhaps obvious, given the focus of the CRC. Pursuant to
article 1, it applies only to those aged 18 or under. It could be argued, there-
fore, that some of the issues that affect adults are simply outside of the man-
date of the Committee for comment. As a Committee Member noted, unless
an issue has a direct effect on the lived experiences of children, it is generally
avoided. But there are at least three arguments against this view.

1133 It is clear too in the Committee’s 2016 General Comment on the rights of adolescents.
‘Alternatives to punitive or repressive drug control policies’ were to be welcomed, but specifi-
cally ‘in relation to adolescents’. This reflected the calls for children to not be treated as crimi-
nals, but the wider effects of drug control efforts in the name of protecting children were again
missing. CRC, GC 20, para 64.
1134 Interview with Committee Member 3, on file.
First, there are various provisions within the CRC that entail benefits, even rights, for adults over the age of 18. A clear example is the right of parents to direct their child’s religious education in article 14(2). This right inhere not in the child at all, but in the parent. Other rights may inhere in the child, but they include positive obligations towards adults. Assistance to parents under articles 18 and 27 and antenatal care under article 24 are illustrative. A difference between them and Article 33 is that these other articles explicitly refer to adults in various ways. But this is a superficial distinction. If a benefit to adults stemming from a right within the CRC can be within the mandate of the Committee, then harms to adults stemming from the implementation of those rights must surely also qualify. Why prefer one and not the other?

Second, and related to this, the Committee regularly issues recommendations on wider legislation with implications for, and effects upon, adults. An example is the decriminalisation of abortion, not just for minors seeking it, but for all women. Moreover, the Committee has recommended that states adopt drug laws, and has welcomed the strengthening of drug laws or increases in sentences. Put simply, if the Committee can welcome these broad legislative frameworks, and recommend their implementation, why can’t it critique them?

Finally, perhaps most obviously but also most importantly, children grow up. While the CRC applies to under 18s, children do not live in a world separate from adult interactions. This is a central concern for critical child rights scholars that challenge the lack of a ‘life world’ perspective in the child rights

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^135 See for example Concluding Observations: United Arab Emirates, UN Doc No CRC/C/ARE/CO/2, 30 October 2015, para 58(d) (Recommending that the State ‘Decriminalize abortion in all circumstances’); Concluding Observations: Sri Lanka, UN Doc No CRC/C/LKA/CO/3-4, 19 October 2010, para 55 (recommending that the State ‘review its legislation on abortion’).
framework.\footnote{136} Even if this is a somewhat rudimentary observation, it is a serious critique of child rights law, and presents an important dilemma for an approach that seeks to protect child victims from adult perpetrators. Those who are most at risk of drug use will most likely go on to use drugs. They will likely grow up to become those that are subjected to the very same criminal laws intended for those ‘others’, and justified, as we have seen, on the basis of implementing Article 33. A victim can become a perpetrator by blowing out the candles at eighteen and moving out of the protections of the CRC.

7.2.3 Under Interpretation

The third main theme that helps describe the process is ‘under interpretation’, comprised of two sub-themes: the Committee’s reliance on standard language and holistic interpretation; and the wide margin of discretion afforded States parties in the implementation of Article 33.

7.2.3(a) Standard Language and Holistic Interpretation

The Committee has long adopted a ‘holistic approach’ to the interpretation of the CRC, through which no one right should be read in isolation, but as a component of the treaty as a whole.\footnote{137} All of the Committee Members interviewed saw this as a strength. It is the Committee’s commitment to the ‘interdependence’, ‘indivisibility’ and ‘equal importance’ of all of the rights in the Convention.\footnote{138} From one perspective this is appropriate approach and conforms to placing the text within its ‘context’ for the purposes of article 31 of

\footnote{136} ‘They are in constant interaction with the world around them, including with adults, in a relational and interdependent way.’ See Desmet et al, ‘Critical Children’s Rights Studies’, p. 416.

\footnote{137} See, for example, CRC, GC 5, para 18.

\footnote{138} For example, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24) UN Doc No CRC/C/GC/15, 17 April 2013, para 7.
the Vienna Convention on the Law of Treaties, and bridges economic and social rights on the one hand and civil and political rights on the other. Based on this approach it can be argued that the Committee may remain general in its recommendations about drugs through standard, tried and tested formulations of language, and expect that States parties apply the remainder of the Convention, read alongside various General Comments, to fill in the gaps and provide further normative guidance. In this way, for example, the near absence of discussions of psychosocial risk factors underlying drug use from the majority of the Committee’s recommendations could be resolved by reference to the child’s various economic and social rights. The child, for example, has the right to rest and leisure, which should be applicable to the need to resolve boredom as a driver of drug use. Similarly, all juvenile justice standards apply regardless of the type of offence, drugs or otherwise. Through these other rights, the Convention may provide a richer normative framework than Article 33 alone.

But even if the holistic approach were conceptually helpful, the issue is that we do not see it coming through in practice. As Khaliq and Churchill have

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1140 When wider psychosocial factors are addressed by the Committee it is mostly in relation to social factors leading to delinquency and drug use among street children specifically. See also, however, Concluding Observations: Guinea-Bissau, UN Doc No CRC/C/15/Add.177, 13 June 2002 (referring to children not attending school); Russian Federation, UN Doc No CRC/C/RUS/CO/3, 23 November 2005, para 77(c); Concluding Observations: Bosnia and Herzegovina, UN Doc No CRC/C/15/Add.260, 21 September 2005, para 68 (both recommending a comprehensive study on the ‘causes and consequences’ of drug use and to use that study to make improvements. In neither case was this later followed up); Concluding Observations: Maldives UN Doc No CRC/C/MV/CO/3, 13 July 2007, para 89(c) (recommending that the State ‘Adopt comprehensive strategies which are not limited to penal measures but also address the root causes of gang violence and crime related to drugs among adolescents, including policies for social inclusion of marginalized adolescents’); and Concluding Observations: Democratic Republic of Congo UN Doc No CRC/C/15/Add.153, 9 July 2001, para 73 (recommending that the State focus on ‘factors leading to vulnerability’); Nigeria UN Doc No CRC/C/15/Add.257, 13 April 2005, para 68 (recommending prevention including through general poverty reduction strategies)
noted, ‘the CRC Committee will insist upon the interdependence and indivisibility of all of the rights within the CRC’, but ‘does not really elaborate upon what that means in practice.’\textsuperscript{1141} We see this from Concluding Obligations about drugs. Instead, there is an expectation of holistic interpretation by the State, alongside which recommendations or statements may be made that are so general that they say nothing substantive on the topic at hand. Committee Member 1 referred to this directly, noting that while there may not always be specific guidance in the recommendations about drugs, this can be found elsewhere in the Concluding Observations.\textsuperscript{1142} However, there is little evidence, from the current analysis, of the holistic approach in State party reports over time. This was acknowledged by two Committee members interviewed for this study. State party reports instead tend to have a section dedicated to specific articles, including one dedicated to their actions under Article 33. In other words, the Committee is looking at the CRC holistically, while States are speaking to specific provisions directly.

