

THE SUPPRESSION OF ILLICIT DRUGS THROUGH INTERNATIONAL LAW

VOLUME ONE

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Abstract

This study examines the suppression through international law of the illicit production, supply and use of drugs. The study focuses upon the provisions relating to the suppression of illicit drugs in the 1961 Single Convention on Narcotic Drugs, the 1971 Psychotropic Convention, the 1972 Protocol to the Single Convention and the 1988 United Nations Convention Against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances. It examines the content of the obligations imposed on states party by these conventions, and gives select examples of how these provisions have been incorporated into domestic law.

Chapter one introduces the global drug problem, the policy options available to deal with it, and the regulation of this problem by a system established by international law. Chapter two places the international drug control system in historical context. Chapter three examines the crimes and penalties that the drug conventions require Parties to create in their national law. Chapter four examines the provisions in the drug conventions that deal with jurisdiction over drug offences, extradition of drug offenders, and miscellaneous procedural provisions. Chapter five investigates the international regulation of enforcement in the sense of actual policing, prosecution and punishment of drug offenders. Chapter six examines the alternative methods of control of illicit drug related activities provided for under international law, such as treatment and rehabilitation. Chapter seven examines the supervisory organs of the international drug control system, the supervision of the system and its execution and enforcement. Chapter eight attempts a general comment upon the nature of the system and its aim of suppressing illicit drug use.

While the major concern of this study is an examination of the technical rules of international law designed to suppress illicit drugs, it is also concerned with the policy of prohibition that underpins these rules, because of the interrelationship between this policy and the shape of the international legal provisions designed to implement it.

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Abbreviations

<i>1961 Commentary</i>	<i>Commentary on the Single Convention on Narcotic Drugs, 1961</i> (New York, 1973) UN Publication Sales No. E.73.XI.1.
<i>1961 Records vol.I</i>	<i>United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs Official Records Volume I</i> (New York, 1964) UN Doc. E/CONF.34/24; UN Publication Sales No. 63.XI.4.
<i>1961 Records vol.II</i>	<i>United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs Official Records Volume II</i> (New York, 1964) UN Doc. E/CONF.34/24/ Add.1; UN Publication Sales No. 63.XI.5.
<i>1971 Commentary</i>	<i>Commentary on the Convention on Psychotropic Substances, 1971</i> (New York, 1976) UN Doc. E/CN.7/589; UN Publication Sales No.E.76.XI.5.
<i>1971 Records vol.I.</i>	<i>United Nations Conference for the Adoption of a Protocol on Psychotropic Substances Official Records Volume I</i> (New York, 1973) UN Doc. E/CONF.58/7; UN Publication Sales No.E.73.XI.3.
<i>1971 Records vol.II.</i>	<i>United Nations Conference for the Adoption of a Protocol on Psychotropic Substances Official Records Volume II</i> (New York, 1973) UN Doc. E/CONF.58/7/Add.1; UN Publication Sales No.E.73.XI.4.
<i>1972 Commentary</i>	<i>Commentary on the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961</i> (New York, 1976) UN Doc. E/CN.7/588; UN Publication Sales No.E.76.XI.6.
<i>1972 Records vol.I</i>	<i>United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs Official Records Volume I</i> (New York, 1974) UN Doc. E/CONF.63/10; UN Publication Sales No.E.73.XI.7.

<i>1972 Records vol.II.</i>	<i>United Nations Conference to consider amendments to the Single Convention on Narcotic Drugs Official Records Volume II</i> (New York, 1973) UN Doc. E/CONF.63/10/ Add.1; UN Publication Sales No. E.73.XI.8.
<i>1988 Records vol.I</i>	<i>United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Official Records Volume I</i> (New York, 1994) UN Doc. E/CONF.82/16, UN Publication Sales No. E.94.XI.5.
<i>1988 Records vol.II</i>	<i>United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Official Records Volume II</i> (New York, 1991) UN Doc. E/CONF.82/16/Add.1, UN Publication Sales No.E.91.XI.1.
<i>ABA Jnl</i>	<i>American Bar Association Journal</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>American ULR</i>	<i>American University Law Review</i>
<i>American University Jnl. of Int. Law and Policy</i>	<i>American University Journal of International Law and Policy</i>
<i>Am. Jnl of Comparative Law</i>	<i>American Journal of Comparative Law</i>
<i>Boston College Int. and Comp. LR</i>	<i>Boston College International and Comparative Law Review</i>
<i>Brigham Young University LR</i>	<i>Brigham Young University Law Review</i>
<i>Brooklyn JIL</i>	<i>Brooklyn Journal of International Law</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>Carolina Jnl of Int. Law and Commercial Regulation</i>	<i>Carolina Journal of International Law and Commercial Regulation</i>
<i>California Western ILJ</i>	<i>California Western International Law Journal</i>
<i>Cambridge LJ</i>	<i>Cambridge Law Journal</i>

<i>Case Western Reserve ILJ</i>	<i>Case Western Reserve International Law Journal</i>
<i>CLB</i>	<i>Commonwealth Law Bulletin</i>
<i>Columbia Jnl of Transnational Law</i>	<i>Columbia Journal of Transnational Law</i>
<i>Criminal LR</i>	<i>Criminal Law Review</i>
<i>CYBIL</i>	<i>Canadian Yearbook of International Law</i>
<i>Denver Jnl of Int. Law and Policy</i>	<i>Denver Journal of International Law and Policy</i>
<i>Dickinson Jnl of Int. Law</i>	<i>Dickinson Journal of International Law</i>
'Draft Convention'	'Draft convention against illicit traffic in narcotic drugs and psychotropic substances' UN Doc. E/CN.7/1987/2, 1988 <i>Records</i> vol.I at 4.
<i>Emory International LR</i>	<i>Emory International Law Review</i>
'Expert Group Report'	'Report of the open-ended intergovernmental expert group meeting on the preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances' UN Doc. E/CN.7/1988/2 (Part II), 1988 <i>Records</i> vol.I at 10.
<i>Georgia Jnl of Int. and Comp. Law</i>	<i>Georgia Journal of International and Comparative Law</i>
<i>George Washington Jnl of Int. Law and Economics</i>	<i>George Washington Journal of International Law and Economics</i>
<i>Fordham ILJ</i>	<i>Fordham International Law Journal</i>
<i>Harvard ILJ</i>	<i>Harvard International Law Journal</i>
<i>Hastings Int. and Comp. LR</i>	<i>Hastings International and Comparative Law Review</i>
<i>Hastings LJ</i>	<i>Hastings Law Journal</i>
<i>Houston Jnl of Int. Law</i>	<i>Houston Journal of International Law</i>
<i>Howard LJ</i>	<i>Howard Law Journal</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>

<i>Inter-American LR</i>	<i>Inter-American Law Review</i>
<i>International Financial LR</i>	<i>International Financial Law Review</i>
<i>Int. Jnl of the Sociology of Law</i>	<i>International Journal of the Sociology of Law</i>
<i>Iowa LR</i>	<i>Iowa Law Review</i>
<i>Israel LR</i>	<i>Israel Law Review</i>
<i>Jnl of Criminal Law and Criminology</i>	<i>Journal of Criminal Law and Criminology</i>
<i>Jnl of Int. Dispute Resolution</i>	<i>Journal of International Dispute Resolution</i>
<i>Loyola of Los Angeles Int. and Comp. LJ</i>	<i>Loyola of Los Angeles International and Comparative Law Journal</i>
<i>Multilateral Treaties Deposited</i>	<i>Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1996 (New York, 1997) UN Doc. St/Leg/Ser.E/15.</i>
<i>Netherlands ILR</i>	<i>Netherlands International Law Review</i>
<i>New LJ</i>	<i>New Law Journal</i>
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<i>North Carolina Jnl of Int. Law and Commercial Regulation</i>	<i>North Carolina Journal of International Law and Commercial Regulation</i>
<i>Notre Dame Jnl of Law, Ethics and Public Policy</i>	<i>Notre Dame Journal of Law, Ethics and Public Policy</i>
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<i>‘Review Group Report’</i>	<i>‘Report of the Review Group on the draft Convention’ UN Doc. E/CONF.82.3, 1988 Records vol.I at 55.</i>
<i>Singapore LR</i>	<i>Singapore Law Review</i>
<i>Solicitors Jnl</i>	<i>Solicitors Journal</i>
<i>South African Jnl of Criminal Justice</i>	<i>South African Journal of Criminal Justice</i>
<i>Suffolk Transnational LJ</i>	<i>Suffolk Transnational Law Journal</i>

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Law and Commerce*

*Syracruse Journal of International Law
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Vanderbilt LR

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Virginia JIL

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CHAPTER ONE: INTRODUCTION

1.1 The international drug conventions and the aims of this study

Non-scientific and non-medical drug use is today generally regarded as a universal social evil. Fourteen international conventions exist with the aim of preventing the abuse of drugs¹ while assuring their continued availability for medical and scientific purposes.² The most important of these are the Single Convention on Narcotic Drugs, 1961 (hereinafter the 1961 Convention),³ the Convention on Psychotropic Substances, 1971 (hereinafter the 1971 Convention),⁴ the Protocol of 1972 Amending the Single Convention on Narcotic Drugs, 1961 (hereinafter the 1972 Protocol),⁵ and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the 1988 Convention).⁶ These conventions have attracted a great deal of international support. As at the 31 December 1996 there were 138 Parties to the 1961 Convention (85 percent of states), 105 Parties to the 1972 Protocol, 142 Parties to the 1961 Convention as amended by the 1972 Protocol, 147 Parties to the 1971 Convention (just less than 80 percent of states) and 139 Parties to the 1988 Convention (75 percent of states).⁷ The drug conventions provide the legal structure for the system of international drug control. They do so by prescribing rules to be obeyed by states in their relations with each other, and by defining control measures to be maintained within each state. These rules can usefully be categorised according to the two principle methods of achieving drug control, viz: a) commodity control - the definition and regulation of the licit production, supply and consumption of drugs; and b) suppression of illicit production, supply and consumption.

¹ For the sake of brevity, this study following UN practice will, unless the context demands a different meaning, use the term 'drug' to denote generally: (a) any of the substances, whether natural or synthetic, included in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol; (b) any substance natural or synthetic, or any natural material included in Schedules I, II, III or IV of the 1971 Convention on Psychotropic Substances. The expressions 'drug abuse', 'drug trafficking' and the like should be construed accordingly.

² Renborg B 'International Control' (1957) 22 *Law and Contemporary Problems* 86 at 88. These aims or goals are partially reflected in the preambles of the drug conventions.

³ 520 UNTS 151, in force 13 December 1964.

⁴ 1019 UNTS 175; in force 16 August 1976.

⁵ 975 UNTS 000; in force 8 August 1975.

⁶ UN Doc. E/CONF.82.15; UKTS 26 (1993); in force 11 November 1990.

⁷ *Multilateral Treaties Registered with the Secretary General* (UN, New York, 1997) UN Doc. ST/LEG/SER.E/15. See also Wells A *International Legal and Policy Framework* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) at 2.

The complex of international rules dedicated to suppression of illicit drugs creates an international illicit drug prohibition system.⁸ This system is created by isolated articles in the 1961, 1971 and 1972 instruments and most particularly by the specialist criminal law convention, the 1988 Convention. Very broadly, these substantive and procedural rules attempt to ensure the following: i) the national criminalisation of the different forms of conduct involved in the supply and use of drugs and the effective punishment of offenders; ii) the establishment of national jurisdiction over drug offences wherever committed and the extradition of drug offenders to ensure that they do not escape prosecution because of lack of local jurisdiction; and iii) effective and speedy co-operation between national authorities in the enforcement of illicit drug laws. In essence, the creation and enforcement of an effective international criminal law suppressing illicit drugs is considered to be crucial to the suppression and ultimately elimination of illicit drug use. While a detailed examination of the technical content of the rules contained in the drug conventions will be the substance of the bulk of this study, these rules do not exist in a vacuum. They must be examined in the context of the policy they apply - prohibition.

1.2 The rationale of the international drug control system

1.2.1 Introduction

The international illicit drug control system exists to control a social problem. A brief look at the scale of the problem, its causes, the harm that results and how societies have attempted to solve the problem through the use of law, is essential to an understanding of this system.

1.2.2 The scale and causes of the illicit drugs problem

An adequate description of the size and nature of the existing global drug problem and of associated criminal activity is impossible here. It is well known, however, that large-scale illicit drug consumption is well established today in the developed world and growing rapidly in the developing world. As consumption has increased so has supply.

The necessity of situating “safe” sources of supply outside heavily policed states has made drug trafficking probably the fastest spreading area of international crime. Groups in developing states have been drawn into international criminal networks that have expanded their operations to include the export of drug profits in order to avoid legal and fiscal controls. What has resulted is perhaps the largest criminal enterprise ever seen, and steady increases in amounts of drugs seized, reductions in the retail price of drugs, and increases in diversity of drugs available, suggest the continued growth of this enterprise.⁹ According to the United Nations Drug Control Programme (UNDCP), annual drug sales are now worth billions of dollars and drugs are considered to be the world’s second biggest trading commodity next to armaments.¹⁰ Astronomical profits have been used to create alternative economies and to undermine legislative and political systems. The following random statistics are as fascinating as they are unverifiable. In 1993 estimates quantified drug money laundering activities in the United States and Europe at about \$500 billion per annum.¹¹ In 1994 in Britain an upper level cocaine dealer was estimated to earn around £500 000 per annum, an established crack/heroin dealer £100 000 per annum, and a street level cocaine dealer £25 000 per annum.¹² In 1994 it was estimated that there were five million hard drug users in the European Union and twenty to thirty million cannabis users.¹³ In 1995 it was estimated that between twenty and forty thousand hectares of Colombia were devoted to coca plantations.¹⁴ In 1995 it was estimated that drug revenues generated \$300 billion in the United States alone.¹⁵

Undoubtedly there is a problem, and not one that can be solved nationally, because national control is impossible when drugs are externally sourced. But the international focus on the source and supply of drugs tends to ignore the fact that people grow, make, trade and sell drugs because people take drugs; in other words, supply follows demand as with any other commodity. Drugs are small in bulk and high in value so the rationale for production and supply is obvious. Supply grows for these reasons

⁸ Nadelmann EA ‘Global prohibition regimes: the evolution of norms in international society’ (1990) 44 *International Organisation* 479-526 prefers to use the perhaps more pejorative label ‘global prohibition regime’ to describe the various regimes that have been developed to prohibit certain activities globally.

⁹ Anderson M *Policing the World* (1989) 105.

¹⁰ UN Doc. E/CONF.82/SR.1 at 3.

¹¹ *Report of the UN Secretary General on control of the proceeds of crime to the Commission on Crime Prevention and Criminal Justice* UN Doc. E/C.15/1993/4.

¹² *The Observer* 6 November 1994.

¹³ *Newsweek* 4 July 1994.

¹⁴ *The Economist* 14 January 1995.

and because of the addictive nature of drugs. The reasons for demand are multifarious. They include the psychological make-up of individuals, poor social and economic conditions, peer pressure, the centrality of drug use to youth culture and alternative lifestyles, the collapse of the normative qualities of existing social values, auto-established addiction, cultural and religious drug use, psychological demand for taboo products, and supply driven demand in the sense of informal advertising.¹⁶ In spite of their variety and intractability, addressing the causes of drug use would seem to be the logical solution to the global drug problem. Yet as we shall see, the belief that law can provide a solution to the drugs problem primarily through penalising supply, if only there were more law and more money to enforce that law, pervades both the national and international legal systems created to control and suppress the problem.

1.2.3 Drug policy responses

Official drug policy depends upon appreciation of the true causes of the drug problem. Some consider it primarily a health problem, others exclusively a legal problem. Key states have adopted the latter view and have used their national legal systems to attempt to suppress drugs. They have done so because they perceive the supply and consumption of drugs as causing harm and because they believe that prohibiting such supply and use is the best way of controlling that harm. These key states have argued that such drug caused harm affects all states and thus also serves as the reason for international regulation.¹⁷ It is out of their efforts that the international legal system for the control of illicit drugs has emerged. This system is based on the division of drug use using the harm principle into licit and illicit. Drug use for medical and scientific purposes is considered licit. All other use is illicit and must be eliminated. This policy of prohibition relies on criminal sanction. It has been applied through international law in most national jurisdictions. Medical and social responses such as treatment and rehabilitation of users have only been resorted to on a small scale. The policy of prohibition is, however, open to criticism. It is, for instance, a *non sequitur* that drugs are bad therefore they must be illegal. Such reasoning ignores whether anti-drug laws do more harm than good.

¹⁵ Rudnick AG et al 'United States' in Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (1995) 227.

¹⁶ See Chatterjee SK *Legal Aspects of International Drug Control* (1981) 6.

¹⁷ Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *International Criminal Law Volume 1: Crimes* (1986) 507.

Generally speaking, the implementation of drug prohibition by law is vulnerable to arguments that attack its morality and arguments that question its utility.

Morrison notes that deontological arguments for and against prohibition of drugs by law are strong on humanity and short on reality.¹⁸ Arguments that morality must be protected against the evil of drugs by prohibition, depend upon general acceptance that there is a human morality and that it is worth protecting. Arguments for individual freedom relate to a whole range of human freedoms. In principle in capitalist economies, the right to free economic activity protects the agricultural and industrial production of drugs, while the right to free movement of peoples and goods protects trafficking. Moreover, besides conflicting with the right to consume inherent in capitalist economies, stopping consumption violates privacy. Yet these rights have been violated by prohibition, primarily because freedom to produce and use drugs denies that humans are often unfree when they choose to use drugs because of an incapacity to make an informed decision or because of addiction.

Although strong on reality and short on humanity,¹⁹ materialist arguments are more influential on official policy. Medical and social pathology arguments provide the orthodox justification for prohibition. The most immediate consequence of drug use is that it frequently causes medical harm to the consumer, to children *in utero* and to others through the injuries users inflict intentionally or negligently when intoxicated. Nahas argues that illicit drugs often cause irreversible changes in the centres of the brain regulating pleasure-reward and memory and that they affect personality.²⁰ He argues that drug users cannot make reasonable decisions about use once they begin taking drugs because the drugs prevent them from doing so.²¹ He submits that treatment is no solution as results have been disappointing, that there is no cure, and concludes that the only solution is enforced abstinence.²² Doubters, such as Eldridge, point out that evidence of physiological damage is controversial, note that prohibition is often based on flawed assumptions that drug usage is always harmful and all drugs have the same effects, and

¹⁸ Morrison W 'Modernity, knowledge and the criminalisation of drug usage' in Loveland I (ed) *Frontiers of Criminality* (1995) 195 at 199.

¹⁹ Morrison *ibid.*

²⁰ Nahas G 'Drugs, the brain and the law' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 729-746 at 736.

²¹ *Op cit* at 736-738.

²² *Op cit* at 738.

dispute that rehabilitation is unsuccessful.²³ Gilmore argues that drug use in fact benefits users through relief, recreation, reinforcement and replenishment.²⁴ The secondary consequence of drug use is social harm. Society pays for medical harm, it pays for welfare assistance for users and their families, it pays for lost productivity, and it pays through a crime rate driven upwards inter alia by drug users desperate for money to finance their habits. But blaming drug use for endemic human ills such as violence, joblessness and child abuse which like drug use may also be caused by the users personality or social conditions is to assume a causal link to drug use which may not exist. Many dispute the claims that drug use causes social destruction. Eldridge, for example, disputes that drug users become weak ineffective members of society, that addicts are criminals, and that addiction is contagious.²⁵ He points out that studies show that drug user's psychiatric difficulties lead to use and not vice versa, that the law criminalises their conduct, and that it is not drug use but the mores of the societal sub-group they belong to which are anti-social and which encourage use.²⁶ In connection with the latter point, anti-prohibitionists reject the gateway hypothesis which posits that use of soft drugs leads inevitably to use of hard drugs. They argue that the prohibition of soft drugs leads to hard drug use, because the latter are easier to traffic and purchasers of soft drugs are exposed to criminal cultures.²⁷ Examining both the medical and social harm discourses, Ostrowski points out that it is the medical and social harm prevented by prohibition - harm that the illegality of drugs presently prevents users doing to themselves or others through use - that is the central and perhaps only argument for maintaining prohibition, and he notes that uncertainty about the quantity of such prevented harm favours prohibitionists because the future impact of drugs if legalised is unknowable.²⁸ In sum, the problem with the medical and social pathology discourses is that the quality and quantity of some of the ill effects of drug use and the existence of others are in dispute, and it is uncertain how much harm prohibition is actually preventing.

²³ Eldridge WB *Narcotics and the law* (1967) 13-34.

²⁴ Gilmore N 'Drug use and human rights: privacy, vulnerability, disability, and human rights infringements' (1996) 12 *The Journal of Contemporary Health Law and Policy* 355 at 371.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Inglis B *The Forbidden Game* (1975) at 226.

²⁸ Ostrowski J 'Answering the critics of drug legalization' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 823 at 824.

Anti-prohibitionists concentrate on the failure of prohibition by law and its adverse effects on man and society. They focus on the limited practical effects of addressing agricultural drug production by a combination of development and eradication, supply and use by arrest and punishment. Nadelmann argues that enforcement, whether international or domestic, cannot achieve much more than it has already.²⁹ He argues that the massive actual and potential land areas available for drug cultivation, the push-down-pop-up nature of illicit production, political opposition in foreign states, reliance in the developing world on drug income, the fact that immense interdiction efforts only thwart a small percentage of illicit drug imports, and the low impact of street level policing, all indicate that using the criminal law is ineffective to control drugs. Nadelmann then points to the costs of prohibition.³⁰ First, he argues that prohibition increases crime for a number of reasons. It criminalises use and supply. Massive increases in property crime are directly linked to the needs of drug-dependants to feed habits. Prohibition places drug deals and disputes outside the law thus connecting users and by extension enforcement officers and innocent third parties to the physically dangerous and corrupting influence of traffickers. It fosters the growth of crime through increased profits because it limits supply, driving up profit margins. Second, Nadelmann argues that prohibition costs an enormous amount. A large part of the criminal justice system must be dedicated to prohibition's enforcement and the punishment of offenders, which requires the diversion of resources from the policing and punishment of other crimes. It costs the large numbers of people who use drugs because it brands them as criminals, subjects them to criminal sanction, and requires them to involve themselves with criminals in order to get drugs. It harms the moral fabric of society through the corruption of government agencies and officials and the creation of an informant based society. It has an unquantifiable negative impact on the normative power of the criminal law itself. It incurs medical costs through the supply of adulterated drugs to users and of infected needles to intravenous drug users, and because of the limitation of the legitimate medical use of substances such as cannabis.³¹ It is also clear that prohibition affects the poor most acutely. Prohibition inflates drug prices making street crime the only way of feeding habits thus impacting on the economic viability of poor neighbourhoods.