It has been found that Concluding Observations written in general terms are some of the least ‘effective’.\textsuperscript{1143} This may appear to be ‘ineffectiveness’ from one perspective, and it may at the same time be an important normative effect. As one former Committee member remarked of such recommendations, a State may ‘interpret that any way they want’.\textsuperscript{1144} The holistic approach, in other words, may contribute to a structural bias in that, absent its role as part of a critical review of State action, it risks leaning towards apology.\textsuperscript{1145}


\textsuperscript{1142} Interview on file. See, however, W. Källin, ‘Examination of State Reports’ in H. Keller and G. Ulfstein (eds), \textit{UN Human Rights Treaty Bodies: Law and legitimacy}. Cambridge University Press, 2012, pp. 16-72, referring to the need for Concluding Observations to be ‘specific’ and ‘useful’.

\textsuperscript{1143} Krommendijk, ‘Domestic Effectiveness’.

\textsuperscript{1144} Interview with Committee Member 1, on file.

\textsuperscript{1145} As another Committee member has noted of the standardised structure of Concluding Observations ‘It might be more fruitful if the observations were more tailored to the individual
7.2.3(b) The Breadth of States’ Margin of Discretion

Over the years the Committee has expressly welcomed or recommended the implementation of strategies ranging from Egypt’s Youth Drugs Strategy, to the wider drugs strategies of Spain, Hungary, Cyprus and Bosnia. ¹¹⁴⁶ Cyprus bases its drug policy on that of the EU with its core commitments to human rights and harm reduction alongside prevention and treatment. Spain has a long-standing harm reduction approach and allows for small-scale cannabis co-operatives. Bosnia’s includes explicit reference to the CRC (a rarity) and includes a policy pillar on harm reduction. ¹¹⁴⁷ This is quite unlike that of Hungary, which was criticised by national NGOs for its abandonment of harm reduction efforts in the strategy welcomed by the Committee. ¹¹⁴⁸ Indeed, the Committee has heard from States setting out legal frameworks as diverse as decriminalisation, ¹¹⁴⁹ to ‘zero tolerance’, ¹¹⁵⁰ to those containing the most severe of penalties up to an including execution. And it has heard from those proclaiming the goal of a ‘drug-free society’ to those (albeit far less often)

¹¹⁴⁶ Concluding Observations: Egypt, UN Doc No CRC/C/EGY/CO/3–4, 15 July 2011, para 6; Spain, UN Doc No CRC/C/15/Add.185 13 June 2002, para 39(a); Concluding Observations: Hungary, UN Doc No CRC/C/HUN/CO/3–5, 14 October 2014, para 6(a); Concluding Observations: Cyprus, UN Doc No CRC/C/CYP/CO/3–4, 24 September 2012, para 5(b); Concluding Observations: Bosnia and Herzegovina, UN Doc No CRC/C/BIH/CO/2–4, 29 November 2012, para 4(c).
¹¹⁵⁰ Initial Report: Palau, UN Doc No CRC/C/51/Add.3 23 March 2000, para 246
challenging prohibitionist frameworks.\textsuperscript{1151} But the variation in State efforts reported under Article 33 is no better illustrated than in 2014 when the strategies of Portugal and the Russian Federation were both welcomed during the very same session.\textsuperscript{1152} In both cases the Committee issued general concerns about drug use and made general prevention recommendations.\textsuperscript{1153} Portugal, however, decriminalised possession of all drugs in 2001 and invested heavily in harm reduction and drug treatment efforts.\textsuperscript{1154} Data from the European School Survey Project indicate lower than EU average rates of drug use among school age children in the country.\textsuperscript{1155} Russia’s current drug strategy,\textsuperscript{1156} on the other hand, welcomed by the Committee, is considered by many observers to represent an ‘anti-model’ for drug control.\textsuperscript{1157} Notably, despite having approximately 1.8 million injecting drug users, most of them using opiates, many of

\textsuperscript{1151} Initial Report: Qatar, UN Doc No CRC/C/51/Add.5 11 January 2001, para 193. For the connection of this goal to severity of criminal laws and the UN drug control conventions, see Qatar’s second periodic report, UN Doc No CRC/C/QA T/2, 16 December 2008, paras 305-307. See also Initial Report: Sweden, UN Doc No CRC/C/3/Add.1 23 September 1992, para 247 (‘the ultimate aim of Swedish drug policy is the creation of a drug free society’) and para 249 (noting an increase in penalties and the UN drugs conventions). Contrast Initial Report: Macedonia, UN Doc No CRC/C/8/Add.36, 27 June 1997, para 257.

\textsuperscript{1152} Concluding Observations: Russian Federation, UN Doc No CRC/C/RUS/CO/4-5, 25 February 2014, para 5(c); Concluding Observations: Portugal, UN Doc No CRC/C/PRT/CO/3-4, 25 February 2014, para 53.

\textsuperscript{1153} Ibid. Russian Federation, paras 55 and 56; Portugal, para 54.

\textsuperscript{1154} While results have been somewhat mixed, there has been a large decrease in overdose deaths, HIV infections and, of course, criminal records issued to people who are drug dependent. C. Hughes and A. Stevens, ‘A Resounding Success or a Disastrous Failure? Re-examining the Interpretation of Evidence on the Portuguese Decriminalisation of Illicit Drugs’, 31 Drug and Alcohol Review, 2012, pp. 101–113.

\textsuperscript{1155} See European School Survey Project on Alcohol and other Drugs (ESPAD) and European Monitoring Centre on Drugs and Drug Addiction (EMCDDA), Country Overview: Portugal available at http://www.espad.org/report/country-summaries/portugal


\textsuperscript{1157} The Russian Federation’s anti-drugs efforts have been consistently welcomed over the years in its interactions with the Committee. See Summary Records: Russian Federation, UN Doc No CRC/C/51/Add.5, 30 September 1999, para 38 (welcoming information on increased penalties); Concluding Observations: Russian Federation, UN doc No CRC/C/RUS/CO/3, 23 November 2005, para 76 (welcoming ‘measures taken to prevent and combat drug abuse among children, resulting in a decrease in drug addiction’); Concluding Observations: Russian Federation, UN Doc No CRC/C/RUS/CO/4-5, 25 February 2014, para 5(c) (welcoming the strategy to 2020).
them under 18, the strategy includes a criminal ban on opioid substitution therapy to 2020, contrary to WHO guidance.  

It has been argued that while Concluding Observations ‘must not be drawn up too cautiously’, the Committee ‘must also be careful that its observations do not turn into convictions because it does not have the authority to do so.’

This is a difficult balance, and the doctrine of the margin of discretion (or ‘margin of appreciation’) afforded to States, especially in human rights implementation, is long-standing. But it has been subject to critique, in particular its use by the European Court of Human Rights. In the present case, while not referred to as such, nor applied via any identifiable tests, the margin of discretion afforded States parties has been very wide. What the above examples demonstrate is that the Committee appears to make no qualitative distinction between such laws and policy frameworks. The adoption of a drug law or strategy of some sort seems sufficient. This too is apologetic. A lack of commentary is a choice, just as much as with making specific declarations. As has been well observed ‘even non-intervention is intervention - namely intervention on the side of the status quo.’

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1158 After its annexation of Crimea, a month after the Committee’s Concluding Observations, the Russian Federation implemented that ban in the region, resulting in as many as 100 deaths in the following year. ‘Crimea: No McDonald’s or Methadone After Annexation’, The Guardian, 4 April 2014; ‘AIDS Crisis Brewing in Crimea and East Ukraine Says UN’, AFP, 21 January 2015.
1161 Koskenniemi, From Apology to Utopia, p. 613.
7.3 Practical Considerations: The Work of the Committee

7.3.1 The Influence of Reporting Guidelines

The guidance on the form and content of State reports issued by the Committee influences the structure and content of State reports. From the earliest days the Committee has invited States parties to present their laws and strategies to protect children from drugs, which States parties have duly done under the heading of Article 33. Thus, the Committee invites this information, which States then present as their evidence of compliance. The guidance, therefore, reflects the Committee’s preferences which are then embedded in State reports. It is a crucial element of the ‘dialogue’.

In the early days the Committee was concerned that initial State reports were too general so more detailed information was requested.\footnote{1162}{Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc No CRC/C/58, 20 November 1996.} In relation to Article 33, this included requests for legislation, minimum penalties for exploitation, treaties ratified and other information. This detailed guidance, however, resulted in very lengthy reports to which the Committee could not fully respond.\footnote{1163}{M. Verheyde and G. Goedertier, ‘Articles 43-45: The UN Committee on the Rights of the Child’ in A Alen et al (eds), A Commentary on the UN Convention on the Rights of the Child, Brill/Martinus Nijhoff, 2006, p. 22.} The guidance itself ran to fifty pages. Therefore, in a later iteration States were told that if they had already reported on a given issue they need not repeat that information, and the focus was placed on asking States parties to follow up on Concluding Observations.\footnote{1164}{Committee on the Rights of the Child, Recommendation on the Organization of Work, UN Doc No CRC/C/118, May 2002, para 3(b).} This produced a further side effect. If concerns about such information had not been raised in earlier Concluding Observations, or if a recommendation was too vague or general, then
the State could merely refer back again to its older report, reaffirming its ex-
isting action. From State reports over time we can see that in later years refer-
ence has often been made to paragraphs in older reports relating to drug laws
and policies that have remained unchanged. These had already passed by the
Committee without comment, and thus the opportunity for a critical review
was further limited. In this way they remained unproblematised ‘silences’,
having been taken outside of the central dialogue for administrative reasons
related to the workload and resource constraints facing the Committee.

7.3.2 Workload and Resource Constraints
The CRC is ‘a victim of its own success’. The first success is its wide rati-
faction. The CRC has amassed 196 States parties indicating the Convention’s
near universal acceptance. The second ‘success’ is the breadth of issues it co-
vers. Its comprehensive articulation of rights has been lauded from the outset,
and still is today. But the combination of the two ‘successes’ results in a mas-
sively burdensome reporting process, which involves a huge amount of docu-
mentation, both because of the amount of States parties reporting and because
of what it is they are meant to include. State reports are lengthy, running to
80-120 pages on average. Each session now involves approximately 8-10
States parties for the main convention, additional to the two optional protocols
on which States also report. There are 18 Committee members, and a small
secretariat of six people working with limited resources of approximately
$3.2 million dollars. Increased ratification does not trigger increased re-
sources.

1165 Interview with Committee Member 1, on file.
1166 Office of the High Commissioner for Human Rights, Background Paper in Support of the
Intergovernmental Process of the General Assembly on Enhancing the Effective Functioning of
the Human Rights Treaty Body System, UN Doc No A/68/606, 19 November 2013, Table 1.
1167 Office of the High Commissioner for Human Rights, Comprehensive Cost Review of the
1168 Ibid p. 9. The General Assembly has addressed the resourcing problem by making various
cuts instead of adding resources. For a discussion see C. Broeker, ‘The Reform of the United
These workload and resource constraints can affect the quality of the review and recommendations made.\textsuperscript{1166} These are prepared based on a draft developed by a country rapporteur (or sometimes more than one) working with the secretariat.\textsuperscript{1170} They are then adopted by consensus in a plenary meeting of the Committee. The Committee, however, simply does not have the capacity to properly scrutinise the reports in front of it. Indeed, to deal with the workload, Committee members often spend their free time outside of sessions reviewing the material.\textsuperscript{1173} Due to the amount of information involved, limited time, and very little research capacity in the secretariat,\textsuperscript{1172} previous wording that was agreed by the Committee is used (in relation to Article 33 and other areas\textsuperscript{1173}) and so we see, albeit with exceptions, the repetition of formulaic Concluding Observations, whatever the specific national dynamics at play.

Infrastructural weakness therefore plays a role in the generation of the issues discussed above. These resource problems have long troubled the Committee, and relate to wider, long-standing concerns about the human rights treaty bodies.\textsuperscript{1174} Indeed, this study may be seen in part as a case example illustrating


\textsuperscript{1170} Ibid pp. 111 and 112.

\textsuperscript{1171} Interview with Committee Member 2, on file.

\textsuperscript{1172} Committee Members 2 and 3 identified this problem, interviews on file.


those concerns, and could bolster calls for increased resources to the mecha-
nism. States, however, will not likely welcome increased scrutiny of their ap-
proaches to drugs.\footnote{1175}

7.3.3 Expertise and Institutional Memory

The issue of expertise within the Committee and in the secretariat was raised
by all three Committee members interviewed. In order to properly analyse
State performance with regard to drugs and comment effectively, some expert-
tise in this area is required. Where the Committee has issued its fairly rare
Concluding Observations that critique State practices or challenge a drug law,
it has been through a combination of an informed country rapporteur, either
because of their own expertise, or because of NGO reports. A good example
is the Concluding Observations on Ukraine in 2011, which tackled a proposed
strengthening of national drug laws. The country rapporteur had lengthy pro-
fessional expertise in adolescent addiction. The Committee as a whole, how-
ever, lacks consistent expertise on this topic.