²⁹ Nadelmann EA 'Drug prohibition in the United States: costs, consequences and alternatives' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 783-808.

³⁰ *Ibid.*

³¹ *Ibid.*

Trafficking also becomes an attractive alternative to poverty. The response of prohibitionists to such arguments is simple denial that law enforcement policies have failed, and claims that they have helped to eliminate suppliers and users while deterring or delaying potential suppliers and users.

The speculative benefits of legalisation are equally difficult to test. The usual steps suggested to regulate and repress drug usage, short of actual prohibition, include consumption taxes, advertising bans, restrictions on time and place of sale, and massive public anti-drugs education. The chief legalisation argument is that the licensed sale of drugs for non-medical use would destroy the wealth and corruptive power of drug traffickers because supply would become so much cheaper due to a considerable growth in the efficiency of production and distribution. Nadelmann argues that homicide and property crime rates would decline and organised crime would break up allowing criminal justice systems to refocus on other crimes, the poor to turn their backs on crime and the health and quality of drugs users' lives to increase dramatically.³² He continues that reductions in government expenditure on enforcement could be used together with tax revenue to fund treatment programs. Further benefits would include the refocusing of the foreign policy of developed states where drugs are consumed on important and realistic objectives, and the reclamation by the governments of states from which supplies of drugs originate of the authority lost to traffickers.³³ Resort to comparisons with two legal drugs, tobacco and alcohol, are often made by anti-prohibitionists. They point out that the social and financial costs of smoking and drinking alcohol are much greater than the costs of illicit drugs, and argue that illicit drugs should be placed in the same category as tobacco and alcohol, opening them to the same kind of social control processes through education and regulation paid for by the rerouting of law enforcement funding and by taxation.³⁴ The counter-argument is that although these drugs have largely slipped beyond official control, it does not necessarily follow that society can withstand the impact of additional massive legal drug use. Indeed, speculation about the benefits of legalisation, can be met with speculation about its costs.

Faced with the difficulty of accounting for prohibition, prohibitionists fall back on speculation about the greater costs of legalisation. For instance, Nahas argues that

³² *Ibid.*

³³ *Op cit* at 798.

³⁴ See Burnham JC 'Comments on Nadelmann' and Nadelmann EA in 'Nadelmann's response' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 810 and 817.

historical precedent shows that the social costs of legalisation will be greater than prohibition, that drug abuse and crime will increase and medical and social costs will skyrocket.³⁵ It is also claimed that while crime to finance use might decrease, crimes committed under the influence would increase. Prohibitionists submit that it is naive to believe that legalisation will kill the illicit market, arguing that illicit production and supply costs will also drop and traffickers will still be able to undercut the licit market.³⁶ This may not occur if drug taxes are low enough to keep their pricing competitive, but increases in usage would be a negative result of cheap drugs. Prohibitionists argue that the new licit drug producers will enjoy a generally greater influence on the state, as per the tobacco industry, than illicit traffickers do at present. They argue that it is naive to expect governments to provide highly addictive drugs while at the same time educating users against use. One of the most potent anti-legalisation arguments is that it sends a message of approval of use to those least able to resist, especially children.³⁷ It is likely that legalisation would expand demand among children. Prohibitionists question the effectiveness of educating children and point out the difficulties of enforcing purchasing age-limits. The illicit market and indirect sales through adults would still serve children if purchasing age limits were set. The counter-arguments are that all users, even children, would be sold better quality drugs under healthier conditions, profit margins would be much lower and the illicit market less violent. Legalisation would, however, have other less obvious negative effects. It would spell disaster for the rural peasants in producer states who are reliant on drug cultivation as a form of income. Dorn notes commercial cultivation would almost certainly mean that control of production would be taken from them.³⁸ Moreover, Morrison notes that legalisation would condemn and pacify the marginalised of consumer societies.³⁹ But all of this is speculation. Reuter and MacCoun argue that it is mainly due to the uncertainty of its future effects that the appeal of legalisation is low.⁴⁰ They argue that accurate hypothetical studies of its future effects

³⁵ *Op cit* at 746. See also Lowenstein LF 'Legalizing or not legalizing drugs' (1993) 66 *The Police Journal* 296 at 301.

³⁶ Commentary 'Combating the drugs menace' (1989) 13 *The Criminologist* 65 at 65; see also Jacobs JB 'Imagining drug legalization' (1990) 101 *The Public Interest* 28-42.

³⁷ Strebel DE 'Comments on Nadelmann' (1991) 5 *Notre Dame Jnl of Law, Ethics and Public Policy* 814.

³⁸ Dorn N, Murji K, and South N Traffickers: *Drug Markets and Law Enforcement* (1992) at XVI referring to Dorn N 'Clarifying policy options on drug trafficking' in Buning E, Drucker P, O'Hare P and Newcombe R (eds) *Reduction of Drug Related Harm* (1991).

³⁹ *Op cit* at 214.

⁴⁰ Reuter P, MacCoun R 'Assessing the legalization debate' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 39 at 48-49.

are almost impossible because of the nature of the problem to be studied, and that the political appeal of a risky social experiment is not likely to grow unless the situation seriously deteriorates.⁴¹ Ostrowski takes issue with such complacency, pointing out that any justification of prohibition must show both that drug use would increase significantly after legalisation, and that the harm of increased drug use, after being offset by factors like increased safety, would exceed the harm now caused by the side-effects of prohibition.⁴² He argues that instead of showing that legalisation would lead to increased harm, prohibitionists have focused on the existing drug related harm it has failed to prevent, and used that as an argument for prohibition. He condemns prohibitionists as an elite that guess that the future impact of drug legalisation will cost more than prohibition presently does and take the decision for the rest of society to retain prohibition.⁴³ But he notes that the fact that the majority of those who have tried drugs do not continue using them suggests that people are able to make the decision for themselves.⁴⁴ Nadelmann believes that legalisation will not lead to greater usage and costly consequences as the 'types of drugs and methods of consumption that are most risky are unlikely to prove appealing to many people precisely because they are so dangerous.'⁴⁵ Similarly, Evans argues that the experience with society slowly turning against tobacco use indicates that society, when given the opportunity, can assess the damage for itself, and should be given the choice backed up by education as to the risks.⁴⁶

The practice of states since the 1970s indicates a general reluctance to trust individual self-control and move away from prohibition. Some states, such as the Netherlands, have adopted more permissive policies such as decriminalisation of "soft" drugs.⁴⁷ Reuter and MacCoun note that decriminalisation is an attractive half-way house

⁴¹ *Op cit* at 45-46, 49.

⁴² *Op cit* at 825.

⁴³ *Op cit* at 841.

⁴⁴ *Op cit* at 843.

⁴⁵ *Op cit* at 800.

⁴⁶ Evans K 'The hundred per cent solution' (1993) 143 *NLJ* 751-752.

⁴⁷ Dutch drug policy distinguishes between soft and hard drugs, and waives prosecution of possession of small amounts of soft drugs. Consequently there is little risk to traffickers, prices have dropped and the police have been able to identify the areas where drugs are sold so they can police them easily. The 1980s however, saw the growth of a more conservative attitude because of burgeoning social, medical and criminal problems associated with drug abuse, and the growth of Amsterdam and Rotterdam as trafficking centres, as well as pressure from other more rigidly prohibitionist European partners - Anderson M *Policing the World* (1989) 109; see also on decriminalisation - Crowther E 'Will three wrongs make a right' (1992) 156 *Justice of the Peace* 654.

for those uneasy with full scale prohibition because it removes the criminal law's sanction from the victim users and retains it for the traffickers.⁴⁸ They argue, however, that its harm reductive effect is not clear, and that it should be treated as a minor variant of existing prohibitionist policies.⁴⁹ Dorn et al argue that drug trafficking control is here to stay and legalisation is improbable, 'given the momentum required to reverse the tide of international agreements'.⁵⁰ Although its basis may be questionable social policy, the law does appear to have taken on a logic of its own.⁵¹

The radical explanation for the retention of prohibition is that despite its questionable success in preventing medical and social harm, it is retained because the laws it generates serve to control politically threatening groups at home and abroad through the identification of these groups with certain forms of drug abuse.⁵² Fear of ethnic minorities has been directly linked to the passing of drug prohibition laws in the United States,⁵³ and prohibition has also played a role in its foreign policy.⁵⁴ Johns argues that the real purpose of prohibition is to increase state power domestically through, for example, warrantless searches and random drug testing, and internationally through, for example, increased use of the military in the drug war, kidnappings and invasions.⁵⁵ Mugford and O'Malley's criticism of such arguments is that they ignore demand and that there is little evidence of the states that are allegedly using the war on drugs to achieve their aims at home and abroad actually managing to do so.⁵⁶ They do not believe the war on drugs is a coherent conspiracy, but rather an incoherent construct

⁴⁸ Reuter P, MacCoun R 'Assessing the legalization debate' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 39 at 47-48.

⁴⁹ *Op cit* at 48.

⁵⁰ Dorn N, Murji K, and South N *Traffickers: Drug Markets and Law Enforcement* (1992) at X referring to Pearson G 'Drugs and criminal justice: a harm reduction perspective' in Buning E, Drucker E, O'Hare P and Newcombe R (eds) *Reduction of Drug Related Harm* (1991).

⁵¹ See Morrison *op cit* at 217 who argues that once transformed into law, into issues of crime, penalty, procedure, enforcement, prohibition serves to legitimate itself.

⁵² See, for example, Gordon DR *The Return of the Dangerous Classes* (1994).

⁵³ For example, Musto DF *The American Disease: Origins of Narcotics Control* (1987) at XI notes that fear in the US of Chinese immigrant labourers was used as a reason for the passage of anti-opium laws, fear of blacks in the Southern US was linked to the passing of anti-cocaine laws, and prohibition of marijuana was linked to fear of immigrant Mexicans in the Southwestern US in the 1930s.

⁵⁴ Accusations of use of drug trafficking as a weapon were made during the Korean War - Anslinger H and Tompkins W *The Traffic in Narcotics* (1952) 11 note that Harry Anslinger, US Commissioner of Narcotics, stated in 1952 in his report to the UN's Commission on Narcotic Drugs (CND): 'And today it is the Communists of Red China who are exploiting the poppy, who are financing and fostering aggressive warfare through depravity and human misery.' A similar anti-drugs enthusiasm was displayed during the Vietnam War.

⁵⁵ Johns C *Power, Ideology and the War on Drugs* (1992) at 174.

⁵⁶ O'Malley P, Mugford S 'The demand for intoxicating commodities: implications for the war on drugs' in South N (ed) *Drugs, Crime, and Criminal Justice* (1995) 441 at 445-446.

subscribed to by a range of people including moral extremists, political opportunists and the genuinely concerned.⁵⁷ Hence its confused nature.

It is plain that the debate between the advocates of legalisation and prohibition is polarised; each side addresses the other's weaknesses, neither side appears to have a complete answer. Little systematic analysis of the costs and benefits of prohibition has been made and it is doubtful whether such analysis of legalisation can be made. Public attitudes to drugs are confused.⁵⁸ Legalisation does not appear politically likely at present and the alternatives are not promising. More law enforcement is a very limited option. For one thing, the protection of individual freedoms militates against more extreme intrusion by law. For another, most states are too poor to spend the amounts of money the United States does on drug control, and such expenditure does not appear to achieve much. Musto doubts whether intervention will ever result in the disappearance of drug use. He submits that the collective shock of society at the devastating effects of drugs will be crucial to the disappearance of drug abuse.⁵⁹ Unfortunately, it appears that drugs do not at present produce severe enough shocks for society to discard them. Indeed, Mugford and O'Malley argue that drugs epitomise modern culture rather than being an aberration.⁶⁰ They note that while some use drugs to escape unpleasant reality, a much larger group do so for leisure, which they argue is central to the imperative in modern society to consume commodities that re-enchanted users disenchanted with the routine rational world.⁶¹ Mugford and O'Malley regard policies that try to eliminate supply or correct pathology as ineffective when faced with this imperative.⁶² They suggest that the relationship between regulation and harm is a U-curve. High on the left is prohibition which maximises costs suffered by others than the users, high on the right is legalisation which maximises direct costs to the user. In simple terms both have problems and one policy will not eliminate all problems. The best policy is to reduce harm, to move to the bottom of the U-curve away from complete prohibition or legalisation of any drugs.⁶³ A mixed approach appears to have the best prospects for success, because it draws on the strengths and dilutes the weaknesses of the two extreme

⁵⁷ *Op cit* at 457.

⁵⁸ See, for example, the studies cited by Lowenstein *ibid* who examines the empirical research on attitudes to drug usage.

⁵⁹ Musto DF *The American Disease* (1987) X.

⁶⁰ *Op cit* at 445.

⁶¹ *Op cit* at 449.

⁶² *Op cit* at 452.

positions. Foundations of such an approach would be the decriminalisation of soft drugs and the issuing of hard drugs to registered addicts on the assumption that drug addiction is a medical problem,⁶⁴ and the retention of the criminal law as an umbrella under which state authorities set about dealing with drug use as a medical and societal problem and not solely as a problem of law and order.

1.2.4 The nature of the international “consensus” on global drug prohibition’s application through international law

The rationale for the reliance on prohibition at an international level is identical to the rationale for relying upon it at a national level. The systems that grew up nationally as a response to the spread of illicit drugs globally, have grown into an international system.

In his summary of the development of the international drug control system to 1948, May submitted that its development was largely apolitical.⁶⁵ If this were true, it would mean that most states recognised there was a problem and agreed upon the method for dealing with it.

Chatterjee notes that in the early stages of the expansion of the international drug control system, many states in Asia, Africa and South America, where drugs had traditional cultural or religious uses, did not have the necessary social awareness of drug problems to want to control use.⁶⁶ States in Europe and North America where drug use was relatively novel, experienced its negative effects as novel. The international drug control system was initiated by intra-state groups who shared a conception of the drug problem and a vision of how to solve it. It was a minority of individuals from Europe and the United States who assumed the role of moral guardians of international society. They were influential in establishing the policy of prohibition in their own powerful states, which then became the agents of the international expansion of this policy. The most notable characteristic of the resulting international control system is that it was externally imposed on the majority who did not share a social awareness of drug problems. Chatterjee thus submits that the system was not originally based upon a

⁶³ *Op cit* at 460.

⁶⁴ See, for example, Adams M ‘How to destroy the market for drugs?’ (1993) 66 *The Police Journal* 42 who at 45 proposes retention of prohibition for non-addicts and the issuing of drugs to addicts.

⁶⁵ May HL ‘Narcotic Drug Control - Development of International Action and the Establishment of Supervision under the United Nations’ (1948) 441 *International Conciliation* 303.

⁶⁶ *Op cit* at 7-11.

spontaneous sense of obligation on the part of the members of the international community.⁶⁷

Although prohibition is the dominant official state and international policy towards drugs today, not all states currently share a common conception of the nature of the harm caused by drugs or an equal commitment to the prevention of that harm by law. Indeed, with an increase in intervention into states producing illicit drugs, drug control has become highly politicised. Many developed states have governments which are expressly hostile to illicit drugs. Some, like the United States, have declared "war on drugs". The position in drug source or producer nations like Colombia is more ambivalent. While on the whole their governments subscribe to prohibition, are party to the drug conventions, and have legislation outlawing the production and trafficking in illicit drugs, many of these states apply this law less than enthusiastically. Their reaction depends on the support for prohibition exhibited by individuals within these states who are able to influence the leadership of these states. Small political and economic elites within developing states who identify with the concerns of consumer states may be strongly supportive of prohibition. But there are many factors against them. There are many foundations for pro-illicit drug attitudes in producer and transit states, ranging from the relatively benign established historical use of a particular substance, such as the chewing of coca leaves in Bolivia, to the more malign interests of established criminal networks. However, the most important variable affecting attitudes to prohibition in these states is their economic reality.

Illicit drugs are cultivated, manufactured and supplied by individuals from economically poorer states because drugs represent valuable sources of income. For many agricultural producers of organic substances such as coca leaves in the Andean states, there may not be another crop which provides even remotely the same kind of return on investment. The economic dependence of large part of the populace of poorer states on drug production should not be underestimated and does have an impact on the attitudes of the leadership of these states towards the international control of illicit drugs. Suppliers operating as a bridge between agricultural producers and consumers tend to be wealthier than producers because they are able to make heavy profits from the usually significant increase in the sale price of drugs over the price at source. They too may influence the leadership of the states from which they operate, either directly through

compulsion or bribery, or indirectly because their massive investment makes them central to the economic and therefore political stability of these states. Producer states lose in two ways if they enforce prohibition. They expend revenue on enforcement while simultaneously cutting off revenue generated by drugs. Due to adverse public opinion and drug network action producer states may be too weak to enforce prohibition. But they may never have been strong enough to do. Dorn et al caution in regard to drug producer states that 'it is important to see that loss or weakness of authority of the central state has been the pre-condition for the emergence of trafficking on a large scale.'⁶⁸

In this context, it is not surprising that producer and consumer states have different attitudes to international drug control and different ideas about who is responsible for the international drug problem. Anderson comments that 'producer countries in the third world ... often naturally take the view that the root cause is the insatiable market for drugs in the rich countries.'⁶⁹ Although drugs are consumed everywhere today, the consumer nations are usually characterised as being first world developed states where there is extensive drug usage. These developed consumer states tend to blame producer states for the drug problem because they are unable to stop usage or address its domestic causes. This externalising of responsibility allows recourse to harsh measures of supply reduction.⁷⁰ It has also moulded the international illicit drug control system into a vehicle mainly for the general prohibition of drugs and for international co-operation in reducing international supply. This system has been agreed to by producer states because of a combination of political and economic pressure from consumer states. But they also realise that drug use affects their own societies. They recognise that drug trafficking threatens their economic integrity through money laundering and their political integrity through corruption and developments such as

⁶⁷ *Op cit* at 530-1.

⁶⁸ *Op cit* at X referring to Garcia-Marquez G (1990) 31 *Granta* 86-95.

⁶⁹ *Op cit* at 29.

⁷⁰ Musto *op cit* at 206 notes that after World War I the drug problem in the United States was blamed on foreigners. He argues that placing the blame on others both internally (ethnic minorities) and externally (foreigners) allowed drugs to be dismissed as un-American, avoiding the painful and awkward realization that drug use may be an integral part of American society. At 248 he argues that putting the blame on others also permits more punitive measures to be taken against certain of the culprits. The "War on Drugs" carries over into a foreign policy which anticipates the policing of the illicit drug traffickers in other states, not by the authorities in those states, nor by international control, but directly by the United States authorities.

narco-terrorism.⁷¹ Nevertheless, the international system remains a terrain of contest, where developing states try to shift the responsibility for control on to developed states, both legally, by criminalisation of use, and financially, by making developed states pay for international enforcement of drug prohibition. Whether states do feel a spontaneous obligation to impose the international illicit drug control system, evidenced inter alia by a subscription to the common goal of prohibition, agreement as to the technical legal methods to be applied in enforcing it, and application of international law domestically, or whether such subscription, agreement, and application is only achieved (if at all) under duress, is one of the major themes of this study.

1.3 The nature of the international illicit drug control system

1.3.1 Introduction

We turn now to the international system itself, focusing on the strategy that dictates the shape of the drug conventions, the reason why the drug conventions are not a perfect expression of that strategy and the plight of the individuals who are subject to the system but whose rights it appears to ignore.

1.3.2 Supply reduction through international law

Against the background of the policy of prohibition, it is not surprising that the provisions of the drug conventions are largely designed to implement a supply reduction scheme which sees the source of drugs as the problem to be eliminated.⁷²

Crop eradication or substitution aims at the agricultural source of the problem, that is, the crops from which most narcotic drugs are derived, by convincing farmers to grow other legal crops, or by eliminating the illicit crops through burning, clearing, or poisoning. But such a strategy may simply cause the displacement of the crops; if they are substituted or destroyed in one area then their cultivation may shift to another. Moreover, use of herbicides may cause collateral damage, while ground level clearance is costly in time and energy. A further problem is that the areas where such crops grow

⁷¹ Anderson *op cit* at 28 and 108 referring to Adams J *The Financing of Terror* 265-289 describes narco-terrorism as the financing of terrorism by drug trafficking and the use of drugs as an alternative currency for the illegal purchase of weapons.

⁷² See generally Murji K 'Drug enforcement strategies' (1993) 32 *Howard LJ* 215-230.

are often beyond government control. The whole strategy is inapplicable to synthetic drugs made in laboratories which must be identified and eliminated by ordinary enforcement action.

Supply interdiction attempts to stop the arrival of drugs at the market place from abroad by interdiction at sea, at the border and so on. Its rationale is that it causes shortages and drives up the market price of drugs, forcing potential consumers to leave the market. But price increases may have the unintended consequence of forcing addicts to turn to crime to pay for their addiction. Moreover, reports of increased arrests and seizures may indicate not the increased success of law enforcement, but the increased entry of traffickers into the market. Legal problems also arise with, for example, extraterritorial enforcement activities such as interdiction of foreign registered ships on the high seas.

High-level enforcement concentrates on neutralising the individuals in control of drug trafficking organisations. This involves a range of different tactics, from investigation and arrest to the identification and confiscation of assets derived from drug trafficking and the elimination of money laundering. This strategy rests on the flawed assumption that these organisations are highly centralised and are run by irreplaceable personnel, while in practice it has been shown that the arrests of several individuals at the top of an organisation does not invariably lead to the organisation's collapse, as others within the organisation may rise to fill their places. Indeed, experience has shown that even if such organisations do collapse, other smaller organisations simply take over the eliminated organisation's sources, networks and methods.⁷³ The resulting more fragmented system is even more difficult to police. Legal problems arise with respect to high-level enforcement when the individuals involved never enter the jurisdiction of the state which wants to prosecute them. The extension of jurisdiction over such individuals is legally precarious, and laying hand upon them through extradition, difficult. International co-operation in this regard, one of the goals of the international system, is extremely problematic.