The Committee’s lack of a follow-up mechanism is also a well-known con-
cern. It can only wait for the next State report, which also helps to explain why
silences can become patterns. This was also raised as a problem by Committee
members interviewed.\footnote{1176} The State report is frequently late, and has on occa-
sion taken over ten years to appear. So even if a Committee member were to
take issue with a certain State practice or piece of legislation, that Committee
member and any secretariat staff that were involved may have left by the time
the next reporting process is begun. Thus, there is little institutional memory
without adding to the existing documentary workload by necessitating a return

\footnote{1175}{On this dilemma beyond the topic of drugs see C. Broeker, ‘The Reform of the United
https://www.asil.org/insights/volume/18/issue/16/reform-united-nations’-human-rights-
treaty-bodies}

\footnote{1176}{Interview with Committee Member 1, on file.}
to previous reports on each occasion. This may further explain the lack of follow up on those few occasions when impact assessments or legislative reviews were recommended.

7.3.4 ‘Visibility Bias’

In the view of Committee Member 3, Article 33 has suffered from three problems, none of which are unique to this provision, but which all relate to some of the issues already raised above. These were collectively referred to by the Committee Member as ‘visibility bias’.1177

The first is that the article is ‘sandwiched’ between other provisions that have generally received far more attention. This is partly to do with long standing concerns about sexual exploitation, trafficking in children and juvenile justice, but also because the expertise on the Committee, including those in leadership positions, tended to lean more in this direction (this, it was noted, was not a criticism). This aspect of visibility bias is clearly in evidence in the periodic reporting process, when we compare the attention and detail given to juvenile justice recommendations from the very beginning as compared with those relating to drugs. And it is clear also from the drafting process where the discussions around other provisions were far more in depth and detailed. A similar view was voiced by Committee Member 1, who was of the view that, while there was no explicit evasion of the topic of drugs, there was a lack of in depth discussion about Article 33, which, despite so many Concluding Observations on the topic of drugs, had not been a priority concern.1178 This was related in their view to the breadth of the Convention and an inevitable selectivity of focus that would emerge from that.

1177 Interview with Committee Member 3, on file.
1178 Interview with Committee Member 1, on file.
The second element of visibility bias, according to Committee Member 3, was the ‘quality of the information available to it’. Where the Committee has been able to sit down for in depth conversations with NGOs and national human rights institutions far more detailed and targeted Concluding Observations have been possible. NGOs brought the situation in drug detention centres to the attention of the Committee, and later the death squads in the Philippines. However, due to the nature of the NGO sector in drug policy and the lack of attention of child rights NGOs to drugs issues, shadow reports are not likely to come in any consistent way. Despite this gap, it is important to recall that State party reports regularly provide sufficient information if the Committee has the expertise to critically assess it.

The third element was the absence of a consistent secretariat or specialised agency presence on this issue. The comparison was made to the UN High Commissioner for Refugees, which has for years submitted shadow reports and attended Committee sessions. This has helped to move the dialogue with States parties forward and evolve the norms around child refugees. Similarly, Unicef regularly takes part (though not on drugs issues). The problem with Article 33 was summarised by Committee Member 3 rather dryly: ‘Where is UNODC?’ The lead office of the UN Secretariat with responsibility for drugs issues had not taken part in the periodic reporting process, including in relation to other issues within its mandate. This speaks to the long-standing silos between Geneva and Vienna-based mechanisms, between which the child’s right to protection from drugs appears to have fallen.
7.5 Conclusion

This chapter has explored three inter-related themes or ‘preferences’ of the Committee on the Rights of the Child in how it approaches the child’s right to protection from drugs. In doing so it has attempted to bring together the findings of the previous two chapters into a succinct critique. The first theme is a persistent victim narrative implying a perpetrator requiring enforcement action, while over-simplifying the reality on the ground. The second is a ‘selective reticence’, understood in two ways. The entire process demonstrates a narrow issue focus that silences certain aspects of the problem, while the Committee has been unwilling to challenge or critique legal and policy frameworks. And there is a clear preference for considering the rights of children to the exclusion of the rights of adult others in the name of implementing Article 33. Together these themes produce, in Bacchi’s words, a ‘problem representation’ that tends to reproduce and reaffirm certain actions. Overall, the Committee has adopted a passive stance on issues raising human rights concerns due to a focus on the protection of children to the exclusion of the consequences for others of actions undertaken in this regard.

The third theme is about the under interpretation of Article 33, again understood in two ways. The Committee’s holistic approach to the CRC, while conceptually useful, has also led to Article 33 remaining unpacked specifically, resulting in the repetition of standard language that restates existing State justifications for their actions. Meanwhile, a very wide margin of discretion has been afforded to States that seems apologetic (in the sense set out in chapter 1) and even permissive in its capability to encompass all policy options from the most repressive to the most liberal.

There are, however, also important practical issues that play a role in this dynamic, not least of which being the massive workload the Committee carries and the significant resource constraints under which it operates. Over time,
moreover, Article 33 has suffered from a ‘visibility bias’ that has contributed to its under interpretation.

Together, these themes and practical challenges may be seen to represent the CRC Committee’s structural bias with regard to the child’s right to protection from drugs. It is one that has tended towards the reaffirmation of existing State behaviour, whatever this might be, through what is essentially a positive feedback loop revolving around Article 33.
8. Conclusion

8.1 The History of the Regimes

The historical development of the CRC and the drugs conventions is a story both of content and the relationship between the two. The CRC and the Vienna Convention were adopted at the same time and entered into force within months of each other. Drug control entered into what is widely seen as a major advancement in the international recognition of child rights. Meanwhile children entered for the first time into drug control law in its most punitive manifestation to date. By this time, however, as chapter 2 showed, the main strategies and infrastructure of drug control were long in place and developed without children in mind. Issues relating to this age group were in fact often purposefully avoided due to a lack of information or understanding of what to do. However, concerns about children and young people did provide important justification for the extension and strengthening of international drug control law, whatever the position any given State might have held. Their protection provided justification for what had already been put in place and, contradictorily, was a reaction to the fact that, despite considerable State effort, things were getting worse. Article 33 of the CRC, meanwhile, was developed with little more than a cursory discussion of drug policies. Even in its formulation it was ‘barely contested terrain’, to recall the critique with which this thesis began.