A number of alternative strategies are available, but they are not popular at the international level. Demand reduction targets the user or purchaser of drugs because it

⁷³ The arrest in 1995 of Miguel and Gilberto Rodriguez Orejuela, leaders of the Cali cocaine cartel, led to the collapse of the cartel, but not the collapse of the cocaine supply from Colombia to the United States, as supply was taken over by smaller Mexican cartels who had previously worked for the Cali Cartel - *The Guardian* 28 November 1997.

identifies them as the cause of the drug problem. Its tactics range from non-criminal measures such as treatment and rehabilitation and general social upgrading, to harsher criminal measures such as arrest and punishment of users.⁷⁴ Modern demand reduction relies on low-level enforcement to make life difficult for drug retailers and consumers. It does so by, for instance, disruptive policing of areas where drugs are sold which increases prices in order to drive costs up and users out of the market. Harm reduction emphasises reduction of the harm caused by drug usage. Taking the view that drugs must be used in a harmless manner whenever use occurs, it emphasises education, counselling, support, treatment, persuading drug users to switch from needles to inhalation or ingestion, the provision of clean injection equipment and safe places to use drugs, and the testing of drugs for purity to protect users.

Drug production and use is a complex problem that requires a response to a whole range of social, economic and political factors. This makes it difficult to understand the domination of the international drug control system by the simple supply reduction scheme clearly reflected in the provisions of the drug conventions. This study attempts to trace the historical development of these conventions in order to reveal why this is so.

1.3.3 The limited application of international drug prohibition in law and practice: state sovereignty and indirect control

Neither the policy of prohibition nor the strategy of supply reduction achieve perfect expression in international law. State sovereignty presents the major obstacle to their execution internationally. Domestic inaction tends to create legal havens for traffickers, but the rules of territorial sovereignty and non-intervention stand in the way of unilateral action to pursue drug traffickers. This point is well illustrated by the refusal, for instance, of South American states to co-operate in the arrest and extradition of alleged drug traffickers to the United States. Sovereignty barriers lead supporters justifying direct United States intervention to make various wild claims. Fletcher claims abduction of drug traffickers is practically and legally justifiable in international law because the

⁷⁴ US "Drug Tsar" William Bennet's notorious "Zero Tolerance" approach places great emphasis on user responsibility for addiction and drug related crime, forcing users through the criminal law and administrative penalties to give up drug use.

United States is specially affected by drug trafficking.⁷⁵ Keig claims that loss of territorial control by authorities in states like Colombia means that the United States military may intervene without violating sovereignty.⁷⁶ A legal advisor to the United States State Department claims that the activities of foreign drug traffickers justifies the United States taking steps such as abduction in self-defence in terms of article 51 of the UN Charter.⁷⁷ Such claims may be disturbing, but they do indicate that it is impossible to use an enforcement strategy to attempt to control the global drug-trade without either the unilateral derogation or consensual relaxation of state sovereignty. The international drug control system has adopted the latter approach. It is based on the consensual countenancing by states, both party and non-party to the system of conventions, to an encroachment of their sovereignty. But this consensus is shallow.

It should thus come as no surprise that the provisions for the suppression of illicit drugs and drug related crime in the drug conventions are applied indirectly by states in their national law; the drug conventions are not self-executing.⁷⁸ National transformation of international obligation causes major problems for the perfect international expression of prohibition. States define crimes differently, impose different penalties for similar conduct, establish jurisdiction on different grounds, grant or refuse extradition using different procedures and on different evidence and base legal co-operation upon different forms of request. The UN's official *Commentary on the Single Convention on Narcotic*

⁷⁵ Fletcher A 'Pirates and smugglers: an analysis of the use of abductions to bring drug traffickers to trial' (1991) 32 *Virginia JIL* 233 at 236 comments: 'Because of their focus on the relations between states as states, the norms of the public international legal structure are incompatible with the practical reality of prosecuting drug traffickers. The practice of abduction [of traffickers for prosecution] recognises this incompatibility.' He defends the US policy of selective abduction of drug traffickers on the basis that as a practical matter, the extraterritorial enforcement of domestic criminal law cannot in the case of drug trafficking 'effectively proceed by treating all nations as equals.' He argues using the analogy of piracy, that international law treats similarly affected states differently from other states that are not affected. In simple terms, it allows consumer states to violate the sovereignty of source or transit states.

⁷⁶ Keig LA 'A proposal for direct use of the United States military in drug enforcement operations abroad' (1988) 23 *Texas ILJ* 291 at 306 states: 'Some countries, such as Colombia, where the drug trade is careening out of the government's control, no longer can lay claim to sovereign control over their own borders; therefore, the use of United States military personnel to combat drug trafficking arguably would not violate the principles of international law.'

⁷⁷ Sofaer AD before the Congressional Sub-committee on Civil and Constitutional Rights, 8 November 1989, in Leigh MN 'Contemporary practice of the United States relating to international law: territorial jurisdiction' (1990) 84 *AJIL* 725 at 727 is quoted as stating: 'We are reaching the point ... at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from the trafficker's threats would have to be strong to sustain a self-defense argument. Arrests in foreign states without their consent have no legal justification under international law aside from self-defense. But where a criminal organisation grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures of self-defense.'

⁷⁸ See, for example, article 2(1), article 5(1), and article 5(9) of the 1988 Convention.

Drugs, 1961 (hereinafter the *1961 Commentary*) points to the roots of this divergence and to the usual method resorted to overcoming it in international law:

Widely different moral, religious and cultural traditions are reflected in the differences which distinguish the systems of substantive and procedural penal law of individual nations and of groups of culturally related nations. It is therefore extremely difficult, and in some respects even impossible, to establish universally acceptable international rules to be implemented in the national penal systems. Attempts to overcome these difficulties have been made by adopting international provisions which are broad enough to leave escape clauses for the benefit of those Governments to which even such vague norms would be unacceptable.⁷⁹

A good example of the way states contract in to the drug conventions then claw back their sovereignty in the terms of the conventions themselves, is article 2 of the 1988 Convention. Entitled 'Scope of the Convention', it asserts state sovereignty in the face of international obligation. While the other drug conventions do not contain such a provision, the 1988 Convention does so because it has a broader scope especially with regard to criminal law provisions. It was introduced to reassure producer states and make them less hesitant to assume the 1988 Convention's obligations.⁸⁰ It reads:

1. The purpose of this convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in

⁷⁹ *Commentary on the Single Convention on Narcotic Drugs, 1961* (1973) at 425.

⁸⁰ Article 2 was introduced by Mexico - see 'Report of the Review Group on the draft Convention' UN Doc. E/CONF.82/3 par 14, 46 and 120 and Annexure II 'Revised text of the draft Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances'. This very long proposed draft article evolved into the existing article 2. Sproule DW and St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 explain at 266 n18 that article 2 was among the most divisive at the Conference. They note that article 2 was the result of Mexico's determination not to permit the Convention to be used to allow interference by consumer states in the domestic affairs of producer states. Article 2's wording, which includes wording from article 2 of the UN Charter and wording from the United States/Mexico Mutual Legal Assistance Treaty, reassured the Mexicans and like-minded

conformity with the fundamental provisions of their respective domestic legislative systems.

2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

The first sentence of Article 2(1) explains that the purpose of the Convention is to promote international co-operation in the suppression of the international illicit drug traffic. Following established practice, article 2(1)'s second sentence makes it clear that the 1988 Convention must be transformed by the Parties into and applied through domestic law, but with the *caveat* that this must take place 'in conformity with the fundamental provisions of [the Parties] respective domestic legislative systems'. The co-sponsor of the provision, Canada, stressed that this sentence did not mean that the obligations assumed by the Parties pursuant to the 1988 Convention were subject to domestic law. The Canadian delegate stated that

it was to clarify that while Parties had assumed obligations, it was up to each of them to decide what laws they would require and what institutions they would need to establish to meet such obligations.⁸¹

Nonetheless, the United States delegation, critical of the article, felt that article 2(1)'s second sentence could be interpreted as a savings clause that might be used to question the obligation of the Parties to bring their national legislation into conformity with the 1988 Convention.⁸²

delegations. Sproule and St Denis recognise the political necessity of such consensus building provisions but bemoan the uncertainty they create about the legal obligations established by the Convention.

⁸¹ 1988 Records vol.II at 155.

⁸² 1988 Records vol.II at 156.

Article 2(2) continues in the self-protectionist vein by obliging the Parties when carrying out the Convention's obligations to respect sovereign equality, territorial integrity and the principle of non-intervention.⁸³

Article 2(3) completes the picture by obliging Parties not to carry out in the territory of another Party either the exercise of extraterritorial jurisdiction or the performance of functions exclusively reserved to that other Party by its domestic law. Gilmore points out that this provision is a reformulation of the international law doctrine that enforcement jurisdiction is strictly territorial in nature, and remarks:

Its specific reaffirmation was, however, thought to be of value given the emergence in recent years of unorthodox enforcement practices which have in turn been justified on the basis of alleged exceptions to this fundamental general rule. As the UK Home Office has pointedly noted, such treaty provisions may be 'helpful in countering the exorbitant claims to jurisdiction often made by the United States.'⁸⁴

The Canadian co-sponsor of the provision noted that Parties would not be able to unilaterally extend their 'jurisdiction beyond their borders except as specifically agreed to in the Convention.'⁸⁵

In essence then, international co-operation in the suppression of illicit drugs takes place within the parameters of agreements set up between states and must remain with the limited derogation of sovereignty they permit. But as is evident, some states push for more. They would prefer the reduction of legal barriers preventing their direct action within other states. They press for bilateral arrangements that can take them closer to this objective.

Multilateral co-operation, however, offers another solution: direct control by international law, that is, a new drug convention creating an international drug offence to

⁸³ In the *1988 Records* vol.II at 155 the Canadian co-sponsor of the article made it clear that this provision does not provide for a particular state's 'interpretation of rights to lands or waters', it merely reiterates the accepted principle of international law concerning the territorial integrity of states.

⁸⁴ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 3-4 citing 'Ratification of the UN Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances: Contents' in House of Commons, Home Affairs Committee, *Drug Trafficking and Related Serious Crime* H.C. Paper 370-II, 1988-89, at 160.

⁸⁵ *1988 Records* vol.II at 155.

which universal jurisdiction applies and which confers police powers in this regard on an international authority. This study speculates on the possibility of change in the latter direction, given the resistance to it by producer states which have in many cases only achieved territorial sovereignty historically recently and are unwilling to surrender it, and by consumer states like the United States which are able to exercise greater control over a system of domestic law enforced globally through international law. One commonly offered solution which is based upon the existing system and which appears to be a step towards direct international control is the evolution of the offences in the drug conventions into international crimes.

1.3.4 Towards direct international control: drug offences as international crimes

Many commentators either submit or simply assume that drug offences are international crimes like piracy or slavery.⁸⁶ Some are more cautious and argue that they may one day be.⁸⁷ Others deny that they are.⁸⁸ There is no settled definition of what constitutes an international crime, but a number of criteria have been suggested.

The first of these is that the offence must find its source and definition in an international convention.⁸⁹ But Bailey insists that in order to qualify as international, drug offences would have to be derived from international conventions which define offences and bind Parties to prosecute and punish those offences, and not from international conventions that regulate domestic criminal law but which do not create drug offences.⁹⁰ This study examines whether the drug conventions create precise enough obligations to form uniform domestic drug provisions and do not simply set standards which at most harmonise domestic provisions.

A second defining criterion of an international crime is the application of extraterritorial jurisdiction. The assumption of extraterritorial jurisdiction would appear

⁸⁶ Bassiouni MC 'International criminal law' in Kadish SH (ed) *Encyclopedia of Crime and Justice* Volume 3 (1983) 901 at 902; Bassiouni MC 'Characteristics of international criminal law conventions' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 1; Gianaris WN 'The new world order and the need for an international criminal court' (1992/3) 16 *Fordham ILJ* 88 at fn 1; Oehler D 'Criminal Law, International' in Bernhardt R (ed) *Encyclopedia of Public International Law* Volume I (1992) 877 at 881; The Quito Declaration of 11/8/1984 signed by Bolivia, Colombia, Ecuador, Panama, Peru and Venezuela declared drug trafficking to be a crime against humanity.

⁸⁷ Abramovsky A 'Extraterritorial abductions: America's "Catch and Snatch" policy run amok' (1991) 31 *Virginia JIL* 151 at 180.

⁸⁸ Anderson *op cit* at 27.

⁸⁹ Bassiouni *op cit* at 2. He submits that it need not be declared to be an international offence in the convention.

⁹⁰ Bailey SH *The Anti-Drug Campaign: An Experiment in International Control* (1935) at 112.

to take drug offences closer to the status of international crime. Key provisions in the drug conventions do extend jurisdiction but it is uncertain how far. Bassiouni argues, however, that because all states are harmed by the universal problems created by drugs and have a duty to co-operate internationally to control them, all states are under an international obligation to combat drug criminality in compliance with the principle of subsidiary universality (the *aut dedere aut judicare* principle - duty to extradite or prosecute).⁹¹ This study examines whether subsidiary universality or any other extraterritorial jurisdictional principles coupled with extradition can provide a successful jurisdictional bridge to international status for the offences in the drug conventions.

A third criterion for classifying crimes as international is whether, as Bassiouni asks, the particular conventions proscribe the conduct because it: i) contains either an international or transnational element; and ii) it is necessary to take international steps against this conduct.⁹² Thus it must first be asked whether drug related conduct either threatens the state system or is subject to the level of universal opprobrium necessary to be regarded as international. It seems easier to satisfy transnationality because drug offences do affect the interests of more than one state by, for instance, involving transborder activities or the nationals of more than one state. The second element, the necessity of taking international steps may be conclusive because drug trafficking does require international co-operation to enforce suppression. Satisfaction of this criterion as a whole has more to do with an analysis of the existing drug supply situation than of the international law provided to deal with it, and thus can only be discussed tangentially in this study.

Those who deny the international status of drug offences usually rely upon the same criteria but interpret them differently. For instance, Anderson argues that because drug offences are defined by states through their domestic criminal law and state officials are responsible for prosecution of offenders and the administration of the judicial systems in this regard, the international dimension of these crimes is therefore restricted to co-operation between states enforcing their own criminal laws.⁹³ The “international crime” of international drug trafficking is thus conveniently labelled as

⁹¹ Bassiouni MC ‘The International Narcotics Control Scheme’ in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507.

⁹² Bassiouni MC ‘Characteristics of international criminal law conventions’ in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 1 at 2.

⁹³ *Op cit* at 27.

such because of its transnational implications, because drug trafficking is a genuinely international activity, but without being truly an international crime.

The definition of drug offences as international crimes represents a shift from indirect to direct international control over these offences. Analysing whether such a shift has taken place is one of the major tasks of this study.

1.3.5 The individual in the system

Preoccupation with developing international prohibition is driven by the perception that drugs threaten states. But the policy of prohibition threatens the interests of the individuals caught up in the web of national laws derived from international regulation. These individuals must be protected, principally through procedural due process rights, but in other ways as well. In fact, there appears to be little concern in international drug control for human rights.⁹⁴ Criminal law, whether domestic or international, impacts *inter alia* on: i) the rights of users through criminalisation of private behaviour; ii) the rights of suppliers through for example detention without trial of suspects and confiscation of property not proved to be linked to trafficking; iii) the rights of inner city residents through for example police raids, curfews and warrantless searches; iv) the rights of all alleged offenders to fair pre-trial proceedings and to a fair trial; v) the rights of convicted offenders to fair conditions of punishment, especially to protection against cruel and unusual punishment for drug offences; vi) the right of all convicted offenders to life in those states where death penalties for drug trafficking apply; and vii) the general procedural rights of alleged offenders in proceedings leading to international criminal co-operation, such as the right to be informed of an extradition request, the right to be heard, and the right to legal assistance. Offenders at present have the protections provided by their national law and by the few principles and norms which indirectly protect individuals once international law comes into operation, such as the political offence exception to extradition. But these are usually construed as principles protecting state's interests and states only may have recourse to them. Traditionally, international criminal law has regarded the individual as an object of

⁹⁴ Gilmore N 'Drug use and human rights: privacy, vulnerability, disability, and human rights infringements' (1996) 12 *The Journal of Contemporary Health Law and Policy* 355 at 356. Gilmore notes at 357 that only one human rights instrument, the 1950 European Convention for the Protection of Human Rights and Freedoms ETS 46, mentions drug use.

negotiation between states. One of the tasks of this study is to discover what protections the drug conventions provide for individuals.

1.4 The structure, content, and methods of this study

This study examines the technical rules of international drug control law designed to suppress illicit drugs, and to a lesser extent the policy of prohibition that underpins those rules. The focus is on the efficiency of the technical rules, and the international consensus in respect of the policy, both obviously interrelated. The basic hypothesis to be tested is that the system of international control has taken a peculiar indirect shape which reflects the evolution of the policy of prohibition in international law.

This examination begins in chapter two with a history of the international legal regulation of drugs in order to place the existing international drug control system in historical context. In this chapter particular attention is paid to the interrelationship between the development of national and international legal regulation of drugs, and to the policy upon which the system is based - prohibition. The chapter also sets out the international legal provisions for the licit supply and use of drugs, in order to enable the distinction to be made between licit and illicit drug related conduct.

Turning to the substantive criminal law, the study examines in chapter three the crimes and penalties that the drug conventions require Parties to create in their national law. These crimes, set out in the 1961 Convention (as amended), the 1972 Convention and the 1988 Convention serve as the foundations of the entire illicit drug control system because the system is aimed at apprehending and prosecuting offenders for these offences. These crimes mainly involve the criminalisation of the supply of drugs and related activities such as money laundering, but they also include the more controversial personal use offences. This chapter also examines the penalties that the drug conventions require Parties to enact to complement the offences created under international law.

The study then considers the procedural aspects of international drug control law. In chapter four it examines the provisions in the drug conventions relating to the crucial issue of jurisdiction over drug offences, and looks particularly closely at the extraterritorial extension of such jurisdiction. It examines the related issue of extradition simultaneously because the provisions for jurisdiction and extradition are bound up with each other in the drug conventions. Finally it examines the international legal provisions

that regulate the general criminal procedure to be adopted when dealing with drug offenders.

Chapter five investigates the international regulation of enforcement in the sense of actual policing, prosecution and punishment of drug offenders. This wide-ranging chapter covers the many provisions of the drug conventions that regulate drugs policing, operational co-operation, mutual legal assistance and other more specific aspects of international enforcement co-operation.

Moving beyond criminal law, chapter six examines the alternative methods of control of illicit drug related activities provided for under international law. They include alternative methods of dealing with drug users, such as treatment and rehabilitation.

Chapter seven examines the supervisory structures of the international drug control system, the supervision of the system and its execution. It examines the role of each of the various organs controlling or participating in the system created under the drugs conventions and by the United Nations (UN), as well as intergovernmental organisations and the domestic organs of various influential states. This chapter also examines the methods of enforcement of the international system against Parties and non-parties to the drug conventions.

Finally, the Conclusion attempts to draw the separate conclusions of each chapter together and remark upon the coherence of the system in achieving its aim of suppressing illicit drug use.

The international drug control system is a creature of international treaty law. As this study examines the provisions of the relevant conventions, it is an exercise in the interpretation of treaties.⁹⁵ Article 31 of the 1969 Vienna Convention on the Law of Treaties⁹⁶ provides for three distinct tests of interpretation. The first test refers to the ordinary meaning of the words, in other words to a textual interpretation. The second test requires the interpreter to look at the intentions of the parties. Their intentions are commonly derived from the looking at the treaty as a whole and at related documents. Resort to preparatory documentation (*travaux préparatoires*) is given support by article 32 of the Vienna Convention. It permits recourse to 'supplementary means of

⁹⁵ See generally McDougal MS, Laswell H and Miller J *The Interpretation of Agreements and World Public Order* (1967).

⁹⁶ 1155 UNTS 331. Article 31 provides 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 purpose.'

interpretation' to confirm the textual meaning or should that remain ambiguous by relying on the meaning suggested by the preparatory documentation only. The third test in article 31 of the Vienna Convention requires an analysis of the object and purpose of the treaty and interpretation of its text in line with that object. Although the Vienna Convention gives no priority to any of these tests, the textual approach is commonly resorted to first because of its apparent simplicity. However, the drug conventions are products largely of compromise and are, as we shall see, saturated with textual ambiguity. Clarification of the meaning of their provisions thus frequently forces recourse to attempts to discover the intention of the parties and to the teleological approach. For this reason, I have drawn extensively upon the drafting history of the provisions to resolve ambiguity and obscurity and to avoid absurd and unreasonable results. But reliance on the intention of the original signatories to drug conventions to which considerable numbers of states have later acceded is not always satisfactory. In the process of interpretation of the drug conventions regard is thus taken of the contemporary expectations of Parties to these treaties as evidenced by their subsequent state practice.⁹⁷ Reference is made to domestic legislation, administrative measures and court decisions. In most cases, however, such reference is not intended to justify an interpretation that conflicts with the 'original intent' of the conventions. It is rather intended to illustrate how Parties have, as a result of their obligation to apply the conventions, fleshed out the content of the conventions.⁹⁸ It must be noted at this point that an exhaustive examination of the implementation of international drug control law is beyond the scope of this study. Finally, this study also touches upon the "soft law" of major policy instruments generated by the UN to the extent that they inform the "hard" law of the drug conventions within the general context of international drug control.

⁹⁷ Article 31(3)(b) of the Vienna Convention allows recourse to state practice subsequent to the conclusion of a treaty as evidence of what its authors originally intended. It is submitted, however, that it is a fiction to regard practice merely as evidence of the parties' original intentions. State practice is the instrument for developing interpretations of the drug conventions and must have strong probative value in respect of the interpretation of the conventions even if that interpretation conflicts with the 'original intent' - see McDougal et al *op cit* at 134.

⁹⁸ Moreover, as Chatterjee states in *Drug Abuse and Drug Related Crimes* (1989) at 3, '[v]ery few countries have provided any detailed explanation of the principles on which their drug legislation is based.'

CHAPTER TWO: THE HISTORY OF THE INTERNATIONAL LEGAL REGULATION OF DRUGS¹

2.1 Introduction

The primary aim of this chapter is to chart the growth of the international legal system for the suppression of illicit drugs in order to place it in historical context. In this examination particular attention is paid to the interrelationship between the growth of international and domestic drug prohibition regimes, and to the fundamental assumptions upon which these regimes are based. A subsidiary function of the chapter is to set out briefly the international legal provisions for the licit production, distribution and consumption of drugs, in order to make possible the distinction between such licit conduct and illicit drug related conduct, a distinction essential for the definition of illicit drug related conduct and by extension of the international law suppressing such conduct.