The CRC therefore on the one hand seemed to ‘cap’ the UN legislative process in drug control that had begun in the early 1900s. From decades of ‘detachment’ as the main components of the drug control system were put in place
came ‘convergence’ at a time when States were becoming more willing to take on board more intrusive international legal obligations. The agreement of a child’s human right to protection from drugs came at the height of the drugs threat in the late 1980s, a context that also paved the way for the Vienna Convention’s more stringent provisions, put in place to respond to the illicit drug trade which was by then larger and more damaging than ever.

It was as though including protection from drugs in a human rights treaty could somehow add value, despite the evidence that the drug control system was not working. This could only be destined to fail. But on the other hand, the CRC still placed the drugs issue within a human rights treaty dedicated to children’s wellbeing, however little thought went into the specific provision. Fragmentation was evident in the drafting process as the differing underlying principles of the two regimes played out in their negotiation. The fact that incitement could be accepted with ease in drug control and rejected with similar ease in child rights, with the reverse occurring for societal root causes of harm, merely confirmed the significance of their different legal traditions.

8.2 Fragmentation and Drug Policy Debates

Chapter 3 focused on the content and principles of the Convention on the Rights of the Child and the UN drugs conventions. It was argued that the CRC and the drugs conventions, as regimes, are in theory only superficially similar, and not necessarily commensurate, whatever the intention of the drafters might have been. Fragmentation looms large given their differing principles, ethos and potential ways of viewing the drugs issue. One system is a suppression regime and a part of transnational criminal law and global administrative law. The other is part of the framework of human rights law.

Chapter 4 showed how Article 33 of the CRC has been a component of drugs and human rights debates over at least the last decade. Opposing positions
adopted by writers, advocates and UN agencies with regard to the relationship between human rights and drug control, and the role of the right to protection from drugs within this, were categorised, showing fundamental disagreements that go far beyond (and beneath) the texts of the treaties. The potential for fragmentation thus plays out in real-world debates in which the child’s right to protection from drugs plays alternative, opposing roles. Adopting the indeterminacy thesis, it was argued that a political or policy preference may be held, but there is no logical or legally objective ‘winner’ in this regard. The positions adopted with regard to Article 33 and the relationship between the two regimes effectively cancel each other out in precisely the ways predicted by indeterminacy, and expose the politics of the right to protection from drugs.

Critically, though Geraldine Van Bueren had asserted that Article 33 did not ‘add significantly’ to the drugs conventions, she was wrong in at least one sense. The CRC created a new monitoring mechanism. Through Article 33 a human rights body for the first time had an explicit mandate to scrutinise drug laws, policies and practices. The question was where this new mechanism might take the drugs discussion through a child rights lens, despite the histories of the regimes and superficial complementarity of the regimes. Irrespective of fragmentation and indeterminacy, would the process prefer certain outcomes over others?

8.3 Dialogue on a Contested Right
8.3.1 Recommendations and Silences
Through the periodic reporting process, as chapter 5 showed, the Committee has made a series of normative recommendations that do not appear in drug policy forums, such as the International Narcotics Control Board. In some cases these are challenging to government practice, such as calls to implement harm reduction services for minors, for access to drug services to be possible
without parental consent, or for amending criminal laws to decriminalise minors (none of which have been recommended through the drug control monitoring mechanisms). It was also shown that the CRC Committee is in fact in a ‘dialogue’ with States, in the sense of an identifiable ‘back and forth’ over time. Issues the Committee raises are responded to in later State reports, where these had previously been absent. And States directly cite the Committee’s recommendations in referring to legislative change. This shows that States at least regard the requests from the Committee as legitimate with regard to their Article 33 obligations. It is a simple but important finding on this topic. What this research shows, at least, is the potential for the CRC, via Article 33, to operate as a ‘lens’ through which to filter drug laws and policies and reach operational conclusions. Whether or not such recommendations might be followed on the ground is a matter for other research. What matters for now is the possibility of an alternative lens, but also that this potential has not been realised.

We may of course ask what effect such recommendations might have. There have been a number of recent studies looking at their effectiveness. But ‘effectiveness’ and normative effects are not the same. Effectiveness refers to ‘observable, desired changes in behaviour’ that would not have happened without the mechanism’s intervention or recommendation. But what of ‘silences’, or what is not said or problematised by the relevant legal forum, as Carol Bacchi asks? As chapter 6 showed, the Committee has largely remained passive when presented with information that raises human rights concerns. It has demonstrated a reticence in critiquing drug laws and policies, but welcomes or endorses them without scrutiny. Moreover, formulaic language and

1179 Many actors within States question the legitimacy of the treaty bodies themselves, however. See Krommendijk, ‘Domestic Effectiveness’.
holistic interpretation overshadows the need to unpack the implications of Article 33 specifically. From one perspective the Committee’s Concluding Observations about drugs may be seen as ‘ineffective’. But as part of a dialogue with States they still may generate normative effects. In this case, that of leaving unchallenged over repeated reviews that which is contingent, questionable and potentially harmful for human rights. This is no less significant.

8.3.2 The Relationship Between the Regimes: Two Effects

It is possible that in a fragmented system one regime may play a stronger role to the potential detriment of another. Ellen Hey, for example, has observed that environmental law is not ‘in the lead’ in how it interacts with other areas of international law, such as trade and investment law, human rights law and the laws of armed conflict.1182 For Hey this is in part due to the fact that the ‘sites’ for decision-making are outside of environmental law.1183 But this was precisely the defining characteristic of the CRC’s periodic reporting process. It was outside the drug control system. Still, the process appears to demonstrate a structural bias that reaffirms the principles and strategies of the drug control system. The dynamics of this were set out in chapter 7, and through the entire process we may observe two normative effects that speak directly to our research questions:

a. A changing of the original relationship between the drugs conventions and the CRC from defining the substances captured to defining the ‘appropriate measures’ to take, and;

b. A changing of the normative status of drug control obligations from instrumental strategy to child rights value.

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1183 Ibid.
8.3.2(a) From Defining the Substances Captured to Defining ‘Appropriate Measures’

With regard to the first effect, it is clear from the drafting process that the mention of the drugs conventions was intended to clarify which substances were involved. It was not intended to set out specific legal or policy requirements, which would then also become child rights obligations. Nonetheless, the periodic reporting process has apparently altered this original position. It is a form of norm transmission from international drug control to child rights within which the child rights system plays a more passive (or receptive) role but provides its political weight as an outcome.