2.2 Historical events precipitating international drug control

When European colonial powers established trade links and acquired territory in the Americas, Africa and Asia, they took advantage of the commercial possibilities of the new drugs they discovered being used by the societies they encountered, and they encouraged drug production and trade.² Colonial authorities became reliant on the revenues thus generated. The supply to China of opium from India remains the classic example of such a situation.³ The origins of the international legal system of drug control can be traced to the international rejection of the Indo-Chinese opium trade. Opium was prohibited in China in the eighteenth century, but colonial interests in it resulted in the

¹ For a general history of the regulation of drug consumption see Inglis B *The Forbidden Game* (1975). For a history of the early phases of the international legal regulation of drugs see Eisenlohr LES *International Narcotics Control* (1934); Lowes PD *The Genesis of International Narcotics Control* (1966). Much of the substance of this chapter has already been published in the following three articles: 'The interrelationship between the development of domestic and international drug control law' (1995) 7 *African Journal of Comparative and International Law* 906-914; 'The international legal regulation of drug production, distribution and consumption' (1996) 29 *Comparative and International Law Journal of Southern Africa* 1-15; 'The historical development of international legal measures to suppress drug trafficking' (1997) 30 *Comparative and International Law Journal of Southern Africa* 1-21.

² See Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 3-4.

³ See Holt E *The Opium Wars in China* (1964) and Inglis B *The Opium War* (1976). Marx gives a contemporary view of the trade in Torr D (ed) *Marx on China, 1853-1860* (1968).

opium wars between the colonial powers and China. China was forced to accept legalisation of the trade in 1858.⁴

Negative reaction to the wars and the trade fed support for the anti-opium lobby that was growing in Britain, as well as in other states. Some arguments were moral, but others were strictly commercial. While the colonial powers resisted control of the opium trade for reasons of economic dependence, the United States was not reliant on drug revenues and was eager to see their monopoly over the supply of drugs to China broken so that it could be replaced by more legitimate forms of trade. It thus became the closest adherent of drug control and slowly began to lead the world into the new drug control system.⁵ The Americans tended to favour prohibition, but to assume that this was a coherent American policy from the outset would be to ignore its own profit from the opium trade. Some coherence came when America's own domestic opium problem led to the first federal drug control law which began to drive its international prohibitionary stance.⁶ United States condemnation of the opium trade served as the catalyst for reform of the opium trade to China.⁷ The Chinese Imperial Edict of 1906 called for the eradication of opium within ten years, and after negotiation the Chinese and British agreed in 1908 to phase out the trade.⁸

Scientific advances in the nineteenth century also meant that more hazardous substances were becoming available in the West. Morphine and later heroin were derived from opium, cocaine from the coca leaf and mescaline from the peyote cactus. The use of these drugs was initially approved by the medical profession on the basis of their apparent benefits, but disapproval followed as more rigorous studies showed few positive and many negative effects.⁹ These newly discovered substances gradually also became available in the non-Western world. Pressure to prohibit all drug use except for approved purposes grew and finally bore fruit during the early twentieth century when the foundations of the international drug control system were laid.

⁴ The Treaty of Tientsin, signed at the end of the Second Opium War.

⁵ See Taylor AH *American Diplomacy and the Narcotics Traffic, 1930-1939* (1969) chapter 1.

⁶ See Lowes *op cit* at 89-90; Musto DF *The American Disease* (1987) 1ff. After 1860 there was a rapid increase in drug use in the United States, probably mainly because of large scale use of opiates in patent medicines, opium use by migrant Chinese workers, and the acquisition of the Philippines in 1898 which had a significant opium problem. The report of the Philippines Opium Committee into opium abuse revealed a major domestic narcotics problem. It recommended complete prohibition of opium importation into the Philippines, and in 1909 Congress passed this recommendation into the first federal drug control law, the Opium Exclusion Act of 9 February 1909.

⁷ See Lowes *op cit* at 75.

⁸ See Wright H 'The International Opium Commission (part 2)' (1909) 3 *AJIL* 827 at 838ff.

2.3 International drug control 1909-1945¹⁰

2.3.1 The Shanghai International Opium Commission¹¹

Through American prompting, thirteen states¹² with an interest in opium met in Shanghai in 1909 to simply exchange views on the opium problem. Their discussions were preoccupied with the Indo-Chinese opium trade, but the Commission also formulated resolutions which have had a significant impact on international law. Participants resolved to suppress opium smoking, limit its use to medical purposes, control its export and extend drug control to its harmful derivatives. Unfortunately these resolutions carried no legal weight. No attempt was made to regulate penal law. But the most significant feature of the Shanghai Commission was that it established the United States as leader of international drug control. Lowes notes that at some point between 1910 and 1913 the United States found itself to be the unwilling leader of an international drug prohibition movement which it had initiated almost unconsciously and which it felt obliged to continue to support.¹³

2.3.2 The 1912 Hague Convention¹⁴

Agitation from the anti-opium lobby to see the Shanghai Commission's resolutions transformed into legal obligations, coupled with growing domestic consumption, prompted the United States to propose an international solution to the opium problem. A conference was held in 1911 at the Hague, and it adopted the International Opium

⁹ See Inglis *op cit* at 131.

¹⁰ See generally May HL 'Narcotic drug control - development of international action and the establishment of supervision under the United Nations' (1948) 441 *International Conciliation* 303 at 320ff; Renborg BA *International Drug Control* (1947) 14-28.

¹¹ See Wright H 'The International Opium Commission' (1909) 3 *AJIL* 648; Wright H 'The International Opium Commission (part 2)' (1909) 3 *AJIL* 827.

¹² Britain, the United States, China, Austria-Hungary, France, Germany, Italy, the Netherlands, Portugal, Russia, Japan, Persia and Siam.

¹³ See Lowes *op cit* at 192.

¹⁴ See Wright H 'The International Opium Conference (part 1)' (1912) 6 *AJIL* 865; Wright H 'The International Opium Conference (part 2)' (1913) 7 *AJIL* 109.

Convention on 23 January 1912 (hereinafter the 1912 or Hague Convention), the first multilateral international drug control treaty.¹⁵

The most enduring part of the 1912 Convention was concerned with obliging Parties to create a domestic control system that provided for a low level of regulation of the legal production of drugs, for greater regulation of the trade and use of drugs, and for the exchange of laws and statistics through a central clearing house. The system's shortcomings were many: no control over production and distribution of drugs, no quantitative limits on production, nothing said about how consumption was to be suppressed and no administrative machinery to co-ordinate enforcement.¹⁶ The scope of the convention was not wide but extended beyond opium.¹⁷

Little provision was made for suppression of the illicit traffic in drugs. Wright notes that the Americans had proposed adoption of 'uniform provisions of penal laws concerning offences against any agreement entered into by the powers in regard to the opium production and traffic', but the proposal was dropped when the French objected that it would require the alteration of domestic law, something they were not prepared to do.¹⁸ Article 20 was all that remained of the American initiative. It provided:

The Contracting Powers shall examine the possibility of enacting laws or regulations making it a penal offence to be in illegal possession of raw opium, prepared opium, morphine, cocaine and their respective salts, unless laws or regulations on the subject are already in existence.

Even article 20's modest attempt to introduce uniform criminal law failed as Parties were not willing to restrict their sovereignty in this domain.

¹⁵ 8 *LNTS* 187; in force only generally at the end of World War One. The conference was attended by delegates from China, France, Germany, Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, Siam and the United States.

¹⁶ See May *op cit* at 322-323.

¹⁷ The Convention was concerned with raw opium (the coagulated juice of the *papaver somniferum*), prepared opium (raw opium processed to render it suitable for consumption), morphine, cocaine, codeine and to a limited extent in resolution II, cannabis.

¹⁸ Wright H 'The International Opium Convention' (1922) 6 *AJIL* 865 at 869.

2.3.3 The League of Nations assumes supervision of international drug control¹⁹

Upon its formation, the League of Nations took over supervision of the execution of the 1912 Hague Convention. At the League's first meeting in 1920 the Advisory Committee on the Traffic in Opium and other Dangerous Drugs (hereinafter the Advisory Committee) was established with two functions: to collect and analyse information on the drug traffic, and to encourage compliance with the Convention.²⁰ An expert committee dominated from the outset by politicians, diplomats and police officers, it began a trend within a system which even today subordinates the role of health to policing, politics and economics.²¹ With regard to its impact, Chatterjee argues that although formally only an advisory committee, its formulation of policies with international implications slowly transformed national administration of drugs into international administration of drugs.²² In practical terms the Advisory Committee very rapidly became the centre of the drug control universe, and in 1922 states began furnishing it with annual reports of their drug control efforts.

2.3.4 The 1925 Geneva Convention²³

In the post-World War One period, various diplomatic efforts to limit the supply of raw opium failed.²⁴ The 1924-5 Geneva Conference was convened with the goal of controlling the manufacture of drugs. It eventually produced the International Opium Convention signed at Geneva on 19 February 1925 (hereinafter the 1925 or Geneva

¹⁹ See generally Wright Q 'The Opium Question' (1924) 18 *AJIL* 281-295.

²⁰ On the Advisory Committee's establishment see Eisenlohr *op cit* at 43-60.

²¹ See Lowes *op cit* at 188-9.

²² *Op cit* at 75.

²³ See generally, Wright Q 'The Opium Conference' (1925) 19 *AJIL* 559-569.

²⁴ Eventually, the League called two conferences in 1924. The open conference was formally devoted to controlling manufacture, while the closed conference, attended only by states with Far Eastern interests that still recognised the non-medical/ scientific use of opium, was aimed at controlling such use. China withdrew from the closed conference when it failed to limit the agricultural production and the consumption of opium to medical and scientific purposes. The United States then urged the open conference to do so. It failed to do so, and the United States and China withdrew. The producer states opted to rely on government monopolies to control production, and this approach was formalised in the two closed Agreements, the Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium, signed at Geneva on 11 February, 1925; 51 *LNTS* 337, and the Agreement Concerning the Suppression of Opium Smoking, signed at Bangkok, 27 November 1931; 177 *LNTS* 373. The 1925 Agreement also provided for the gradual suppression of consumption of opium. Ironically, article 49(1)(a) and article 49(2)(d) of the 1961 Single Convention permitted opium consumption for quasi-medical purposes until 1979. See generally Wright Q 'The Opium Conference' (1925) 19 *AJIL* 559 at 563; Wright Q 'The American Withdrawal From the Opium Conference' (1925) 19 *AJIL* 348 at 350-1.

Convention).²⁵ The scope of the Convention was limited,²⁶ although a scheme was set up for the inclusion of other substances under control.

With respect to the control of legal drugs, the 1925 Convention enhanced the provisions in the 1912 Convention for domestic control of opium and applied the principle that drugs should only be manufactured for 'medical and scientific' purposes. It also successfully developed regulation of the international drugs trade which at the time was the main source of supply for the illicit traffic. In order to regulate the international trade, the Convention set out an elaborate export/import authorisation scheme and established the Permanent Central Board (hereinafter the Board) to observe and supervise this trade. The Board was given the power to recommend that Parties embargo exports of drugs to other Parties that became centres of the illicit traffic. Parties were also required to make statistical returns to the Board on various aspects of production and supply of drugs. Finally, the League's Secretary General was made the information clearing centre.

With respect to penal law, article 28 of the 1925 Convention only provided that each of the Parties

agrees that breaches of its laws or regulations by which the provisions of the present conventions are enforced shall be punishable by adequate penalties including in appropriate cases the confiscation of the substance concerned.

Article 29, however, provided that the Parties would examine in the most favourable spirit the possibility of taking legislative measures to render punishable acts

committed within their jurisdiction for the purpose of procuring or assisting the commission in any place outside their jurisdiction of any act which constitutes an offence against the laws of that place relating to matters dealt with in the present convention.

The 1925 Convention also provided in terms of article 22 that information on illicit exports and imports of drugs would be reported to the Board.

²⁵ 81 *LNTS* 317; in force September 1923.

²⁶ Raw opium, coca leaves, manufactured drugs and cannabis.

2.3.5 The 1931 Geneva Convention²⁷

Massive diversion of morphine in the mid-1920s evidenced a breakdown in the control system. The illicit drug traffic was being supplied by the pharmaceutical industry.²⁸ The League called for a conference on the limitation of production in 1931.²⁹ The conference adopted the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931 (hereinafter the 1931 or Limitation Convention).³⁰ The 1931 Convention elaborated the definition of controlled substances and allowed League experts to enlarge and modify the list of these substances.

Limitation of drug production depended on the estimates system adopted by the 1931 Convention. This system required each Party to submit estimates of its drug consumption to the Board, which would then pass them on for examination by a new body of experts created by the 1931 Convention, the Drug Supervisory Body (hereinafter the Supervisory Body). The Supervisory Body, armed thus with an estimate of the drug requirements of every state, was given the task of preparing annual and supplementary statements on maximum permissible world drug requirements to be forwarded to all members of the League and affected non-member states. This consolidated estimate of world drug requirements became a corner-stone of the system of limiting manufacture and stockpiling of drugs internationally. The Board was given the power to enforce the system through the use of an embargo on the export of drugs to nations exceeding their estimates.³¹

The 1931 Convention directed greater attention to the illicit traffic than previous conventions. Article 15 urged Parties to create special administrations to inter alia take 'all useful steps to ... suppress the illicit traffic' and to organise the campaign against drug addiction. Parties also undertook to supply the League's Secretary General with a list of names and addresses of persons or firms authorised to manufacture or convert drugs and the specific drugs involved, information of value to police authorities in tracing the sources of illicit drugs (article 20(1)). The Convention also encouraged enforcement co-operation by obliging Parties to communicate important cases (in the

²⁷ See generally Wright Q 'The Narcotics Convention of 1931' (1934) 28 *AJIL* 475-486.

²⁸ See Bruun K, Pan L, Rexed I *The Gentlemen's Club* (1975) at 223-5.

²⁹ See Eisenlohr *op cit* at 132-4.

³⁰ 139 *LNTS* 301; in force 9 July 1933.

³¹ The Board was granted the power to impose mandatory embargoes in terms of article 14(2).

sense of quantities seized or methods used) discovered by them to other Parties through the League's Secretary General. Article 23 obliged states to provide great detail on:

- (a) The kind and quantity of drugs involved;
- (b) The origin of the drugs, their marks and labels;
- (c) The points at which the drugs were diverted into the illicit traffic;
- (d) The place from which the drugs were despatched, and the names of shipping or forwarding agents or consignors; the methods of consignment and the name and address of consignees, if known;
- (e) The methods and routes used by smugglers and names of ships, if any, in which the drugs have been shipped;
- (f) The action taken by the Government in regard to the persons involved, particularly those possessing authorisations or licenses and the penalties imposed.
- (g) Any other information which would assist in the suppression of the illicit traffic.

When it came to put the new system into practice, the Board succeeded in welding national administrations into a co-ordinated system and in its determination of legitimate consumption was unafraid to enquire into the domestic affairs of parties to query over-consumption.³² But after a time the 1931 Convention's lack of efficacy began to show: non-parties began to produce opium to meet illicit demand; illicit drugs were not destroyed after being seized; and the embargo system was not used against states violating their commitments.³³

2.3.6 The Advisory Committee's campaign against the illicit traffic

The Advisory Committee became engaged in a campaign against illicit drug trafficking as soon as it came into being.³⁴ It regularly received information from states on cases of illicit trafficking, and it made an account of this traffic together with suggestions for its suppression to the League's Council. It tried to identify major sources of supply,

³² See Eisenlohr *op cit* at 171-7.

³³ See Inglis *op cit* at 175.

suggested measures to states to prevent their territories from becoming centres of illicit traffic, studied the methods and organisation of traffickers in order to inform domestic enforcement authorities and encouraged communication on the drug problem between states. In 1923, it decided that information about seizures should be communicated directly between the central enforcement bureaux of the states concerned as diplomatic channels were too slow, but investigation revealed that few such central bureaux existed. Action was taken to remedy the situation, but progress was sluggish.³⁵ Article 23 of the 1931 Convention, which obliged Parties to send each other, via the League's Secretary General, reports on important cases of illicit traffic, codified the existing practice of sending such reports to the League. An annual summary of these reports had been made from 1925, but from 1931 these reports became quarterly and were circulated ever more widely in order to use publicity to combat the illicit traffic.³⁶

The Advisory Committee also played an important role in securing uniform penalties for drug offenders. It considered many states to have inadequate penalties and thus of running the risk of becoming illicit drug trafficking centres. The Advisory Committee thus recommended the imposition of severe penalties upon individuals engaged in illicit traffic in drugs.³⁷ Repeated resolutions calling upon states to impose such penalties gradually obtained results. Taking the issue one step further, in 1930 the Portuguese representative proposed that drug trafficking should be considered an 'international crime', but the Advisory Committee could not agree upon the definition of an international crime, and rejected his proposal.³⁸

Despite the establishment in 1931 of the Subcommittee on Seizures and Illicit Traffic, the aim of which was to give a firmer organisation to the Advisory Committee's campaign against the illicit traffic,³⁹ the campaign was not as effective as it might have been. For example, when the campaign focused on the supply to the illicit traffic by authorised manufacturers, traffickers relocated, first to states willing to license their factories and ignore their operations, and then, when international attention caught up with them, to obscure parts of the world to set up clandestine factories. The latter proved far more difficult to suppress. The problem was one of effective policing by national

³⁴ See generally Renborg *op cit* at 142-6.

³⁵ See Eisenlohr *op cit* at 71-5.

³⁶ See Eisenlohr *op cit* at 84-7.

³⁷ See Wright Q *op cit* (1924) at 287.

³⁸ See Eisenlohr *op cit* at 83.

³⁹ See Renborg *op cit* (1947) at 143.

police. All the Advisory Committee could do was to facilitate policing by information gathering and organising co-operation.⁴⁰ It could not intervene directly.

2.3.7 The actions of police organisations against the illicit traffic⁴¹

The Advisory Committee was able to rely on help from police organisations and advisers in its campaign against the illicit traffic. From its inception in 1923, the International Criminal Police Congress (ICPC or Interpol) concentrated on the illicit drug problem. Initially rebuffed by the Committee, the ICPC attacked the drug problem on its own. In 1926 it resolved that central police offices should be established in each country to facilitate the campaign against drug trafficking through the exchange of information about traffickers, and emphasised that adequate penalties should be provided for offences against drug laws. In 1928 the Advisory Committee granted it observer status, and in 1931 it was granted representative status at Advisory Committee meetings. In 1923, the Advisory Committee appointed a police expert as an assessor on the Committee. In 1930, the police assessor presented a comprehensive plan for the organisation of drugs policing. The plan called for the establishment in each state of a central bureau to unify administration and police control over the drug trade, for the establishment of co-operative relations with similar authorities in other countries, for the establishment of a central bureau at the League's Secretariat for the international control of the drug trade or the transmission of this function to the ICPC and for the arrangement for extradition of offenders against important drug laws.⁴² The Committee's response was that the domestic laws of many states made centralisation difficult, co-operation between central bureaux was impossible in practice because they did not exist, and it effectively vetoed the proposal of a central enforcement office by simply drawing attention to the Secretariat's existing work of collecting information on seizures.⁴³ However, in 1933 a draft convention along similar lines to the plan was submitted to the Committee who passed it on to governments for comment before holding an international conference.

⁴⁰ See Renborg *op cit* at 187.

⁴¹ See generally Eisenlohr *op cit* at 109-118.

⁴² See Eisenlohr *op cit* at 113.

⁴³ See Eisenlohr *op cit* at 114.

2.3.8 The 1936 Geneva Convention⁴⁴

2.3.8.1 Introduction

Until 1936, little emphasis was placed on the direct suppression of the illicit trade by international law. As we have seen, only a few provisions of the existing conventions dealt directly with the criminal laws to be adopted by states. These provisions took the same approach: they named but did not define penal offences, they called for adequate penalisation, and they began to formalise enforcement co-operation. In implementing them many states went much further than was suggested.⁴⁵ Only in 1936 did the international system for suppression of illicit drugs take its first real step forward with the conclusion in Geneva of a special international convention for the suppression of the illicit drug traffic. Starke explains that the existence of the licit drug control system was a necessary precondition of this development:

It was the marking of this line between licit and illicit traffic which left the way open for an international punitive campaign directed against the persons engaged in illicit activities. Having erected an international system of control and supervision over legitimate activities in relation to dangerous drugs, governments realised that the next logical step was to endeavour to suppress the illicit traffic.⁴⁶

Until 1936 illicit conduct relating to drugs was defined simply by implication; what was not legal in terms of the conventions was illegal. However, because the conventions spelled out the correct way of making estimates did not mean that estimating incorrectly was illegal. What was needed was a convention indicating the specific forms of conduct regarded as illegal by the international community. It was felt that international law would enable: the unification of domestic criminal law and the consequent criminalisation of drug offences in all states; the punishment of offenders who commit drug offences outside their normal jurisdiction; the relaxation of rigid principles against extradition; the imposition of a uniform global regime of severe punishment for

⁴⁴ See generally Starke JG 'The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs' (1937) 31 *AJIL* 31-43; Chatterjee *op cit* at 168-190.

⁴⁵ See Henrichs W 'Problems of competence in international law with regard to the punishment of narcotic drug offences and the extradition of narcotics offenders' (1960) 12 *Bulletin on Narcotics* 1 at 1-2 for an account of German implementation of these provisions.

⁴⁶ *Op cit* at 32.

trafficking; the enforcement of global drug-law; and the establishment of an administration to facilitate the operation of a unified illicit drug suppression system.⁴⁷

Unfortunately, then current international practice indicated an unwillingness by states to co-operate. To achieve concrete results, some relaxation of sovereignty over criminal law was required. The draft convention presented by the ICPC delegates to the Advisory Committee assumed such a relaxation was possible. It proposed a system of interconnected national drugs police bureaux, but included extensive provisions with 'regard to heavy penalties for drug offences, extradition, punishment of offences committed abroad, etc.'⁴⁸ When asked to comment, governments stated that unification of domestic drug offences was impossible due to their diversity, difference in penalty scales, and basic distinctions in matters of principle. They did, however, favour international agreement on the necessity for severe punishment of these offences. Extradition was controversial and it necessitated the insertion of an escape clause in the convention under which a state might refuse to extradite if the offence was considered insufficiently serious.⁴⁹ The United States was not overly enthusiastic about the new law because it felt that existing provisions if properly observed were sufficient and that a new convention was unnecessary if states followed its example.⁵⁰ After various redrafts the conference met from the 8-16 June 1936 in Geneva and adopted the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs signed at Geneva on 26 June 1936 (hereinafter the 1936 Convention).⁵¹

2.3.8.2 Substantive provisions

The object of the 1936 Convention as stated in the Preamble was 'to strengthen the measures intended to penalise offences' contained in the existing drug conventions and to 'combat by the methods most effective in the present circumstances the illicit traffic in drugs and substances covered by the Conventions.' The Convention aimed to achieve this goal by providing for uniformity in the areas discussed below.

⁴⁷ See Starke *op cit* at 32-3.

⁴⁸ See Starke *op cit* at 33.

⁴⁹ See Starke *op cit* at 34-5.

⁵⁰ See Taylor AH *American Diplomacy and the Narcotics Traffic, 1930-1939* (1969) at 290-291.

⁵¹ 198 LNTS 300; in force 26 October 1939.

Penal and related provisions:

- a) Article 1 defined the drugs to which the Convention applied in such a way that new drugs could be brought under its control.
- b) Article 2 ensured the enactment of domestic legislative provisions by each Party for the severe punishment, particularly by custodial sentences,⁵² of a number of specific acts falling under the rubric of 'illicit drug trafficking',⁵³ including the intentional participation in, conspiracy in, attempts towards and preparatory acts towards the commission of these acts.⁵⁴
- c) Article 4 specified that the commission of these acts should if committed in different countries be regarded as distinct offences.⁵⁵
- d) Article 5 obliged Parties to punish severely the illicit cultivation, gathering and production of drugs but only when their domestic law provided that such actions were criminal.⁵⁶
- e) Article 3 obliged Parties exercising extraterritorial jurisdiction in the territory of other Parties to enact legislation for the punishing of their nationals who were found guilty within that foreign territory at least as severely as if the offence had been committed in their own territory.⁵⁷

⁵² The interpretations clause of the Convention's Final Act noted that the Convention did not restrict Parties in their application of mitigating principles in sentencing.

⁵³ They are: 'The manufacture, conversion, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of narcotic drugs' contrary to the existing conventions. Starke *op cit* at 39 notes that the Committee of Experts made an effort to find an elastic formula which would include all these activities but that would be extendable to new as yet unthought of ways of circumventing the control system. However, due to the vagueness of proposed formulae and government objections, the generic approach was discarded in favour of an exhaustive enumeration of illicit activities, an approach still followed today. The terms used are in themselves open to interpretation, and the fact that 'illicitness' is defined by that which is not licit in terms of the licit control system, gives even greater flexibility. However, as Chatterjee *op cit* at 173 notes, on a strict interpretation of article 2, actions not mentioned by the article are not illicit in terms of the Convention.

⁵⁴ Starke *op cit* at 39 notes that through its extension of criminality to conspiracy and attempt, the article had as its object the penalization of traffickers 'who direct operations from countries which do not punish or do not punish severely complicity or criminal conspiracy in drug offences.'

⁵⁵ Starke *op cit* at 40 notes that this means that such acts are not to be regarded as an element accessory to a principal offence committed in another country, which avoids the consequence that such an offender may escape liability.

⁵⁶ The provisions involving enforcement of the Convention did not apply to article 5.

⁵⁷ Renborg *op cit* at 150 notes that this provision had in mind China and India whose local laws were much more severe than the laws applied by the extraterritorial courts to foreign nationals which allowed foreigners to carry on the illicit traffic almost with impunity in these states.

f) Article 6 provided that in Parties where the principle of international recognition of previous convictions was admitted, foreign convictions for drug offences should be recognised for the purpose of establishing habitual criminality.

Prosecution and extradition provisions:

g) Article 7 provided for the situation where a person committed an offence in one Party and was found in another. If that person was a national of the finding Party and the finding Party did not permit extradition of its nationals it was obliged to prosecute him unless his surrender would have had to be refused for a reason directly connected to the charge. Article 8 provided that if such a person was a foreigner, he had to be prosecuted and punished as if he had committed the offence in the Party in which he had taken refuge. Extradition, however, had to have been requested and been refused for a reason not connected to the offence, and the law of the Party of refuge had to allow the prosecution of foreigners for offences committed abroad.

h) Article 9 provided that all the crimes under article 2 were extradition crimes for the purposes of all existing extradition treaties between Parties. It also provided that where Parties did not recognise extradition as being conditional on the existence of extradition treaties or of reciprocity, that such Parties undertook to recognise these offences between themselves as extradition crimes. It further provided that extradition should be granted in conformity with the law of the Party to which the application was made, and that any Party to which an extradition order was made could refuse such order if its competent authorities considered that the offence in question was not sufficiently serious.

i) Article 10 provided for the seizure and confiscation of drugs, substances and instruments intended for the commission of article 1 offences.⁵⁸

Enforcement co-operation provisions:

j) Article 11 provided that each Party had to set up a central drug control office for the supervision and co-ordination of the campaign against illicit drugs.⁵⁹ These offices

⁵⁸ Renborg *op cit* at 153 notes that the article was an endeavour to deprive traffickers of the means to carry out their trade, and that it had a very wide scope so as to include the financial resources of traffickers and all kinds of vehicles used for transporting drugs. Starke *op cit* at 41 notes that a proposal made at the conference for the seizure of profits derived from drug trafficking foundered on problems of implementation.

⁵⁹ Renborg *op cit* at 93-4 notes that the central drug offices concept grew out of the Advisory Committee's preoccupation with establishing the central drugs administrations envisaged by article 15 of the 1931

would remain in close contact with each other in order to share information that might facilitate prevention and prosecution of drug offences. They would also act as a point of contact with authorities in other countries. Article 12 provided that the information to be shared related to proposed or ongoing drugs transactions, the identity and description of traffickers and discoveries of secret drugs factories.

k) Article 13 provided for further arrangements to facilitate communication and co-operation. These included making provision for the transmission of letters of request from one Party to another. This was preferably to be done through direct contact between the competent authorities or central offices of each country or contact between Ministers of Justice or diplomatic channels.

l) Article 16 obliged Parties to communicate through the League Secretariat laws and regulations promulgated to give effect to the Convention and annual reports on the working of the Convention.

2.3.8.3 Response and criticism

The 1936 Convention was designed to provide the necessary support in the area of criminal law for the licit drug control system. Yet it received little general support and never became effective law.⁶⁰ The fact that it was filled with escape mechanisms indicates the hesitancy of the conference delegates regarding the Convention's future. Innovative provisions had their teeth drawn when some delegations insisted on the inclusion of article 14 stating that participation of a Party in the Convention should 'not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law.' May notes that such loopholes had been allowed, in order to secure the adherence of recalcitrant states, but this did not have the desired effect of encouraging participation.⁶¹ The substance of the Convention scared states off, and has been criticised on the following specific grounds:

Convention. Article 11(5) of the 1936 Convention provided that the central police offices powers could be delegated to such a central drug administration. In addition, the Final Act of the 1936 Convention recommended that each Party should create specialized police services for the purposes of the Convention, which can be seen as the catalyst for the global growth of police drug-squads.

⁶⁰ Renborg B 'International control of narcotics' (1957) 2 *Law and Contemporary Problems* 86 at 102.

⁶¹ May HL 'The evolution of the international control of narcotic drugs' (1950) 2 *Bulletin on Narcotics* 1 at 6.

a) Criticisms of article 2, the article providing for penalisation of different forms of conduct, were legion, due mainly to differences in national criminal legal systems.

First, there was opposition to the adoption of the closed list of crimes. Taylor notes that the American delegates to the Conference had pointed to the impracticality of such an enumeration, the difficulty of describing such offences in a manner that would accord with the different domestic legal systems, and the inadvisability of dictating the terms of legislation in such detail to legislatures.⁶² The enumeration of crimes was bound to leave out some potential forms of illicit conduct; for instance it made no provision for a specific offence of use.⁶³ Chatterjee would have preferred the use of a generic term such as 'illicit trade' to cover the different forms of conduct and would have left it 'to the domestic courts to determine whether or not an act was an act of illicit traffic,' because crimes change continually in response to changing social and moral norms.⁶⁴ However, the conference was seeking to harmonise laws. Leaving definition open to creative judicial interpretation would not have led to uniformity. Moreover, the offences were linked to the conventions controlling the licit trade. As Renborg notes, 'the actual offences for which penalties are provided are all in the nature of illicit industrial and commercial transactions'.⁶⁵

Second, the article struggled to find acceptable definitions for inchoate crimes, particularly for conspiracy and incitement. Some states had highly developed concepts of conspiracy and incitement, which were not recognised in other states where the punishment of 'preparatory acts' in terms of article 2(d) would have required changes to their domestic law.⁶⁶ The inclusion of 'conspiracy' was at the insistence of the Canadian delegate with American support because they were concerned about the prosecution of drug traffickers who promoted drug trafficking but did not personally handle the drugs.⁶⁷ Unfortunately it meant that a parochial legal principle became an international obligation.

Third, with regard to punishment, article 2 failed to recognise that many states were only able in terms of their own law to punish the listed actions with administrative

⁶² *Op cit* at 293-4.

⁶³ Possession appears inadequate for covering use in situations such as those in states which differentiate between possession for own use and possession for trafficking purposes.

⁶⁴ *Op cit* at 181.

⁶⁵ *Op cit* (1947) at 209.

⁶⁶ Chatterjee *op cit* at 181.

⁶⁷ See Taylor *op cit* at 293.

rather than judicial penalties.⁶⁸ At this early stage, the conflict was emerging between states adopting a harsh position on punishment for drug offences, the position which has since dominated, and states with more liberal punishment philosophies. Those states opposed to the stringent punishment regime advocated by article 2 were unwilling to impose the Convention.⁶⁹ The grading of offences according to their severity would have alleviated many of the problems with sentencing.⁷⁰

Finally, article 2 makes no mention of intention as a requirement of an offence other than for 'participation'. The debate at the conference revolved around whether the words 'if wilfully committed' should be required for criminal liability in respect of these acts. Taylor records that the United States and Canadian delegates led the successful fight to delete this stipulation from the draft on the basis that it would render the successful prosecution of many drug offenders impossible.⁷¹ Those against the omission of the words felt that the inclusion of the words would avoid Parties being obliged to punish negligent or inadvertent acts, as most criminal codes required proof of intention in criminal cases.⁷² The interpretation clause inserted into the Final Act ameliorated the exclusion of a specific mental element to a limited extent when it provided that the provisions of the Convention, and in particular of articles 2 and 5, did not apply to offences committed unintentionally. However, there is no *prima facie* obligation on a Party to require a mental element for the establishment of criminal liability in a drugs case, a violation of the general principle *actus non facit reum nisi mens sit rea*.

b) Chatterjee submits that articles 7, 8 and 9, dealing with the punishment of extraterritorial crime, were formulated in such a vague and unrealistic way that they presented a major stumbling block to states wishing to become party to the Convention.⁷³

Article 7 allowed a Party to punish its nationals who commit offences abroad only if it did not permit extradition of nationals. However, in terms of article 7(2) such punishment was not possible if in a hypothetically similar case the extradition of a foreigner could not be granted. Thus, for example, if it was thought that an extradition

⁶⁸ See Chatterjee *op cit* at 180.

⁶⁹ *Ibid.*

⁷⁰ See Chatterjee *op cit* at 182.

⁷¹ *Ibid.*

⁷² See Taylor *op cit* at 293.

⁷³ *Op cit* at 183-7, 195-7.

request would have been based on an improper motive had extradition been possible, then the provision would not operate. This qualification undermined the effectiveness of the provision because Chatterjee notes that such cases were likely to be common as many states were inherently suspicious of the motives of other states when requesting extradition.⁷⁴

Article 8 allowed a Party to prosecute foreigners who had committed offences abroad and were in its territory. But they could only do so if firstly, 'extradition had been requested and could not be granted for a reason independent of the offence itself.' Whether such a reason included the political offence exception to extradition was left uncertain. If it did, Chatterjee notes that it would not have been possible to prosecute persons under article 8 to whom the political offence exception potentially applied.⁷⁵ The second qualification to article 8's operation, that the 'law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule' rendered the article even more vulnerable, because it was doubtful at the time whether the law of many many countries did so.⁷⁶

Article 9, the extradition article, was hamstrung by the simple fact that many states did not recognise the principle of prosecution of extraterritorial crime.⁷⁷ The provision in article 9(4) of a right to refuse extradition if the requested state felt the offence was not sufficiently serious maintained this trend of non-recognition. The then current philosophy of extradition was biased in favour of individual liberty. States would only extradite in serious cases and as extradition was entirely a question of municipal law they decided what was serious. Many felt that drug offences were not serious enough.⁷⁸ It was pointed out at the diplomatic conference that for articles 7 and 8 to function properly all article 2 offences would have to become extraditable. Article 9 attempted to achieve this by including these offences in every extradition treaty concluded or to be concluded by the Parties, but it created too general an obligation for most states to stomach.

⁷⁴ *Op cit* at 184.

⁷⁵ *Ibid.*

⁷⁶ See Chatterjee *op cit* at 185.

⁷⁷ *Ibid.*

⁷⁸ See statement of Swedish delegate - LN Doc. C.341.M216.1936.XI at 193 (annexure 2).

c) The provisions for co-operation - articles 11, 12, 13, and 16 were ambitious but also had shaky foundations.⁷⁹ Article 11 provided for central offices of supervision but ignored the fact that many states did not have the financial or technical capacity to meet this requirement. Displacement of existing government structures was required, and there were practical problems in maintaining contact with all the police authorities in a state. No procedure was set down for the collection of information. Strengths like the transmission of letters of request provision in article 13 were undermined by escape clauses like article 13(8) which provided effectively that Parties were not obliged to use uniform methods and procedures in respect of information and evidence.

d) The Convention was too complicated. Many states without a drugs problem did not want to get involved in a Convention demanding complicated administrative and legal measures.⁸⁰

For Chatterjee the major problem with the Convention was the difficulty states faced in framing domestic legislation to fit its controversial obligations.⁸¹ The Convention was the creation of police experts who planned far more serious inroads into national sovereignty than the level of political co-operation available in the League era made possible. Unlike other drug control measures, the Convention required the alteration of entrenched domestic principles, not the establishment of novel regulations. Perhaps the most significant article in the Convention from the point of view of the development of international criminal law was article 15 which reads:

The present Convention does not affect the principle that the offences referred to in Articles 2 and 5 shall in each country be defined, prosecuted and punished in conformity with the general rules of its domestic law.

What then did the Convention achieve? Renborg states that it

⁷⁹ See Chatterjee *op cit* at 186-7.

⁸⁰ See Renborg *op cit* (1957) at 102.

⁸¹ *Op cit* at 183.

had the effect of making illicit drug trafficking a crime of international character, and the punishment and prevention of illicit traffic became the concern of the community of nations.⁸²

The idea of international regulation of the criminal law of drug control had been planted.⁸³ The Convention is of use today because modern international drug suppression law has a very similar form and faces many of the same problems of acceptance faced by the 1936 Convention.

2.3.9 International drug control 1909-1945 in review

The period 1909-1945 saw a major effort to establish an international drug control system, an effort managed in the main by the League of Nations. The advances brought about through international agreement appeared to be enormous, yet they were eclipsed by the uncooperative attitude of many states and the failure to foresee the true scale of the drug problem.⁸⁴ The Shanghai Commission and the 1912 Convention opened drugs to international control. The 1925 Convention took tentative steps towards implementing a control regime. The 1931 Convention was the key instrument in the development of licit control.⁸⁵ The failures of this period were the inability to suppress the production of opium, and the failure of the 1936 Convention to gain international support.

One of the rationales for the growth of the international drug control system was that even the most effective domestic control of the problem was useless if the drugs could be obtained from other states that exercised little or no domestic control.⁸⁶ Thus international control can be seen as an extension of national control. However, not all states followed the same approach to illicit drug control and the type of system adopted internationally reflects the dominance of a prohibitive punitive system rather than a more permissive system that treated the problem primarily as a medical problem. The focus

⁸² *Op cit* (1947) at 27.

⁸³ Interestingly, despite little support from the international community, because many later conventions did not go as far in their provisions relating to control of illicit drugs, the 1936 Convention is still in force for the limited number of states which remain party to it and it remains open to new parties. Only article 9 of the 1936 Convention deeming the inclusion of drug offences in existing extradition treaties between Parties and that they should be regarded as extradition crimes by states that grant extraction without treaty, was deleted by article 44(2) of the 1961 Convention and replaced by article 36(2)(b) which now makes this process voluntary.

⁸⁴ See Chatterjee *op cit* at 190.

⁸⁵ May HL 'The evolution of the international control of narcotic drugs' (1950) 2 *Bulletin on Narcotics* 3 at 5.

here must be on the United States, because the Harrison Act of 1914⁸⁷ gave birth to a punitive drug control system in the United States, and arguably in the world. Chiefly designed to restrict the use of opium and its derivatives to medical purposes, the Harrison Act was both a response to American adherence to the 1912 Hague Convention and to its own burgeoning domestic drug problem.⁸⁸ From the point of view of its impact on international law, the most influential features of the Harrison Act were that it dealt with the drugs problem as a problem of the criminal law, unlike the approach in most other jurisdictions at the time which dealt with it as a medical problem, and it placed a federal agency in charge of the system of control which began a tendency to centralise responsibility for the system.⁸⁹

2.4 International drug control 1945-1976

2.4.1 The United Nations assumes control

With the establishment of the United Nations (UN), the international community began to redevelop the international drug control system under General Assembly and Economic and Social Council (ECOSOC)⁹⁰ authority. The Lake Success Protocol of 1946 enabled the Conventions supervised by the League to be brought into the UN framework.⁹¹ Although the UN's assumption of control did not change the constitution

⁸⁶ See Renborg *op cit* (1957) at 86.

⁸⁷ Act of Dec. 17, 1914 C.1, 38 Stat.785 as amended; 26 USC Sections 4701-36.

⁸⁸ Eldridge WB *Narcotics and the law* (1967) 7.

⁸⁹ See Musto *op cit* at 282. The Federal Bureau of Narcotics was established in 1930 partly to enable better co-operation with other nations in the prevention of smuggling by for instance allowing constant communication between enforcement agencies. Not surprisingly, the Bureau served as the special administration the United States was obliged to create under article 15 of the 1931 Convention. During the period when Harry Anslinger controlled the Federal Bureau, the emphasis on drugs prohibition increased not only domestically but globally. Commissioner of Narcotics from 1930 to 1962, he also served as the American representative to the 1931 and 1936 Conference's and as its representative on the CND from its establishment until 1970. Although the United States was not enthusiastic about the 1936 Convention for the Suppression of Illicit Traffic, the strengthening of criminal penalties was a subject 'particularly favoured' by Anslinger. The American delegation did not sign the Convention because in their own words 'the stipulations of the Convention do not tend in any increasing measure effectively to prevent or adequately punish the illicit traffic.' See King R *The Drug Hang Up: America's Fifty Year Folly* (1972) at 214.

⁹⁰ In terms of its competence under article 1(3) of the UN Charter in solving problems of an economic, social, cultural, or humanitarian character.

⁹¹ 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, signed at Lake Success, New York, 11 December 1946, 12 UNTS 179. The Protocol came into force in 1948.

or functions of the Permanent Central Opium Board or Drug Supervisory Body, the UN Commission on Narcotic Drugs (CND), with the UN Division of Narcotic Drugs (DND) as its secretariat and executive arm, took over the role of the Opium Advisory Committee.⁹² The CND continued the Advisory Committee's role as the international forum for drug control and established new roles for itself including the rendering of technical assistance in the form of financial or training assistance to UN member states with drug problems. It also persevered with the campaign against the illicit traffic and remained co-ordinator of the information network concerning the traffic in drugs.⁹³ With respect to enforcement, it focused its attention on development of methods for determining the sources of drugs,⁹⁴ and on policing methods such as listing and circulating the names of suspect merchant vessels. It also continually urged states to increase their enforcement efforts, to impose severe penalties on traffickers, to give enforcement agencies the necessary power to suppress trafficking, to facilitate the direct exchange of information between enforcement authorities and to carry out their treaty obligations particularly with respect to communication of information to the UN.⁹⁵

2.4.2 The Paris Protocol

The first development of substantive international drug control law after the UN's assumption of authority was the 1948 Paris Protocol's extension of existing controls to new mainly synthetic drugs outside the scope of the 1931 Convention.⁹⁶ The Protocol was a success with all principle drug manufacturing states becoming party to it and many non-parties applying its provisions.

⁹² The CND initially limited its membership to representatives of 15 UN member states. A 1961 increase to 21 was an attempt to rectify perceived imbalance by making it possible for representation of states with drug addiction problems and for election of non-UN members. See DND 'Twenty years of narcotics control under the United Nations' (1966) 18 *Bulletin on Narcotics* 1 at 6.

⁹³ The DND sent out bi-monthly seizure report summaries, and from 1946 prepared an annual illicit traffic survey setting out details of drugs seized including amounts, smuggling routes, countries of origin, methods of concealment, prices, penalties imposed by national authorities, nationality of traffickers, and nationality of ships carrying drugs. This survey, supplemented by states, served as the basis for the CND's discussion of the illicit trade - see May HL 'Narcotic drug control' (1952) 485 *International Conciliation* 489 at 507-8.

⁹⁴ See DND *op cit* at 25-7. The United States initiated the program, and initially it supplied laboratory facilities and maintained a centre for information and sample exchange. After 1954 a narcotics laboratory was established in Geneva as part of the DND.

⁹⁵ See DND *op cit* at 28.

⁹⁶ The 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, signed at Paris on 19 November 1948 - 44 *UNTS* 277; in force 1 December 1949.

2.4.3 The 1953 New York Opium Protocol

The focus of reformers was still on the limitation of the production of opium.⁹⁷ A draft protocol embodying a stock limits and estimates system was put to a conference in 1953 which concluded the Protocol signed at New York on June 23, 1953 for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of, Opium.⁹⁸ The Protocol's strengths were that it established the principle of limitation of opium production, it restricted the right to export to seven states, and it provided the Board with comprehensive enforcement powers.⁹⁹ These strengths made the Protocol a difficult legal pill to swallow and it did not enter into force until 1962. The absence of enthusiastic support can also be explained by the simultaneous development of the 1961 Single Convention, upon which the 1953 Protocol had a strong influence.¹⁰⁰

2.4.4 The period leading up to the 1961 Conference

By the mid-1950s the volume of the illicit traffic was growing and drug supply and consumption patterns were evolving rapidly. Features of this evolution included the introduction of drugs to new markets, the formation of multinational drug trafficking rings and the manufacture of drugs in hitherto undeveloped regions.¹⁰¹ The successful regulation of the licit drug trade resulted in almost total reliance by the illicit traffic on illicit sources of supply.¹⁰² Yet the illicit traffic still managed to supply an increasing variety of drugs to an increasing market. The CND began to move towards a more developmental approach, as the true nature of the problem became more apparent and law proved ineffective in extinguishing it.¹⁰³ At a political level, the most significant development that took place during this period was the process of decolonisation. This resulted in the dichotomy of developing producer and developed consumer states that still polarises drug control today. Before decolonisation, colonial powers like Britain had been the subject of most international drug control efforts. After decolonisation, it was

⁹⁷ See Gregg RW 'The United Nations and the Opium Problem' (1964) 13 *ICLQ* 96-115.