An example of this is that the initial distinction between substances appears to have broken down over time through the inclusion of alcohol, tobacco and other substances in State party reports and Committee recommendations. But far more important is the equation of national legal frameworks and the ratification of the drugs conventions with implementing ‘legislative measures’ for the purposes of Article 33. Alongside national legal frameworks, we saw in chapter 6 that seventy-two of the 194 States parties explicitly related their ratification of one or more of the UN drug control conventions to their obligations under Article 33. As with national laws the Committee had invited this information in its reporting guidance. In this way, the ratification of the drugs conventions was prima facie associated with ‘appropriate’ protection under Article 33 from the early stages of the Committee’s work. The Committee has reaffirmed this by calling much more recently for the ratification of the drugs conventions by those States that have not yet done so.\textsuperscript{1184} Thus, the protective role of the strategies envisaged by these treaties has gone largely unquestioned, yet folded into the structures of the periodic reporting process.

\textsuperscript{1184} CRC, GC 15, para 66.
Through this process a positive feedback loop has developed that revolves around the child’s right to protection from drugs. The broad strategies within the drugs conventions, based on a given set of theories and ideas that all but omitted children, have been translated into national laws. These are then reported back to the CRC Committee as fulfilling Article 33, often without critical response, sometimes receiving the Committee’s endorsement. The issue of incitement is again illustrative. We now know this was rejected in drafting the CRC, and incitement in fact appears nowhere in the Convention. But it is required by the Vienna Convention and because of this States frequently report these laws as part of their implementation of Article 33. Through the periodic reporting process, therefore, a concept that was rejected in the drafting of the CRC has been reintroduced pursuant to obligations undertaken under a transnational criminal agreement containing ‘deliberately Draconian’ elements. In this way the original formal relationship between the two is changed.

This relationship could, of course, be viewed as a good example of systemic integration. Indeed, the CRC expressly allows for other areas of national and international law to fill any gaps in the CRC or to provide greater protection to child rights (article 41). Systemic integration, however, itself expresses a preference for the coherence of the law, when exposing tensions may be valuable, especially when certain theories or tests may not sit well in another regime. The Committee has otherwise been clear that other areas of international law can have detrimental effects on child rights. To place child rights

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1185 Togo’s national drug law, for example, which contains very stringent penalties, was developed based on UN model laws grounded in the drugs conventions. See International Narcotics Control Board, Annual Report for 2000, UN Doc No E/INCB/2000/1, 2001, para 228. The CRC Committee welcomed this law in 2005. Concluding Observations: Togo, UN Doc No CRC/C/15/Add.255, 31 March 2005, para 66.
1186 Vienna Convention Commentary, p 144.
1187 CRC, GC 16, paras 47 and 48.
‘in the lead’, to use Hey’s term, we may therefore legitimately ask, rather than focusing on avoiding conflict, if the UN drugs conventions and the national laws and strategies they generate are actually ‘conducive’ to the realisation of the rights of the child. If so, how? Indeed, it is this searching question that has been missing from the more than two decades of the Committee’s work. We may therefore recall Michael Freeman’s challenge to the institutions and processes that developed from the ‘protectionist ideology’ that preceded child rights. What have they in fact achieved in protecting children? Now, of course, we may pose the same question to at least part of the rights-based system that ultimately retained precisely those protectionist ideologies.

8.3.2(b) From Instrumental Strategy to Child Rights Value

The second effect may be seen as a form of ‘signalling’. Hillebrecht has theorised that States may conform to human rights judgments to ‘signal’ their commitment to human rights at national level. Goodman and Jinks instead refer to compliance with human rights as signalling to other States in a process

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1188 If the Framework Convention on Tobacco Control, for example, were to be seen as a ‘relevant international treaty’ then the measures it sets out could similarly be seen as ‘appropriate’. These are very different to those in the drugs conventions.

1189 During its meeting with Pakistan in 2009 a Committee member noted that ‘the adoption of legislation severely punishing illegal drug consumption had not succeeded in halting the rising trend in drug abuse.’ It is an exception that proves the rule, and the query did not in any case become a Concluding Observation. *Summary Records: Pakistan*, UN Doc No CRC/C/SR.1444 6 April 2010, para 70.


1191 C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Cambridge University Press, 2014. ‘Signalling a commitment to human rights, suggests that governments can use compliance to demonstrate a commitment to human rights, particularly to domestic audiences. As international organizations endowed with the technical, legal, and moral authority to adjudicate on human rights abuses, the tribunals have earned a reputation as legitimate and powerful human rights actors. Complying with their rulings can help boost a government’s reputation and legitimacy among its constituents’, at 14. (Hereafter: Hillebrecht, *Domestic Politics*)
of human rights ‘acculturation’ between them.\footnote{R. Goodman and D. Jinks, Socializing States: Promoting Human Rights Through International Law, Oxford University Press, 2013. ‘Because actors often emulate orthodox or widespread social practices, the instrument might cue actors to form beliefs about the characteristics and behavior of other group members and, in turn, to adopt those practices for themselves’, at 173. For a discussion of ‘acculturation’ see pp. 25-32. (Hereafter: Goodman and Jinks, Socializing States)} For Hillebrecht, this signalling can provide leverage for national human rights policy change.\footnote{C. Hillebrecht, ‘The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change’, 20 European Journal of International Relations, 4, 2014, pp. 1100-1123, at 1107. See also Hillebrecht, Domestic Politics, pp. 82-97.} For Goodman and Jinks, over time States ‘will be required to enact increasingly meaningful reforms’ to benefit from the international social gains of appearing to conform.\footnote{Goodman and Jinks, Socializing States, p. 156.} Both approach such signalling optimistically, and each view may well be at play here. But aside from who or what is being signalled to, a related yet distinct issue is the content of what is being signalled. ‘Human rights compliance’ is too broad. What matters, as stated at the outset of the thesis, is what compliance looks like, and in response to what. Whatever it is that the State is doing in drug control effectively becomes child rights compliance through the process of reporting and uncritical response, standard language that reinforces State justifications, or even endorsement. Simply put, a policy choice or political preference at a given time, becomes a right and the responses of the past to a given understanding of the drugs ‘problem’, become the child rights compliance of today. And that is what is being signalled.

But even if the drug control system was predicated on humanitarian goals, and even if the Vienna Convention was justified on rights grounds,\footnote{See Pushpanathan v Canada, [1998] 1 SCR 982, para 69 (drug trafficking found not to be contrary to the human rights aims of the UN Charter for the purposes of denying refugee status).} the equation of drug control with the protection of human rights is questionable.\footnote{See chapter 2.} More-
over, as Griffin warns, ‘one must not run together a justification of an obligation and a justification of a right.’ There are good reasons to take this seriously. Transforming a strategy into a value may render it even less amenable to change. Ironically, this may hinder the purpose of Article 33 (i.e. actually protecting children from drugs), the achievement of which being dependent upon legal and strategic agility. But through Article 33 and the periodic reporting process an instrumental strategy devised during a certain period of time is now garnered with the ‘universal’ and timeless normative value of child rights. This was a risk that was predicted early on in the drafting of the CRC and it is one that clearly flowed from the historical analysis carried out as part of this research. It could have been interrupted through periodic reporting in the decades that followed. For the most part, it was not.