⁹⁸ 456 *UNTS* 3; in force 8 March 1963.

⁹⁹ See Gregg *op cit* at 106.

¹⁰⁰ See Gregg *op cit* at 107.

¹⁰¹ See DND *op cit* at 22.

¹⁰² See DND *op cit* at 22.

¹⁰³ See DND *op cit* at 7.

the newly independent states which were to bear much of the burden of international drug control.¹⁰⁴

2.4.5 The 1961 Single Convention¹⁰⁵

2.4.5.1 Introduction

Work on a new unified convention embracing the whole field of drug control began in 1948.¹⁰⁶ On the 3 August 1948, ECOSOC adopted a CND recommended resolution requesting the Secretary General to prepare a draft convention to replace the nine existing conventions.¹⁰⁷ It was to have the following principle objectives: limiting the production of raw materials; codifying the existing multilateral drugs conventions into one convention; and simplifying the existing control machinery.¹⁰⁸ Between 1950 and 1958 the convention went through three drafts until the CND convened a plenary conference which met in New York from the 24 January to the 25 March 1961. It was attended by a large number of states representing a wide range of interests.¹⁰⁹ The conference took a cautious approach, following the principle of indirect control. Finally, on the 30 March 1961, it adopted the Single Convention on Narcotic Drugs (hereinafter the 1961 Convention).¹¹⁰ The material scope of the 1961 Convention is much wider than any of the previous conventions.¹¹¹ It consists of the division of narcotic drugs, based on an assessment of their properties, into four different schedules, and the application of different control regimes to the narcotic drugs in these schedules.¹¹² Special controls are

¹⁰⁴ See generally Bassiouni MC 'Critical reflections on international and national control of drugs' (1990) 18 *Denver Jnl of Int. Law and Policy* 311 at 312-315.

¹⁰⁵ See Lande A 'The Single Convention on Narcotic Drugs' 1961 (1962) 16 *International Organisation* 776-797.

¹⁰⁶ See Gregg RW 'The Single Convention for Narcotic Drugs' (1961) 16 *Food Drug Cosmetic Law Journal* 187 at 194-5.

¹⁰⁷ Resolution 159 IID (VII).

¹⁰⁸ See DND *op cit* at 44.

¹⁰⁹ See generally Waddel IG 'International Narcotics Control' (1970) 64 *AJIL* 310 at 315-321. He notes at 315 that the representatives of 73 states attended the conference including representatives of all the major powers except Communist China, and in addition representatives from the Board, the Supervisory Body, the FAO, WHO and Interpol.

¹¹⁰ 520 UNTS 151; in force 13 December 1964.

¹¹¹ See generally Chatterjee *op cit* at 344-355.

¹¹² All the general control articles apply to Schedule I drugs in terms of article 2(1). In terms of article 2(2) less stringent provisions apply to Schedule II's list of four drugs not addictive in themselves but capable of being converted into addictive drugs. In terms of article 2(4) even less stringent provisions apply to the drug preparations in Schedule III. Schedule IV is a list of the drugs considered most dangerous, to which it is recommended in terms of article 2(5) that Parties apply special additional control measures, extending, if necessary, to prohibition of manufacture, traffic or use of the drugs, except for

applied specifically to the opium poppy, cannabis plant, poppy straw and cannabis leaves.

2.4.5.2 Regulation of agricultural production, manufacture, trade and consumption of drugs¹¹³

The Convention provides that Parties are required to limit the production of all drugs, including opium, exclusively to medical and scientific purposes. It provides for government control of opium cultivation, indirectly limits the number of opium producing states, and limits opium exports to authorised states. Separate systems of control apply to coca bush, cannabis, poppies cultivated for other purposes and to poppy straw. Parties are, however, only required to prohibit cultivation of opium poppy, coca bush or cannabis if they think it necessary to protect the public health and prevent diversion into the illicit traffic. There was a mixed response to these provisions, but most CND members, although they realised that limitation of agricultural production of drugs would always be a problem for poor states where their cultivation is an economic necessity and they play a social and cultural role, supported the 1961 Convention.¹¹⁴

In order to control drug manufacturing,¹¹⁵ the 1961 Convention adopted the measures used in earlier conventions including the licensing of manufacturers and the estimates system used by the 1931 Convention. These measures are complimented by the statistical returns system which enables an audit of the estimates, thus restraining the manufacture and importation of drugs by Parties and revealing possible diversion of drugs into the illicit traffic.

The control of trade in drugs under the 1961 Convention¹¹⁶ relies on the principle that legal trade, both national and international, must always be authorised through licensing to distinguish it from illegal trade. At the local level, for example, prescriptions are required for the supply or dispensation of drugs to individuals and drugs offered for sale must show the exact drug content by weight or percentage on the label. The 1961 Convention controls the international trade by licensing provisions and through reliance

medical or scientific use. In terms of article 3 drugs can be added to or transferred from one schedule to another. The power is granted to the CND to determine if a drug should be controlled and if so to place it under a particular schedule, but in doing so it is obliged to consult with the WHO. See Annexure A: Substances Controlled, for an outline of this procedure.

¹¹³ See generally Chatterjee *op cit* at 367-395.

¹¹⁴ See Gregg *op cit* (1964) at 113.

¹¹⁵ See generally Chatterjee *op cit* at 396-416.

on the import/export authorisation system that requires a state authorising export of drugs to do so only upon receipt of an import certificate from the state of destination.

2.4.5.3 The International Narcotics Control Board (INCB)

The 1961 Convention streamlined the drug control bureaucracy by abolishing the Permanent Central Opium Board and Supervisory Body and replacing them with the INCB, a body of eleven independent experts entrusted with enforcing the Convention by inter alia supervision of the estimates system and statistical returns. The 1961 Convention provides the INCB with a number of ways of forcing the Parties to comply with the provisions of the Convention, including requests for information and explanations, public declarations that a Party has violated its obligations and two embargo procedures, one recommendatory, the other mandatory.¹¹⁷

2.4.5.4 Control of illicit trafficking and treatment of drug users

The draft provisions relating to penalisation of illicit traffickers were controversial and despite the inclusion of escape clauses to facilitate their general acceptance, they were not acceptable to the 1961 Conference. The measures eventually adopted for dealing with illicit drug control are moderate and devised to avoid conflict with the different legal systems of the Parties.¹¹⁸ Indeed, because they were so mild it was agreed that they would not replace the 1936 Convention, and Parties to the 1936 Convention could remain party to it and apply its stronger provisions among themselves.¹¹⁹ The 1961 Convention's measures (articles 35-36) include obligations to punish certain specified offences adequately on a scale commensurate with the seriousness of these offences as well as provisions in respect of jurisdiction and extradition and co-operation, all of which are subject to the constitutional limitations and domestic law of the Parties. A novelty in the Convention is the obligation on Parties to give attention to providing facilities for medical treatment, care and rehabilitation of addicts (article 38). The analysis of these provisions forms part of the substance of this study, and will be dealt with below.

¹¹⁶ See generally Chatterjee *op cit* at 424-436.

¹¹⁷ See generally Chatterjee *op cit* at 264-273.

¹¹⁸ See Gregg *op cit* (1961) at 202.

¹¹⁹ In terms of article 44(2) only article 9 of the 1936 Convention is terminated, unless a Party notifies the Secretary General that it is still in force.

2.4.5.5 The 1961 Convention in review

The 1961 Convention embodies the indirect approach of the earlier conventions. It places the obligation on the Parties, and then monitors the execution of that obligation. Although constituting the basic licit control system today, the obligations themselves represent a compromise and the Convention is not perfect. The Convention has thus had its critics who have claimed that its provisions watered down the estimates system and failed to restrict the number of opium producers directly. Yet the 1961 Convention embodies the general strategy of the developed drug consumer states to curtail and eventually eliminate the cultivation of drug producing plants, which could only be achieved at some cost to the developing states where these plants were grown. With respect to penal law, although it expanded upon the penal provisions of the earlier general conventions, it was a step back from the strong measures of the 1936 Convention.

2.4.6 The 1971 Psychotropic Convention¹²⁰

2.4.6.1 Introduction

Until 1971, the international system only regulated narcotic substances. It did not deal with psychotropic substances, stimulants of the central nervous system or hallucinogens, the abuse of which had become common in the 1960s as their variety and availability increased. With the option of amending the 1961 Convention rejected on the grounds that it would become too complex, support for a new convention grew. In 1969, the CND adopted a draft convention, and a plenary conference held in 1971 in Vienna adopted the Convention on Psychotropic Substances, signed at Vienna, 21 February 1971 (hereinafter the 1971 Convention).¹²¹

2.4.6.2 Control provisions

The 1971 Convention applies a similar control system to psychotropic substances as the 1961 Convention does to narcotic substances. However, there are differences due to the heterogeneity of psychotropic substances and the different risks connected to their abuse and dependence producing potential. Controls also vary greatly among the groups of

¹²⁰ See generally Bruun et al *op cit* at 243-268; Chatterjee *op cit* at 456-494.

¹²¹ 1019 UNTS 175; in force 16 August 1976.

psychotropic substances as broken down in the four schedules annexed to the Convention.¹²² The Convention does not limit the cultivation of plants from which psychotropic substances are made. The basic obligation imposed on the Parties is to limit the use of psychotropic substances to medical and scientific purposes. The manufacture, export and import of psychotropic substances is controlled through reliance on prohibition, strict supervision and licensing. The international trade in psychotropic substances is controlled by the import-export authorisation scheme. Parties are also obliged to provide information to the INCB on their control systems including an annual report regarding the implementation of the convention, changes in their domestic law and reports on important cases of illicit trafficking and seizures. The INCB functions in much the same way under this Convention as it does under the 1961 Convention, concerning itself with the maintenance of statistics, appropriate operation of the export-import system, and keeping Parties informed of urgent situations. However, the 1971 Convention does not make any provision for an estimates system of each Party's psychotropic substance requirements. With respect to enforcement, the INCB has investigatory and embargo powers.

2.4.6.3 Penal and alternative provisions

The Convention provides for measures relating to the abuse of psychotropic substances including provision for rehabilitation and social re-integration (article 20), for co-operation against the illicit traffic (article 21) and for criminal sanctions in national law (article 22). Commentators note that these provisions dissipated support for the Convention.¹²³ These provisions will be examined in the main body of this study.

2.4.6.4 The 1971 Convention in perspective

The Convention was modelled on the 1961 Convention but, aimed at drug manufacturing rather than agricultural states, its provisions are not as rigorous as those of the 1961 Convention. It also took a more remedial line, emphasising that non-legal means such as education, treatment and rehabilitation could also be important factors in the illicit control of drugs. This is not surprising given the liberalisation of the approach

¹²² Noll A 'International treaties and the control of drug use and abuse' (1977) 6 *Contemporary Drug Problems* 17 at 19. The process for extending the scope of Convention is similar to that contained in the 1961 Convention. See Annexure A: Substances Controlled.

¹²³ See Bruun et al *op cit* at 283.

to drugs in the late 1960s and early 1970s. Although some states had reservations about the efficacy of its provisions, the Convention has over time received reasonable support.¹²⁴

2.4.7 The 1972 Protocol to the 1961 Convention¹²⁵

The United States was dissatisfied with the measures for control, especially of opium, in the 1961 Convention. A conference held in March 1972 in Geneva, considered a list of amendments sponsored by thirty nations, and adopted the Protocol Amending the Single Convention on Narcotic Drugs, 1961, signed at Geneva 25 March 1972 (hereinafter the 1972 Protocol).¹²⁶ The 1972 Protocol does not make dramatic changes to the indirect system of control applied by the 1961 Convention. Rather it fine tunes existing provisions relating to the estimates system, data collection and output, fortifies enforcement measures and extradition, and makes greater provision for treatment, rehabilitation and preventive measures. However, the Protocol does increase the INCB's monitoring and enforcement powers and it strengthens the INCB's powers to suppress the illicit traffic.¹²⁷

2.4.8 The growth of the developmental approach to international drug control

The recognition that the failure of governments to carry out their international obligations or their unwillingness to accept international obligations 'may be due more to lack of capacity rather than lack of desire,'¹²⁸ lead to more attention being paid to improving national administrations and assisting governments to meet the demands on their resources resulting from the effective control of the drugs problem. In 1956, all governments were invited by ECOSOC to apply for technical assistance in the shape of expert advice, training abroad, the holding of seminars, and laboratory services. A separate part of the UN budget was set aside for financing such assistance. Assistance soon extended to the co-ordination of regional meetings, missions and consultative

¹²⁴ However, the INCB noted in 1993 that some of the major manufacturing and exporting states had not yet become party to it or introduced control measures in respect of psychotropic substances - INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1993/1 at 2.

¹²⁵ See generally Gross NG, Greenwald GJ 'The 1972 Narcotics Protocol' (1973) 2 *Contemporary Drug Problems* 119-163.

¹²⁶ 976 UNTS 000; in force 8 August 1975.

¹²⁷ Gross and Greenwald *op cit* at 125-126 note that until 1972 the INCB had been increasingly involved in monitoring the illicit traffic without a specific mandate to do so.

¹²⁸ Goodrich LM 'New trends in narcotics control' (1960) 530 *International Conciliation* 181 at 188.

groups and to the out-posting of DND officers to facilitate co-operation. Alternative developmental methods of dealing with the drug problem such as crop substitution were also becoming popular with the UN apparatus. However, the need for extra funding was patent and in 1970 the United Nations Fund for Drug Abuse Control (UNFDAC) was established to provide funding.¹²⁹ Significantly, UNFDAC enjoyed major financial support from the United States.

2.4.9 International drug control 1945-1976 in review

In the sphere of regulation of the licit production, trade and consumption of drugs, the period in which the UN took control of the drug control system must be regarded as a success. The smooth transition from League to UN control, the conclusion of major conventions such as the 1961 Convention, the adaptation to changing conditions as indicated by the development of the 1971 Convention, can all be regarded as positive steps. It is suppression of the illicit traffic, a traffic now producing, transporting and supplying expanding markets entirely independently of the licit trade in drugs, which is the failure of this period. The enactment by Parties in terms of the penal provisions in the 1961, 1971 and 1972 conventions of specialised drug legislation dealing with all aspects of suppression of illicit drugs showed a movement away from the general criminalisation of drug related conduct in national penal codes,¹³⁰ but did not result in the suppression of the illicit traffic. Something more was required.

Developments at the national level indicated the change in direction that this area of international law was likely to take. In the post-war period the United States had continued to pursue the policy of prohibition domestically and internationally. Although the approaches of other Western states to drug control during this period ranged from prohibitionist to permissive,¹³¹ the United States was able to rely on their support because they had no interest in opposing prohibition. The United States brought pressure to bear on recalcitrant states, usually developing states, to adhere to the drug conventions and to enforce domestic drug laws. The amelioration of Western social and official attitudes to drug use during the 1960s and 1970s did not result in a move away from prohibition. Developments like the uncoupling, in the sense of severity of punishment, of

¹²⁹ See Murphy JW 'Implementation of international narcotics control: the struggle against opium cultivation in Pakistan' (1983) 6 *Boston College Int. and Comp. LR* 199 at 230.

¹³⁰ Cotic D *Drugs and Punishment* (1988) at 113.

¹³¹ See Lindesmith AL *The Addict and the Law* (1965) at 179-184.

the offence of possession from trafficking, and the search for more effective non-penal methods of dealing with drug users, did have an impact on domestic law¹³² and by extension ultimately on international law, but they did not culminate in a change to international law's basic prohibitionist policy.¹³³ Official reaction to the growth in the variety of drugs available,¹³⁴ the number of users,¹³⁵ and drug associated criminal activity, is more accurately characterised by President Richard Nixon's declaration in 1969 of 'war' on drugs.¹³⁶ The drug control strategy of developed drug consumer states changed from suppression of domestic drug trafficking and use to reduction of external supplies.¹³⁷ Sceptical about the international community's willingness and ability to implement strict drugs prohibition, the United States began to set up an international drug control system to keep drugs out of its territory.¹³⁸ It reorganised and centralised its drug control agencies¹³⁹ and developed a global Narcotic Control Action Plan. It extended the international activities of American enforcement agencies,¹⁴⁰ extended its enforcement jurisdiction,¹⁴¹ increased extradition of foreign drug traffickers, and when that failed or proved impossible, increased reliance on irregular rendition or abduction.¹⁴² Its military and intelligence communities also became increasingly

¹³² The traditional repressive measures were linked with medical treatment and rehabilitation of users, thus providing a small opening for different approaches to drug control.

¹³³ Strong but ultimately unsuccessful efforts were made to decriminalise cannabis at the federal level. Ratification of the 1971 Convention was unsuccessfully resisted because it imposed criminalisation of psychotropic substances - see Comment 'The Convention on Psychotropic Substances: domestic consequences of ratification' (1978) 63 *Iowa LR* 950-974. Although it was argued that the United States could legalise cannabis in spite of its obligations under the 1961 Convention, it did not do so - see Leinward MA 'The international law of treaties and United States legalization of marijuana' (1971) 10 *Columbia Jnl of Transnational Law* 413-441.

¹³⁴ The opiates and cannabis were joined by a host of other drugs, including amphetamines, barbiturates, cocaine, crack, benzine, solvents, LSD and mescaline.

¹³⁵ Bassiouni MC 'Transnational control of narcotics' (1972) *Proceedings of the American Society of International Law* 227 at 228 estimates that there were twenty million addicted or habitual drug users in at least seventy countries in 1972.

¹³⁶ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 141.

¹³⁷ Clutterbuck R *Drugs, Crime and Corruption* (1995) at 124-125.

¹³⁸ See generally Fisher K 'Trends in extraterritorial narcotics control: slamming the stable door after the horse has bolted' (1984) 16 *NYU Jnl of Int. Law and Policy* 353-413.

¹³⁹ The Federal Narcotics Bureau was replaced by the Drug Enforcement Agency (DEA) in 1973. The DEA has pursued an aggressive anti-drugs policy in foreign jurisdictions since its inception.

¹⁴⁰ Nadelmann *op cit* at 3 notes that between 1967 and 1991, the number of US drug enforcement agents stationed abroad rose from about twelve in eight foreign cities to about 300 in more than seventy foreign locations.

¹⁴¹ See for example, the 1980 Marijuana on the High Seas Act 21 USC section 955(b) which potentially subjects any vessel on the high seas to United States jurisdiction.

¹⁴² Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 at 868.

involved.¹⁴³ It became heavily involved in the training and funding of foreign drug police,¹⁴⁴ and provided direct aid to foreign governments and contributions into UNFDAC. Behind these efforts was a preparedness to either pay or pressurise states to co-operate. A shift from source control strategies aimed at the producer, such as crop substitution, to law enforcement initiatives, such as crop eradication,¹⁴⁵ also took place. The dominant strategy, however, remained supply reduction. The United States also concluded many bilateral drug control treaties¹⁴⁶ and made an effort to tighten the controls of international instruments during this period. Its development of a global supply reduction strategy was bound eventually to find its way into a multilateral drug convention with many of the features of that strategy, although this was still to take some time.

2.5 Recent developments in international drug control

2.5.1 Introduction

Alarm at the booming drug traffic in the 1970s led to increased international activity. In response to the need for closer enforcement co-operation at the regional level, in 1974 the CND established the Sub-commission on Illicit Drug Traffic and Related Matters in the Near and Middle East, and the Meeting of Heads of National Drug Law Enforcement

¹⁴³ See Fisher *op cit* at 391-400; Keig LA 'A proposal for direct use of the United States military in drug enforcement operations abroad' (1988) 23 *Texas ILJ* 291-316. The high point of the extraterritorial military involvement was Operation "Blast Furnace", involving the use in July 1986 of US armed forces in Bolivia against Cocaine laboratories and smugglers airstrips in Bolivia. It proved singularly unsuccessful, and was condemned despite the Bolivian Presidents consent as a violation of international law - see Wadler DG 'Operation Blast Furnace: The United States involvement in Bolivia to put the heat on drug traffickers' (1987) 2 *Jnl of Int. Dispute Resolution* 175-203. See also Welch ME 'The extraterritorial war on cocaine: perspectives from Bolivia and Colombia' (1988) 12 *Suffolk Transnational LJ* 39-81.

¹⁴⁴ Fisher *op cit* at 405 notes that from 1971 to 1984 22 000 foreign police officials were trained by the DEA in the United States, and at 407 notes that in the eleven years to 1984 the United States funded a substantial portion of the national police budgets of Mexico, Colombia, Peru, Bolivia, Ecuador, Jamaica, Haiti, Costa Rica, Panama, Pakistan, Turkey, Thailand and Burma.

¹⁴⁵ See generally Murphy SR 'Drug diplomacy and the supply side strategy: a survey of United States practice' (1990) 43 *Vanderbilt LR* 1259 at 1270-1277. She notes at 1272 that US crop substitution programs became contingent on crop eradication of large amounts of the particular state's illicit crop, and through US pressure UN aid programs also became linked to drug control efforts.

¹⁴⁶ By 1972, 30 such treaties had been concluded, which enabled the opening of 47 drugs offices in 35 states.

Agencies (HONLEA), Asia and the Pacific.¹⁴⁷ In 1975, the Fifth UN Congress on the Prevention of Crime and Treatment of Offenders recommended that consideration be given to the drafting of an international convention on judicial assistance and improved extradition for drug offences.¹⁴⁸ Further developments included the drawing of attention to the financial implications of the illicit traffic¹⁴⁹ and to the need to control drug trafficking on territorial waters and on the high seas.¹⁵⁰ By the late 1970s, the UN organs were committed to organising and funding law enforcement programs and providing a forum for increased international law enforcement co-operation.¹⁵¹

But by the early 1980s, the United States was pushing for further development of the international drug control system. The impact of growing drug use globally induced both developed and developing states to accept the American view that the problem was spreading,¹⁵² although they disagreed about who bore the greater responsibility for solving it. The United States took the view that if the source of supply could be cut off then the problem would be solved, that is, it believed the problem should be solved by producer states and resorted to economic pressure to make them take action.¹⁵³ Producer states responded by blaming the consumer states for not suppressing use. But the problem now appeared to be slipping beyond control. Extensive drug usage

¹⁴⁷ A global network of HONLEA meetings slowly developed: the Meeting of HONLEA, Africa, was established in 1985; the Meeting of HONLEA, Latin America and the Caribbean, in 1987; and the Meeting of HONLEA, Europe, in 1990.

¹⁴⁸ See Noll *op cit* at 30.

¹⁴⁹ In 1976, ECOSOC adopted Resolution E/Res/2002 (LX) 'urging governments to enact such legislation as may be necessary to make financial support, by whatever means, in furtherance of the offences set out in article 36(1) of the Single Convention a punishable offence and to co-operate with one another in exchanging information to identify drug traffickers committing such offences.'

¹⁵⁰ Article 7 and article 108 respectively of the 1982 United Nations Convention on the Law of the Sea - 21 *ILM* 261.

¹⁵¹ See Fisher *op cit* at 408-410. He notes UNFDAC's large scale funding of law enforcement programmes in Afghanistan, Burma, Egypt, Malawi, Malaysia and Turkey in 1981, and a 1980 DND white paper recommending a variety of areas of law enforcement action by states. By this time Interpol was also becoming more heavily involved in drug law enforcement co-operation. An example is the SEPAT plan for analysis of the European drug problem in the 1970s by Interpol officers - see Littas R 'The SEPAT-plan and its development' (1979) *International Criminal Police Review* 101-104.

¹⁵² Anderson M *Policing the World* (1989) 109 at 110 fn 4 cites the example of Pakistan. An opium producer since the early 19th century, Pakistan reported its first case of heroin addiction in the 1980s, but by 1987 it was estimated to have over half a million heroin addicts.

¹⁵³ See generally Murphy *op cit* at 1266-1270. Through the 1986 Anti-Drug Abuse Act the United States amended its Foreign Assistance Act to the effect that states that did not co-operate with it in stopping the flow of drugs into the United States would be decertified and forfeit all forms of foreign aid from the United States.

was now coupled with the threat to the global economy posed by the 'laundering' of billion dollar profits.¹⁵⁴ Greater international co-operation appeared the only solution.

2.5.2 The development of the 1988 United Nations Drug Trafficking Convention

2.5.2.1 Early development

In the 1980s, with the growth in the global consciousness of the dangers of the illicit traffic,¹⁵⁵ the international community tried to do what it had failed to do in 1936 - produce a successful international convention aimed solely at suppressing the illicit traffic. The broad and flexible provisions dealing with the illicit traffic in the 1961 and 1972 Conventions had proved to have little binding character, so following a Venezuelan initiative, in 1984 the General Assembly directed ECOSOC to instruct the CND to prepare a draft convention.¹⁵⁶ The CND resolved that the convention should be concerned with law enforcement, and particularly with such matters as 'controlled delivery' and the 'identification, tracing, freezing and forfeiture of proceeds of drug trafficking'. A draft convention was circulated to governments for comment. In 1987, the CND considered these comments and the convention. ECOSOC then requested the Secretary-General to prepare a working document consolidating the convention's first draft and the comments of governments and the CND upon that draft.¹⁵⁷ The CND requested the Secretary-General to convene an open-ended intergovernmental expert group to discuss the draft. The Expert Group met from 29 June to 10 July and 5 to 16 October 1987, and again from 5 to 25 January to 5 February 1988. The CND reviewed the draft, forwarded some articles for consideration to the forthcoming diplomatic conference but also submitted a draft resolution to the ECOSOC recommending further preparation for the conference. ECOSOC made provision for the convening of a Review Group to review certain of the draft articles before the diplomatic conference.¹⁵⁸ The Review Group met from 27 June to 8 July 1988, and adopted a report. During the process of review many states pointed out difficulties with provisions such as draft

¹⁵⁴ Bassiouni MC 'The international narcotics control system' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 522.

¹⁵⁵ The 1984 Quito Declaration against Traffic in Narcotic Drugs, the 1984 New York Declaration against Drug Trafficking and the Illicit Use of Drugs and the 1985 Lima Declaration all reflected the world's concern with drug trafficking at this juncture.

¹⁵⁶ GA Resolution 39/141.

¹⁵⁷ Resolution 1987/27 of May 1987.

article 6 dealing inter alia with the circulation of information between national law enforcement agencies and customs authorities, mutual assistance in enforcement and the posting of liaison officers.¹⁵⁹ After noting that some developing states had not signed the 1961 or 1971 Conventions because they concentrated on the supply rather than the demand for drugs, Anderson warned that the draft convention's 'more activist approach to law enforcement ... could arouse their fears about possible infringement of national sovereignty.'¹⁶⁰

2.5.2.2 The 1987 Ministerial Conference, the Comprehensive Multidisciplinary Outline and the Political Declaration

While preparation of the draft convention was going on, the UN Secretary General convened a ministerial conference in June 1987, the 'International Conference on Drug Abuse and Drug Trafficking'.¹⁶¹ Delegates from 138 states to the 1987 Conference approved a wide range of voluntary measures. These recommendations are contained in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control. It provides a broad framework for drug abuse control, and presages many of the provisions of the forthcoming convention.¹⁶² The measures focus on four main areas: prevention and reduction of demand for drugs; control of supply; suppression of trafficking; and treatment and rehabilitation of addicts.¹⁶³ They set specific targets and

¹⁵⁸ Resolution 1988/8.

¹⁵⁹ Anderson *op cit* at 116.

¹⁶⁰ *Ibid.*

¹⁶¹ The idea of an international conference on drug abuse was floated by the UN Secretary General in 1985. The same year the General Assembly adopted Resolution 40/122 setting the goals for the Conference as the adoption of a multidisciplinary outline of future steps to be taken at national, regional and international levels to combat drug abuse and illicit trafficking. See Kaufman V 'United Nations: International Conference on Drug Abuse and Illicit Trafficking' (1988) 29 *Harvard ILJ* 581-586.

¹⁶² Reprinted in 26 *ILM* 1638 (1987); *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (UN Publication St/Nar/14, UN Sales No. E.88.XI.1, New York, 1988); see also UN Secretariat *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna 17-26 June 1987* (UN Publication A/Conf.133/12, UN Sales No. E.87.I.18, New York, 1987).

¹⁶³ The outline sets forth 35 targets within these four major areas. The chapter on prevention and demand reduction suggests efforts be made to develop methodologies and to institute systems to assess the prevalence and trends of drug abuse on a comparative basis and to implement the necessary measures to reduce demand (26 *ILM* 1647-1665). The chapter on supply control promotes programs and projects for integrated rural development activities, including crop eradication and substitution schemes, as well as the development and implementation of the necessary procedures to eliminate the supply of substances used in the manufacture of illicit drugs (at 1666-1685). The chapter on suppression of illicit trafficking offers suggestions for the development of mutual legal assistance through bilateral or multilateral treaties or arrangements, including extradition and ways of tracing, freezing and seizing drug profits. This chapter also contains suggestions for improving the dissemination of information to national and international law enforcement bodies and for further developing international financial, technical and operation co-

actions to be taken at national, regional and international levels,¹⁶⁴ although no particular order of priority is proffered and each state may determine whether and how it wishes to employ the recommendations, taking into account its own political and economic requisites. A Political Declaration in which world leaders committed themselves to comprehensive international action against drug abuse and trafficking, was also adopted at the 1987 Conference.¹⁶⁵ The Political Declaration announced the priorities of states to be inter alia strengthening international co-operation, striving for universal accession to the drug conventions and recognising their responsibility to provide appropriate resources for elimination of the drug problem. Both the Outline and Political Declaration are concerned with reduction of drug demand and the rehabilitation of users. It is noteworthy that these concerns are left largely in the realm of soft law as neither instrument is a formal legal instrument creating rights and obligations. By contrast, the Political Declaration recognised that mandatory treaty provisions were required to give content to the framework for the suppression of illicit drug trafficking provided by the 1987 Conference.¹⁶⁶

2.5.2.3 Adoption of the Convention

Delegates to the 1987 Conference gave the development of the new convention support and finally a plenary conference was convened in Vienna from the 25 November to the 20 December 1988. The draft convention put to the 1988 Conference contained a wide range of national and international measures aimed at providing the international community with more effective weapons against the illicit drug traffic. These measures,

operation on drug-related investigations (at 1686-1706). The final chapter which is devoted to treatment and rehabilitation suggests means to develop, promote and evaluate effective treatment techniques and to provide health professionals with information and training concerning the appropriate medical use of drugs (at 1707-1721).

¹⁶⁴ For example, seven targets are presented with respect to demand prevention and reduction. They are: assessment of the extent of drug misuse and abuse; organisation of comprehensive systems for the collection and evaluation of data; prevention of drug abuse through education; prevention of drug abuse in the workplace; prevention programs by civic, community and special-interest groups; leisure-time activities in the service of the continuing campaign against drug abuse; and programs undertaken through public information media. Suggested courses of action at the national level to meet the first target, assessing the extent of drug abuse, include: reviewing current methodologies for epidemiological studies of drug abuse; reviewing present methods of data collection; and establishing central records for storing and evaluating data. At the regional and international level the possibilities include: comparative studies by regional organisations of drug abuse patterns; the establishment of formal agreements for international collaboration in the measurement of international drug abuse patterns; and technical assistance to states by international organisations such as WHO, in the planning and carrying out of epidemiological surveys.

¹⁶⁵ 'Declaration of the International Conference on Drug Abuse and Illicit Trafficking' 26 *ILM* 1722 (1987).

designed to close loopholes in the existing law, included: wide extradition possibilities; appropriate criminal jurisdiction; anti-conspiracy and anti-money laundering schemes; harmonisation of criminal sanctions; and adaptation of criminal sanctions to the form of criminality involved in drug trafficking, for example, the confiscation of the proceeds of drug trafficking.¹⁶⁷ Attended by representatives from 106 states, a variety of IGOs, NGOs and other observers, the 1988 Conference adopted, by consensus, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the 1988 Convention).¹⁶⁸

2.5.2.4 Overview of the Convention¹⁶⁹

The Preamble to the Convention has three separate strands, representing to an extent the different concerns of different states. The first involves the reasons for its existence. Paragraph one of the Preamble recognises that the magnitude of the international drugs problem is the Convention's major rationale because of the impact of this problem on society and even on the sovereignty of states. But the Preamble singles out four other concerns driving the formation of the Convention. Paragraph two recognises the need to protect social groups particularly vulnerable to drugs such as children. Paragraph three singles out the links between illicit drug trafficking and other forms of organised crime which undermine the economies of states and threaten state sovereignty. Paragraph four recognises that 'illicit traffic is an international criminal activity' which must be suppressed as a priority, while paragraph five recognises that the large profits of the illicit traffic lead to the corruption of society at all levels. Paragraphs six, seven and eight of the Preamble identify particular aspects of enforcement requiring attention in the Convention, viz.: depriving illicit traffickers of the proceeds of their criminal conduct thus eliminating their main incentive for trafficking; monitoring precursors to prevent their ready availability to the traffic; and improving international drug enforcement co-operation at sea. The final strand of the Preamble relates to the relationships of states to

¹⁶⁶ 26 *ILM* at 1723 (1987).

¹⁶⁷ 1988 *Records* vol.II at 1-2.

¹⁶⁸ UN Doc. E/CONF.82.15; *UKTS* 26 (1993); in force late 11 November 1990. The procedure for adoption was somewhat unusual: the two Committees of the Whole of the Conference submitted their work directly to the Drafting Committee which then submitted the Convention to the Conference which adopted it by consensus without consideration of its separate articles.

¹⁶⁹ See generally Stewart DP 'Internationalizing the war on drugs: the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1990) 18 *Denver Jnl of Int. Law and Policy* 387-404.

the international drug control system. Paragraph ten recognises the collective responsibility of states to work with the UN within the existing drug control treaty framework, and it recognises that this framework requires reinforcement. Paragraph eleven recognises the need to enhance the legal co-operation of the Parties in suppressing the illicit traffic. These paragraphs of the Preamble betray an overriding concern with the illicit traffic and its ramifications, and are appropriate precursors of the 34 articles and one annexure of the 1988 Convention. Only one of the Preamble's paragraphs, paragraph seven, is directly concerned with the drug abuse problem. It, somewhat anachronistically given the context, articulates a desire to eliminate the causes of the problems of drug abuse including the elimination of demand and the enormous profits derived from the traffic.

The first substantive provisions of the Convention are the definitions section which provides specific definitions of terms used in the substantive articles of the Convention (these are examined in the body of this study) or confirms definitions used in the earlier conventions.¹⁷⁰ Perhaps the 1988 Convention's most significant substantive feature is article 2, entitled 'Scope of the Convention', which asserts state sovereignty in the face of international obligation. Discussed above in the Chapter One, article 2 is a sign-post to the tensions prevalent in international drug control, tensions between supply reduction and demand reduction as dominant drug control strategies, tensions between consumer states and supply states, tensions between intrusive international intervention and the bulwark of national sovereignty.¹⁷¹

These tensions are also manifested in the rest of the provisions of the Convention. These provisions form an extensive legal regime for the suppression of the illicit drug traffic. Examination of this regime will form the bulk of this study. Fleshing out its Preamble, the Convention requires the enactment of a modern code of drug offences by each Party, including the offence of money laundering. It makes provision for international co-operation in mutual legal assistance and confiscation, and eliminates

¹⁷⁰ For example, 'cannabis plant' and 'coca bush' have the same definitions as in the 1961 Convention.

¹⁷¹ See foot-note 80 and the accompanying text. There were many examples of the tensions between consumer and producer states at the 1988 Conference. Sproule DW and St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 point out that the Mexican delegation consistently tried to water down the Convention's obligations by replacing 'shall' with 'undertakes to propose ... to its competent legislative authorities' in several key obligations under the Convention, thus making these provisions non-binding (eg. its proposed definition of draft article 2(1) in 'Further proposals put forward at the Review Group meeting relating to the text of the draft Convention for consideration by the Conference' UN Doc. E/CONF.82/3 Annex IV).

bank secrecy as a barrier to these forms of co-operation. It imposes obligations in the fields of extradition and jurisdiction, and presents Parties with new opportunities in the ordering of their mutual relations. It provides for innovative law enforcement techniques such as controlled delivery and facilitates action in difficult circumstances such as interdiction of foreign flag vessels on the high seas.¹⁷²

With respect to the final provisions of the Convention, most are standard.¹⁷³ But it is worth noting at the outset that Parties are in terms of article 24 free to impose stricter measures if they are of the opinion that stricter measures are desirable or necessary for the prevention or suppression of the illicit traffic and as long as they do not intrude on the national jurisdictions of other states. In addition, article 25 makes it clear that the provisions of the Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to it under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, thus making it clear that the new Convention in no way affects existing international obligations assumed by Parties. Article 31 dealing with amendments and article 32 dealing with settlement of disputes are discussed in Chapter Seven below. One unfortunate omission that must be highlighted is that there is no article dealing with reservations. It was deliberately omitted by Committee II of the Conference. Committee II did not regard this as an invite to states to make reservations, but rather held that the issue was governed by the 1969 Vienna Convention on the Law of Treaties which contains a broad provision to the effect that reservations that are not compatible with the object and purpose of the treaty are not permitted.¹⁷⁴ This leaves unanswered the problem of which states determine what is or is not incompatible with the treaty. In the absence of a reservations provision some states seemed to feel that reservations were permitted by the prevailing international law, while others did not, while some states immediately made reservations.¹⁷⁵

In addition to agreeing upon the substantive provisions of the Convention, the 1988 Conference also passed three non-binding resolutions that are simply invitations to

¹⁷² See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 42.

¹⁷³ Article 26 states that the Convention is open to signature by all states; article 27 makes provision for ratification, acceptance, approval or an act of formal confirmation; article 28 makes provision for accession; article 29 makes provision for entry into force; article 30 provides for denunciation; article 34 provides for the authentic texts of the 1988 Convention; article 34 makes the Secretary General the depositary for the convention.

¹⁷⁴ *1988 Records* vol.II at 316-7, 320-322.

¹⁷⁵ *1988 Records* vol.II at 36-7.

states to take certain actions. It is worth noting that in anticipation of a long delay before application, resolution two urged states to provisionally apply the 1988 Convention because of the slowness of both the ratification process of states and the legislative process in states compared to the urgent need to take action against the rapidly growing drug use.¹⁷⁶

2.5.2.5 Reaction to the Convention

The Convention requires support in order to avoid the fate of the 1936 Convention. The Convention appears to be getting that support. It has been backed by the United States, the Commonwealth Heads of Government, and in early 1990 the General Assembly urged states to take the necessary steps to become party to it and to apply its provisions where practicable.¹⁷⁷ The first recommendation of the 1990 Report of the Group of Seven's Financial Action Task Force (FATF) was that 'each country should, without further delay, take steps to fully implement the Vienna Convention and proceed to ratify it.'¹⁷⁸ Many of the most important producer, transit and consumer states have signed the Convention and the ratification/accession process has been very rapid. The Convention came into force on 11 November 1990, and by 31 January 1997 one hundred and thirty eight states and IGO's such as the European Union were party to it. The INCB cautiously opined in 1994 that the Convention has lead to enhanced drug control,¹⁷⁹ yet there have been complaints that states heavily involved in production and trafficking of drugs hastened to ratify the 1988 Convention without changing their practices or bringing their legislation into line with it.¹⁸⁰

¹⁷⁶ Pakistan delegate's statement, *1988 Records* vol.II at 20.

¹⁷⁷ See Gilmore *op cit* at 42 citing the UN General Assembly Resolution S-17/2/1990 'Political Declaration and Global Programme of Action' at 6.

¹⁷⁸ Recommendation One of the 'Financial Action Task Force on Money Laundering Report on 6 February 1990' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 4 at 15.

¹⁷⁹ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 2.

¹⁸⁰ Leroy B 'The United Nations strategy' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 27 at 37. Marotta E 'Drugs as a priority in co-operation in the fields of justice and home affairs' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 369 at 372 complains of a weakening of the 'Vienna spirit' which drove the development of the 1988 Convention.

2.5.3 International drug control from 1977 to the present

The Convention was, together with the 1987 Comprehensive Multidisciplinary Outline, part of a major drug-control programme launched by the UN in the late 1980s.¹⁸¹ The 1988 Convention has also spawned a number of regional international drug control agreements based very closely upon it.¹⁸² The Outline has been used as the major policy guide by regional drug control organisations such as the Inter-American Drug Abuse Commission (CICAD) and national governments. Yet the UN felt it necessary to get further backing for its drug control efforts, and 1990 saw the adoption by the General Assembly of the Global Programme of Action on Drug Abuse Control, a work-plan calling for government action in numerous areas with a view to attacking the drug problem at the national, regional and international levels using a variety of methods.¹⁸³ The Global Programme of Action placed the UN at the centre of international drug control efforts in order to assist states incapable of acting alone. 1990 also saw the General Assembly establish the System-Wide Action Plan on Drug Abuse Control intended to lay down the mandates and activities of the UN drug control organs, to serve as an instrument to co-ordinate those activities and to strengthen co-operation in respect of drug control within the UN system as a whole.

Against the background of these plans and programmes and the UN's declaration of the 1990s as the 'United Nations Decade Against Drug Abuse', the UN undertook a significant restructuring of its international drug control machinery. The General Assembly made provision for the consolidation of the UN drug control system's administrative structures into a single structure with the general objective of more effective resource utilisation in order to meet the threat presented by the burgeoning illicit drug trade.¹⁸⁴ The DND, the secretariat of the INCB, and UNFDAC were integrated into the United Nations International Drug Control Programme (UNDCP),

¹⁸¹ See generally Leroy *op cit* at 30-32; Rolley R 'United Nations activities in international drug control' in Macdonald SB, Zagaris B (eds) *International Handbook on Drug Control* (1992) at 415-433.

¹⁸² See for example the 1990 South Asian Association for Regional Co-operation Convention on Narcotic Drugs and Psychotropic Substances reprinted in Gilmore WC (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (1995) at 185.

¹⁸³ The areas of focus included eliminating illicit demand for drugs; treatment, rehabilitation and social reintegration of drug addicts; control of drug supply; suppression of illicit trafficking; the illegal use of the banking system; strengthening judicial and legal systems; measures against the diversion of arms and explosives to traffickers; and the use of the existing resources and structures of the UN for drug control - see 'International co-operation against illicit drugs: Political Declaration and Global Programme of Action' (1990) 16 *Commonwealth Law Bulletin* 929-931.

¹⁸⁴ GA Resolution 45/179, 21 December 1990, entitled 'Enhancement of the United Nations structure for drug abuse control'.

based in Vienna and headed by a Director-General with the exclusive responsibility for co-ordinating and providing leadership for all UN drug control activities. The UNDCP carries out the treaty functions of the INCB's secretariat and the DND, continues implementing the policy decisions of the CND and ECOSOC, and carries out the operational functions and the technical co-operation projects once executed by UNFDAC, the DND and the INCB's secretariat. As such it carries out all the functions attributed to the UN Secretary-General by the drug conventions, except for legal matters which are usually handled by the UN's legal advisor. The financial resources of UNFDAC were placed under UNDCP control and became what is now referred to as the Fund of the UNDCP.

The CND and INCB were left intact and functioning in their treaty defined roles, but the General Assembly requested the CND to consider ways of improving its functioning as a policy-making body, and ECOSOC was requested to review the CND in this regard to decide on the appropriate changes. As a result, in 1991 the CND's mandate was enlarged by ECOSOC¹⁸⁵ and the General Assembly.¹⁸⁶ In effect the CND became the governing body of the UNDCP with the power of approval over the budget and programme of the Fund of UNDCP. The CND was also mandated to monitor and review the implementation of the UN's System-Wide Action Plan on Drug Abuse Control and its Global Programme of Action. In order to broaden the CND's representational base to keep pace with the global expansion of the drug abuse phenomenon, the number of representatives was increased.¹⁸⁷

In November 1997 the UN's organs in Vienna were rearranged in a new management structure.¹⁸⁸ The UN Office for Drug Control and Crime Prevention was established (ODCCP) as the overarching organ of control. Its director was placed in control of the UNDCP and of the Centre for International Crime Prevention (CICP), which now share a common management structure. The CICP was formerly the UN's Division for Crime Prevention and Criminal Justice, responsible for a wide range of mandates such as internationally organised crime and the international traffic in human beings. It provides administrative services for the UN's Commission on Crime

¹⁸⁵ Resolution 1991/38.

¹⁸⁶ Resolution 46/185 C.

¹⁸⁷ Membership in the Commission grew from 15 States in 1946 to 21 in 1961, 24 in 1966, 30 in 1972, 40 in 1983, to 53 in 1991.

¹⁸⁸ The restructuring took place as a result of the UN Secretary General's reform proposals made in July of 1997; see UN Doc. A/51/950 Action 8.

Prevention and Criminal Justice, in the same way that the UNDCP services the CND.