8.4 Concluding Remarks: What Kind of Norm is Article 33?

Neil Boister has argued that the expansion of transnational criminal law has not been ‘complemented (or complicated) by a general discussion of coherent

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1198 At the time of writing, for example, Sweden is in the process of incorporating the CRC in its entirety into national law. Quite aside from the wider legal complications of such a move (For a critique see M. Klamberg, ‘Kopiera inte Barnkonventionen’, Upsala Nya Tidning, 14 July 2017), consider the idea of signalling. As we have already seen, Sweden has long stated that its policy is a drug free society, based on a restrictive legal framework backed by criminal law. It equates Article 33 with that vision, which in turn limits other policy options and various service interventions. One may support this approach or not. That is not the point. The issue is that it is the subject of lively national debate. What, then, are the long-term policy effects of enshrining this particular understanding of Article 33 into national law? If a challenge were to be made to Sweden’s policies on the basis of child rights, and one were to look to the periodic reporting process over time for support, would one find argumentation for change, or for a human right to the status quo?

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principles’.\textsuperscript{1201} When we look at a provision such as Article 33, a similar remark could be made of child rights law. Human rights law, after all, is incomplete and contradictory in its theorisation.\textsuperscript{1202} Fundamentally different worldviews represented by ‘first generation’ and ‘second generation’ rights are brought together within the system, as is well known. And the rhetorical gloss of ‘indivisibility’ cannot remove those deeper political problems to render the human rights regime ‘beyond question’.\textsuperscript{1203} The CRC contains these and other theoretical dilemmas. There is still no resolution, for example, to the long-standing debate about the foundations of child rights,\textsuperscript{1204} which has now been overshadowed by the legal fact of the CRC, from which scholars tend to begin. Within the treaty, then, there are theoretical tensions due to its broad issue-capture, summarised in the ‘3P’ model of protection, provision and participation rights. It is easy to conceive of Article 33 as a protection right. Its placing in the convention certainly suggests a ‘special protection measure’. It may also entail provision elements, as chapter 5 showed. It is surely difficult, though, to see it as a participation right.\textsuperscript{1205} But are protection and provision the only descriptions? Scholars and advocates often refer to human rights as positive obligations (e.g. progressive realisation of the right to health) or negative prohibitions (e.g. torture). In both cases they are restraints or checks on State power. To be sure, Article 33 may well contain such elements, including if it is seen as a provision or protection right. But what is less clear are the limits of what is permissible pursuant to this provision. It appears that children

\textsuperscript{1201} Boister, ‘Transnational Criminal Law?’ p. 957.
\textsuperscript{1202} J. Griffin,\textit{ On Human Rights}, Oxford University Press, 2009, pp. 191-211.
\textsuperscript{1205} Consider the necessary implication of Article 33 - that it is, in part, a right to be told not to do something. Depending on how it is implemented it can be conceived of as a right that your behaviour be criminalised (e.g. involvement in production). Irrespective of how good an idea it might be for children and adolescents to not use drugs or be involved in this industry, is this therefore appropriately called a \textit{right} at all? As Griffin observes ‘We speak of ‘proliferation’, in a pejorative sense, only because we suspect that some of the declared rights are not true rights’. J. Griffin,\textit{ On Human Rights}, Oxford University Press, 2009, p. 93.

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have a right to some of the most personal and powerful encroachments of the State into people’s lives, from controls on behaviours to the use of the criminal justice system for social control. This, at least, is not to be taken lightly. ‘Permission’ as a type of international norm,\textsuperscript{1206} or the empowerment of States to act, is a concept rarely applied to human rights. This is not the form of permission granted by the absence of a norm in a system full of gaps (in a Kelsenian sense), but permission granted by a stated one, such as that in the drugs conventions to adopt ‘more strict or severe measures’. As Erik Vranes has argued, failing to focus on permissions may blind us to certain normative conflicts.\textsuperscript{1207} And for Richard Lines, the permissive norm of the drugs conventions renders them in a constant state of normative conflict with human rights.\textsuperscript{1208} Might Article 33 be considered as permission? A fourth ‘P’ in the CRC framework?

Given the above analysis, it might be reasonable to see Article 33 as fairly empty in a normative sense. Perhaps it is simply a declaratory goal. A \textit{telos} with no content. But even if so it should not be dismissed, especially if we consider it as a permissive norm. The protection of the child from drugs, after all, is essentially the restatement of a threat, the meeting of which may free States to take action. At the extreme end, as we have seen, States retaining the death penalty have expressly reported their capital drug laws as part of the implementation of Article 33, whether or not children are involved. Some further explicitly associate this with their obligations under the Vienna Convention.\textsuperscript{1209} But while the influence of the Vienna Convention on the application

\textsuperscript{1207} Ibid.
\textsuperscript{1209} For example, Egypt’s second report associated capital punishment both with Article 33 of the CRC and the requirements of Article 3(5) of the Vienna Convention. \textit{Second Report: Egypt}, UN Doc No CRC/C/65/Add.9 11 November 1999, para 226.
of the death penalty for drugs has already been suggested, the role of the CRC in providing support for these laws and reproducing that justification over time must now also be part of the human rights debate. It is not the only example, simply a very striking one. Indeed, there is good reason from the analysis in Part III to consider Article 33 to have been equally as permissive as the provisions in the drugs conventions allowing states to take stricter measures. As such, in the same way as Lines suggests for the drugs conventions, Article 33 may well be seen as being in a constant state of conflict internally (with other child rights), as well as externally (with wider human right law). In this way, child rights law may well protect. But it may also be law from which people need protection.

To an extent, Van Bueren was correct. Article 33 did not ‘add significantly’ to the drugs conventions in the sense of clear, detailed requirements. But it did add in other ways. In particular, it has served as human rights justification for laws, policies and practices that are not new, and long contested. For the most part, the Committee on the Rights of the Child has not taken a critical stance, and a reporting dynamic has come about in which State actions based on the instrumental strategies of the drugs conventions are equated with the requirements of child rights law. Indeed, the periodic reporting process itself was also a significant ‘addition’. But as incontestable as it may be that children should be protected from drugs, the process might be seen as an example of the ‘insensitivity’ among international lawyers (in this case a quasi-judicial

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1210 See R. Lines et al, ‘The Death Penalty for Drug Offences: ‘Asian Values’ or Drug Treaty Influence?’ Opinio Juris (blog), 21 May 2015. Takahashi’s objection to the connection between the death penalty and the drugs conventions (see chapter 4) appears to be undone by States’ explicit association between the two through the periodic reporting process.
mechanism) to ‘the permissive role of legal rules – the way they liberate powerful actors and reproduce day by day key aspects of the world that, although contingent and contestable, have begun to seem natural or unavoidable’.

However, nothing is set in stone. On the eve of the opening plenary of the 2016 General Assembly Special Session on the World Drug Problem, a statement was released by various UN human rights mechanisms. One of the signatories was the chair of the Committee on the Rights of the Child. With regard to children it read:

‘One of the arguments used in support of the “war against drugs” and zero-tolerance approaches is the protection of children. However, history and evidence have shown that the negative impact of repressive drug policies on children’s health and their healthy development often outweighs the protective element behind such policies…”

This was the first such comment attributable the Committee, quite unlike the way the drugs issue has been framed and problematised before. It neatly summarises much of the above critique of the Committee’s own work and the role Article 33 has played. But at the same time it hints at an alternative way of approaching the content of Article 33 moving forward, and perhaps some rethinking about its relationship to the international drug control conventions.

1214 Koskenniemi, From Apology to Utopia, p. 606
1215 Joint Open Letter by the UN Working Group on Arbitrary Detention; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; ; Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health; and Chairperson of the Committee on the Rights of the Child, on the occasion of the United Nation General Assembly Special Session on Drugs New York, 19-21 April 2016. Available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19828andLangID=E.
Further Research Questions

1. Drug control was the first foray of the US into multilateral diplomacy. Membership of the League of Nations required accession to the 1912 Opium convention. The Vienna Convention has been a model for transnational crime conventions. The Rome Statute began as an anti-drug trafficking concept. Has drug control perhaps influenced wider international law in ways we have yet to appreciate?

2. There is no guide to the travaux préparatoires of the UN drugs conventions. For researchers, such a guide would be very helpful, but the research itself could also explore specific issues (e.g. human rights debates) or specific States or blocs (e.g. Scandinavian contributions).

3. As noted above, a resolution was adopted at the 61st CND on the topic of this thesis. There is considerable scope for qualitative work to be done on the nature of debates of key resolutions in UN forums, not limited to the CND.

4. There is little or no empirical work on the ILO Committee of Experts. As with other mechanisms its reporting mechanism is a rich data set awaiting doctrinal, quantitative and qualitative research.

5. The CRC Committee has now issued its first decision under the third optional protocol to the Convention.1216 But are all CRC provisions

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suitable for a violations approach? What, for example, would a violation of Article 33 entail?

6. ‘What is the child rights problem represented to be?’ Research could be undertaken using Carol Bacchi’s process as a framework across CRC provisions by way of a new analysis and critique of the treaty that moves away from ‘child rights’ writ large, to a more issue specific approach.

7. Following on from the concluding paragraphs above, theoretical and empirical work may be undertaken to see if there are any human rights which may be seen as, or have perhaps become, permissive.

8. If States do legalise certain substances, as Canada is currently doing and Uruguay has done, what then is the role of child rights law? What does this mean for the connection between the CRC, ILO 182 and the drugs conventions?

9. The European Committee on Social Rights has issued approximately 280 Conclusions relating to drugs and addiction that have not yet been analysed. More broadly the documentation from the periodic reporting process under the European Social Charter is under-studied.

10. The INCB is known to be a fairly closed mechanism. This has often prevented in depth research. However, while the INCB will not publicise its correspondence, States are free to do so. Freedom of information requests to certain States (e.g. Sweden) could be made to produce such correspondence for a better understanding of the Board’s approach to certain issues and State responses over time.

11. At key moments in the history of drug control and the development of human rights treaties, the role of Sweden arises. Sweden pressed for the 1971 convention. According to the travaux, Sweden was one of the States ensuring a limitation clause was built into the European Convention on Human Rights to account for addiction. Swedish
NGOs were central to the drafting of the CRC and Article 33. Sweden’s positions have also subtly shifted on the international stage over time. To date these roles in separate yet conjoined regimes have yet to be documented.

12. Drugs appear in the constitutions of many States, as has been reported to the CRC Committee. Work remains to be done on studying the nature, origins and effects of these provisions.
Annex 1: Content and Structure of the Drugs Conventions

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| 2) | Training of personnel |
| 3) | Assist those whose work requires understanding of drug use |

| 14(4) | Co-operation on demand reduction |
| Supply reduction: Control of illicit market (other than penal provisions and scheduling) | 22(2) - Seizure and destruction of illicit opium or cannabis plants for State prohibiting production 26(2) - ‘Uprooting’ of wild coca bush, destruction of illicit crops 28(3) - General measures against illicit cannabis production 35 - Action against illicit traffic, general, weak obligations of co-operation and assistance 37 - Seizure and confiscation of illicit substances, equipment 49(1)(5) - Ban on traditional, religious, quasi-medicinal production (after a given time) | 21 - Action against illicit traffic, general, weak obligations of co-operation and assistance 5(1)-(9) - Confiscation (asset forfeiture) 7(1)-(20) - Mutual legal assistance 8 - Transfer of proceedings 9(1)-(3) - Other forms of co-operation/training 10(1)-(3) - Co-operation with regard to transit States 11(1)-(3) - Controlled delivery 13 - Control of materials and equipment 14 - Crop eradication 1) No less stringent than Single and 71 Conventions 2) General obligation to eradicate, respect for human rights, traditional uses and the environment 3) Co-operation in eradication efforts 5) Destruction of confiscated substances 15(1)-(3) - Requirements of commercial carriers 16(1)-(2) - Labelling of exports 17(1)-(11) - Illicit traffic by sea 18(1)-(2) - Measures relating to free trade zones 19(1)-(2) - Transport by mail |

<p>| Supply reduction: Control of licit market and access to controlled medicines (other than scheduling, estimates, returns) | 21(1)-(4) - Limitation of manufacture and importation 21bis (1)-(5) - Limitation of opium production 22(1) - Special provisions relating to production (total prohibition if necessary) 23(1)-(3) - National opium agencies 24(1)-(5) - Limitation of opium production for int’l trade 25(1)-(3) - Control of poppy straw 7 - Special provisions regarding schedule I substances | a) Prohibit all uses except very limited purposes b) Require manufacture, trade to be under licence c) f) Supervision, record keeping etc. 8(1)-(4) - Licencing for trade in schedule II-IV substances 9(1)-(3) - Prescriptions 10(1)-(2) - Warnings on packages and advertising |</p>
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<td>Education, leisure and cultural activities</td>
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