The ODCCP was established in order to bring the UN's efforts against drug traffickers, terrorists, money launderers and other international criminals under one roof. The ODCCP's main task is to integrate approaches to fighting organised crime generally and drug trafficking in particular because of the belief that there is no clear cut division between these activities in practice. Thus, for example, in respect of money laundering resources can be shared and duplication avoided. But budget shortfalls have also dictated a leaner organisation in Vienna, a flatter organisational structure and cuts in travel spending. The UNDCP and CICP, however, remain separate entities with separate resource bases.

The UN's drug control organs have been restructured and reorganised to make better use of existing resources, but also to keep the UN's organs at centre stage in international drug control as other organs such as the Financial Action Task Force (FATF) have assumed a very prominent role in the suppression of the multi-billion dollar drug money laundering business.¹⁸⁹ However, the UN's role in an indirect drug control system is limited by the nature of the system. Thus one of the major tasks of the UN drug control organs since the reorganisation has been to secure ratification and effective implementation by states of the drug conventions, particularly the 1988 Convention.¹⁹⁰

The UN capped its "Decade Against Drug Abuse" in 1998 by a Special Session of the General Assembly on International Drug Control¹⁹¹ at which member states adopted a Political Declaration reasserting their strong commitment to drug control as a priority at national and international levels. The Declaration emphasises implementation of the 1988 Convention and other provisions of the drug conventions to reduce drug supply and demand.¹⁹² The General Assembly also adopted a Declaration on the Guiding

¹⁸⁹ The prominence of FATF is not surprising given the scale of money laundering taking place. FATF estimated \$122 billion per annum is generated from the sale of cocaine, heroin, and cannabis in the US and Europe alone, of which as much as \$85 billion may be available to be laundered - see 'FATF Money Laundering Report, 1990' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 4 at 6.

¹⁹⁰ See Leroy *op cit* at 33.

¹⁹¹ 8-10 June. The origin of the session was ECOSOC Res. 1996/17 and GA Res. 51/64. See generally UN Press Release GA/9423 (1998).

¹⁹² In terms of the Declaration members states agreed to by 2003:

- i) establish new or enhanced drug reduction strategies or programmes;
- ii) establish or strengthen national legislation and programmes to combat the illicit manufacture of amphetamine type stimulants and their precursors;
- iii) strengthen multilateral, regional and bilateral co-operation against criminal organisations.

Principles of Demand Reduction¹⁹³ and a Resolution on Measures to Emphasise International Co-operation to Counter the World Drug Problem. The laudable goal of these measures is a drug free world.

The recent resurgence at the international level of a prohibitionist approach must be seen against the background of the resurgence of a tougher line on drugs domestically from the late 1970s onwards. This change was exemplified by the official policy of the United States during the Reagan administration.¹⁹⁴ Funding for law enforcement soared; funding for treatment and research plummeted. The emergence of AIDS in 1981 and its association with shared needles, and the appearance in 1985 of crack, a cheap smokeable form of cocaine, contributed to the public furore. The 'war on drugs' became a permanent feature of American foreign policy. 'Demand reduction' was touted but took on a punitive character with the introduction of notions of 'user accountability'.¹⁹⁵ The emphasis remained firmly on the interdiction of supply, even to the extent of military intervention in assisting the DEA and the national authorities of states like Colombia to control the source of cocaine supplies to the United States. The United States became a strong backer of "Mutual Legal Assistance Treaties" to enable greater extraterritorial policing and legal intervention.¹⁹⁶ It has remained committed to the internationalisation of the war on drugs in the 1990s¹⁹⁷ and has begun to police the implementation of international instruments like the 1988 Convention through economic sanctions.¹⁹⁸ In Europe, where the position tended to become more libertarian in the 1970s, official policy has also begun to harden, with a trend towards broader and tougher sanctions, the

By 2008 they agreed to:

- i) eliminate or significantly reduce manufacture, marketing and trafficking in drugs and diversion of precursors;
- ii) achieve significant and measurable results in demand reduction;
- iii) achieve significant and measurable results in the reduction of illicit cultivation.

¹⁹³ This contains:

- i) standards to assist governments to establish demand reduction programmes by the target date;
- ii) standards to guide the setting up of effective prevention, treatment, and rehabilitation programmes and calls for adequate resources for such programmes.

¹⁹⁴ For an official US view see Williamson RS 'International illicit drug traffic: the United States response' (1983) 35 *Bulletin on Narcotics* 33-48.

¹⁹⁵ 'Zero tolerance' as William Bennett called it - see Baum D 'Tunnel vision: the war on drugs, 12 years later' (1993) 79 *ABA Jnl* 70 at 72.

¹⁹⁶ See generally Catino TM 'Italian and American co-operative efforts to reduce heroin trafficking: a role model for the United States and drug supplying foreign nations' (1990) 8 *Dickinson Jnl of Int. Law* 415-440.

¹⁹⁷ Gardner SA 'A global initiative to deter drug trafficking: will internationalizing the drug war work?' (1993) 7 *Temple Int. and Comparative LR* 287 at 315-316.

enactment of stiffer penalties for possession and distribution, and laws designed to seize drug trafficker's assets and to prosecute drug trafficking conspiracies more effectively.¹⁹⁹ The European Union began to get involved in drug control from the early 1970s onwards, and its role has grown through the 1980s and early 1990s.²⁰⁰ In the developed world generally the removal of internal border restrictions, the ascription of drug trafficking to ethnic immigrant minorities such as Nigerians, and the rise in the use of psychotropic substances, has seen greater emphasis on co-operation to enforce prohibition.²⁰¹

The position in the developing world ranges from extremely punitive to mildly punitive prohibition. Whilst states in Africa and South America have been ambivalent, Asian states have been some of the most eager advocates of the renewed war on drugs, and have in many cases taken a much tougher stance than the United States.²⁰² The globalising of drug prohibition has driven up illicit production in developing states. Fuelled also by economic necessity caused by the drying up of foreign economic aid in the post-cold war era, it has resulted in two disturbing trends: the increased use of drugs in these states, and an increase in corruption.²⁰³

¹⁹⁸ For example, the US determined that in 1994 and 1995 the Nigerian Government had not taken adequate steps to achieve full compliance with the goals and objectives of the 1988 Convention and imposed foreign assistance reductions on Nigeria - *DEA Nigeria Country Report* (1995).

¹⁹⁹ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 197.

²⁰⁰ The Pompidou Group, set up in 1971, assumed a role in drug control (it has since been incorporated in the Council of Europe) - see generally Brule C 'The role of the Pompidou Group of the Council of Europe in combating drug abuse and illicit drug trafficking' (1983) 35 *Bulletin on Narcotics* 73. David TJ 'The British Government's international anti-drugs work' (1991) 17 *Commonwealth Law Bulletin* 1368 at 1372 describes the work of other European anti-drugs groups such as the TREVI Group, founded in 1975, as a loose inter-governmental structure to coordinate the fight against terrorism. Initiatives in the TREVI Group to examine the scope for developing a drugs liaison system monitoring developments in producer countries lead to the European Drugs Intelligence Unit for the exchange of operational intelligence among EC members. In 1990 the European Convention on Money Laundering (30 *ILM* 148; in force 1 September 1993) was adopted and in 1991 a Directive on Money Laundering (EC Directive 91/308) was issued. The European Union has been involved in anti-drug production initiatives in the Caribbean (1995) and Asia (1997).

²⁰¹ For an overview of the illicit drug trade in the 1980s and early 1990s see the 'Introduction' to Macdonald SB, Zagaris B (eds) *International Handbook on Drug Control* (1992) at 7-15.

²⁰² See Harring SL 'Death, drugs and development: Malaysia's mandatory death penalty for drug traffickers and the international war on drugs' (1991) 29 *Columbia Jnl of Transnational Law* 364-405. At 371 he notes that Malaysia's president, Dr Mahathir bin Mohamed sought out the chair of the 1988 Conference in order to promote Malaysia's tough anti-drugs stance, which includes the death penalty for drug traffickers and detention of suspects for up to two years without trial in terms of the Dangerous Drugs (Special Preventive Measures) Act 316 of 1985 as amended in 1990.

²⁰³ Seccombe R 'Squeezing the balloon: international drugs policy' (1995) 14 *Drug and Alcohol Review* 311-316 notes the link between the introduction of drug control laws and the phenomenon of increased drug use in producer and transit states. At 313-314 he gives as examples the rapid spread of heroin

While there has been something of a backlash against the war on drugs approach in more developed states in the mid-1990s²⁰⁴ the war against drugs continues today. And the international system still remains firmly wedded to global enforcement of prohibition despite a manifest lack of success in quelling production, supply and consumption of illicit drugs. Recent trends in agricultural production and synthetic drug manufacture, detection of illicit laboratories, drug seizures and demand all show steady increases in these activities.²⁰⁵ In the 1990s agricultural drug production has become more sophisticated with greater yields from smaller crops and more potent plants being developed, and the spread of refining facilities globally. Drug trafficking is spreading and adapting itself to the modern commercial transport systems with heavy use of ship and vehicle-borne containers making for large-scale movement of drugs. Drug consumption, although fairly stable in the developed world is growing quite rapidly in the developing world.²⁰⁶ The laundering of drug profits remains a major concern,²⁰⁷ as does the growth of transnational crime generally. Flynn and Grant note that the growing disparity of wealth between the developed and developing worlds, the globalisation of capitalism in the post-cold war era, the deregulation of the global economy, and the resurgence of ethnic conflict and nationalism have all contributed to the growing illicit

addiction in Pakistan from 1980 after the passing of the Prohibition Order of 1979 which restricted licit cultivation of opium.

²⁰⁴ States such as Canada have not been as committed to supply reduction as the United States - see Gilmore N 'Drug use and human rights: privacy, vulnerability, disability, and human rights infringements' (1996) 12 *The Journal of Contemporary Health Law and Policy* 355 at 402 notes that while the US spent roughly 71% on supply reduction and 29% on demand reduction in the early 1990s, Canada's figures were 30% and 70% respectively. Some authorities have moved away from the strong prohibitionist stance of the United States - see, for example, the 1990 Frankfurt Resolution by European Cities on Drug Control Policy (EDCP) calling for a revision of prohibitionist policies. Under the Clinton administration the US began to scale back on its supply interdiction efforts and downgraded the use of the military in these operations. More effort has been put into development, but source country control still continues, albeit through the agency of local drugs police, with some success - see Stares PB *Global Habit: The Drug Problem in a Borderless World* (1996) at 45. The arrests of all the members of the Cali Cartel in 1995 by Colombian police was regarded as a major success.

²⁰⁵ Wells A *International drug control: recent developments, patterns and trends* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) at 4-6 sets out the now as usual alarming statistics. Taking just one drug, cocaine, his statistics indicate a doubling in size of the coca leaf crop between 1985-1994, a shift in laboratory sites to growing areas, steady increases in seizures of drugs and precursors, the tripling of global cocaine production since 1980 to around 900 tonnes and an estimated user population of between 30-45 million.

²⁰⁶ See generally Stares *op cit* at 3-5.

²⁰⁷ Stares *op cit* at 59 notes that attention has shifted a) from traditional off-shore banking centres to places like Russia where new banks have proliferated and b) to traditional grey market money transfer techniques like Hawala in India which are open to abuse by money launderers.

drug trade.²⁰⁸ Drug control remains in the international spotlight as the capacity of most states to implement it diminishes.

2.6 Conclusion

2.6.1 The domestic roots of the international drug control system

The roots of the international drug control system lie in three historical events. It originated in the international reaction to the Chinese opium problem of the nineteenth and early twentieth century. Indo-Chinese opium trade was not stopped by the ineffectual Chinese prohibition of opium but by a mixture of international morality and foreign commercial policy manifesting itself in international drug control. When the opium trade ceased, the American drug problem beginning in the late nineteenth century and still ongoing took over as the motivating factor for international control. Pursuing prohibition at home, it was natural that the United States should also do so abroad in order to prevent drug supplies reaching its territory from other states. Over time it succeeded in universalising the policy of prohibition. Finally, although the rest of international society had to be dragged into the system, in the last twenty years most states have moved closer to the American position as their own drug problems have grown. This has led to the further development of the international control system.

Although illicit drug use is accepted throughout the world as a major social problem against which international action must be taken, it is the nature of that action which is the source of most of the controversy relating to drug control today. Supply reduction impacts mostly on the developing world, demand and harm reduction impact mostly on the developed world. The nature of the conflict is obvious. Because developed states are unwilling to take draconian steps against users, the obvious consequence of prohibition is the shifting of attention to supply reduction and the economic burden of policing it to the developing world. International drug control law has been and continues to be used as a mechanism to make this shift possible. International drug control has been imposed by developed states on developing states - by consuming states on producing states - with little consultation. It has been and remains drug control from

²⁰⁸ Flynn SE, Grant GM *The Transnational Drug Challenge and the New World Order: The Report of the CSIS Project on the Global Drug Trade in the Post-Cold War Era* (1993) at 2-3.

the top down, and the legacy of its failure to shape social mores in respect of drugs in these societies is the resistance to control in many of these states. This resistance has been generated to an extent by their economic dependence on illicit drug cultivation. Assistance in economic development, the only potential way out of the drug production dependency of many developing states has not been forthcoming from developed states, despite the linkage of foreign debt and falling commodity prices to drug production dependence in developing countries.²⁰⁹ But economic development in such countries is not an all embracing panacea. While it may have an impact on economic reliance on supply within developing states, it may not address all of the reasons for the use of drugs in these states.

2.6.2 The development of two systems with different goals

The history of the international regulation of drug control is really a history of the development of two parallel strategies. The first, the creation of the control system for the trade in licit drugs was initiated earlier than the second, the international control of illicit drugs. International law could only logically follow this pattern of development as the definition of what is licit behaviour is an absolute precondition of what is illicit behaviour.

The system of commercial regulation of drugs was initiated by the Shanghai Opium Commission and developed by the conventions that followed. This development followed a three pronged approach: first, by confining the international drug trade to very small amounts only for medical and scientific purposes; second, by confining the manufacturing and then the agricultural production of drugs to the same purposes; third, by confining the consumption of drugs to the same purposes. The stress throughout was on the control of material. As May puts it, 'the Conventions should be considered as restrictive commodity agreements rather than health measures ...'.²¹⁰ This system is a system of indirect control; it relies on states to apply the law in good faith and then regulates the behaviour of these states. Economic sanctions in the form of embargoes are available against defaulting states, but it is by its nature a consent based system which does not rely heavily on coercive/extreme sanctions for its implementation, or else states

²⁰⁹ Bassiouni MC 'Critical reflections on international and national control of drugs' (1990) 18 *Denver Jnl of Int. Law and Policy* 311 at 325-6. At 326 he cites in support of this point a damning UN Report *Drug Trafficking and the World economy* UN Doc. DPI/1040B-40076 (1990).

²¹⁰ *Op cit* (1948) at 305.

simply would not comply. Due to its indirect nature, the system has struggled to resolve major problems such as the limitation of drug production. Yet centralisation of authority has slowly contributed to a more direct approach to control, as evidenced by the quasi-judicial activities of the INCB. The system is generally regarded as functioning in a satisfactory manner.²¹¹

By the 1930s, the commercial regulatory system was already well established, and a brief switch in emphasis was made to developing measures to extinguish the illicit traffic which had grown up to serve drug users. Minor provisions to control the illicit traffic had been included in the early conventions, but the suppression of illicit activities by means of criminal law and enforcement really began with the abortive 1936 Convention. It failed because international society was not yet ready for the derogation of national sovereignty necessitated by the development of international rules controlling criminal activity. Further minor progress was made in the 1961 Convention as amended and the 1971 Psychotropic Convention, but only in 1988 was another full scale attempt made to provide for legal regulation in this area with the conclusion of the UN Drug Trafficking Convention.

The international drug control system has been a success as a commercial regulatory measure, but the strategy to extinguish the illicit drugs problem has, at least thus far, failed. The system has tried for a century to balance two goals, viz.: making possible the supply of drugs for licit purposes, and suppressing the supply of drugs for illicit purposes. These goals may be irreconcilable and it may be that the system has served more to keep drug companies in business than to put illicit traffickers out of business. Enactment of severe laws and tighter enforcement has always been followed by a surge in the illicit traffic and a rise in illicit drug prices. Illicit suppression appears to have failed because it is an attempt to control the lives of individuals, whereas licit regulation has succeeded because it depends upon influencing the conduct of government administrations, professionals and private enterprise. Suppression's failure thus appears to be linked to the international drug control system's inherent defect of trying to eliminate illicit drug use.²¹² The stock response to criticism of international prohibition's failure is that illicit drug supply and use would be far more widespread and

²¹¹ INCB *Effectiveness of the International Drug Control Treaties: Supplement to the Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1/Supp.1 at 4.

²¹² See Bruun et al *op cit* at 276-7.

would constitute a far greater menace to the whole world without international drug control.²¹³

It appears that the 1988 Convention will escape the fate of the 1936 Convention because the drug problem is much bigger today and its impact much more widespread than in 1936, and thus the 1988 Convention's provisions are guaranteed a much greater amount of support out of political necessity. Moreover, modern state acceptance in general of the extension of jurisdiction beyond territoriality, of extradition, and of enforcement co-operation, is extensive. Many of these concepts, viewed with a great deal of suspicion in 1936, are not viewed with the same suspicion today. But the presence of escape clauses in the 1988 Convention indicates that states are still wary of international drug control and jealous of their sovereignty. It would thus be precipitate to argue that international drug control is moving into an era of direct control, away from the indirect approach of the past.

²¹³ See for example Renborg *op cit* (1948) at 111.

CHAPTER THREE: OFFENCES AND PENALTIES

3.1 Introduction

The drug conventions do not create a system of international offences¹ and international penalties. Rather they broadly describe a number of offences and suggest a range of penalties, both offences and penalties to be defined and punished by national legal systems. Thus international law initiates a top-down process which results in the criminalisation and punishment of certain drug related conduct. Although the definitions of offences and penalties are guided by both the ordinary meaning of the terms used in the drug conventions and the interpretation given those terms by inter alia the UN and other Parties, each offence and each penalty is essentially national in its content, and international only in general character. Strictly speaking, the “offences” listed in the international conventions are not offences at all, but are merely terms used to set out the obligations Parties assume to render certain conduct criminal, and so too with penalties. On the other hand, if a Party in professing to meet its obligations under the conventions enacts in its national criminal law an offence or penalty that does not or only partly meets the definitions of offences or penalties laid down in the drug conventions, the Party in question may well be in breach of its international obligations.

The skeleton of offences and of penalties set down in international law serves, even if only indirectly, as the legal cornerstone of the entire international illicit drug control system. The aim of this system is clear: to apprehend and successfully prosecute individuals who commit these offences wherever they commit them, whatever their degree of complicity, whether the offences are completed or not, and then to punish such offenders appropriately so that they and others are deterred from engaging in such activities. These offences and the penalties which attach to them are thus worthy of closer examination in order to discover whether they have the capacity to achieve the system’s aim. Offences and penalties have been separated for the purposes of this study, following the general common law practice.

¹ The term offence is generally used in preference to the term crime throughout this study because of its consistent use in the drug conventions. Although many states distinguish between different categories of criminal conduct based upon their seriousness, e.g. less serious misdemeanours and more serious crimes, offence is as the *Commentary on the 1971 Psychotropic Convention* (1976) explains at 348, a broader term than crime, and includes all violations of the criminal law no matter how serious.

3.2 Offences

3.2.1 Introduction

The definition of illicit drug trafficking is crucial to the whole international control effort because its parameters set the general limits of the conduct to be criminalised by international law. In essence, the illicit traffic involves the supply of drugs created by non-medical or non-scientific demand. Flynn and Grant define drug trafficking as follows:

At its heart, drug trafficking is a transnational business with five stages: (1) the production of the raw materials, (2) their refinement into the final product, (3) the transportation of the product to their markets, (4) wholesale and retail distribution within these markets, and (5) the investment/laundering of the profits.²

The international system has made a major effort to settle upon a series of definitions of conduct which adequately cover the entirety of this process, from production through all the levels of engagement with the drugs until they are actually used. It even includes how profits are dealt with. Personal use offences fall outside the illicit traffic, but controversially are criminalised by the system.

When defining these offences, the goal of the authors of the conventions was to lay down international guidelines sufficient to determine a harmonious set of national drug offences facilitating international law enforcement co-operation against drug offenders. The problem inherent in attempting to develop national criminal law by international agreement is the difference in national grammars of criminal law. The UN *Commentary on the Single Convention on Narcotic Drugs, 1961* (hereinafter the *1961 Commentary*) comments:

The definitions of crimes differ in national penal systems. What is considered to be a punishable offence in one country may cover activities which are elsewhere the substance of two or more definitions of crimes, or may even include some

² Flynn SE, Grant GM *The Transnational Drug Challenge and the New World Order: The Report of the CSIS Project on the Global Drug Trade in the Post-Cold War Era* (1993) vii-viii.

behaviour which is not subject to penal sanction in other countries. The various forms of participation in crimes (instigation (incitement), organisation, actual execution, counselling, abetting, etc.) are also included in different categories in different countries. Divergent views are also held in different countries as regards the stage at which the preparation or commencement of an uncompleted offence should generally become punishable. "Preparatory acts", "attempts" and conspiracy" therefore assume a different legal position in different legal systems.³

The authors of the conventions had two options in defining the offences: they could choose generality, that is, criminalise all conduct not defined as legal in terms of the international system, or they could specify the various forms of conduct to be criminalised. The 1961 Convention, its amended version and the 1988 Convention opt for the latter approach while the 1971 Convention opts for the former. Generality results in an indeterminacy which makes for ease of passage into domestic law but for little international standardisation. Specificity has roughly the reverse effect. To achieve national harmonisation, Henrichs notes that the convention itself would have to define 'the offences exhaustively, and in that way ... establish a system of definitions that would be uniform in the territories of all the states parties.'⁴ The drafters of the drug conventions were forced to abandon strict uniformity as specific definitions were unlikely to lead to either agreement or application. However, drug crime is a universal phenomenon which manifests itself in similar forms of conduct globally. This means that the conventions do attempt a limited specificity of definition of illicit conduct which, although it demands more of Parties than generality, may serve to introduce a measure of harmony because it may lead to the enactment of the same or similar offences by Parties.

Specificity of definition demands a specific examination of each offence. This study adheres to the following scheme when analysing the offences criminalised by the conventions, viz.: first, it examines the basis for the criminal nature of the conduct, that is, the unlawfulness of each form of conduct as generated by the international obligation itself and as potentially limited by the existence of constitutional and domestic safeguard

³ See *1961 Commentary* (1973) at 425.

⁴ Henrichs W 'Problems of competence in international law with regard to the punishment of narcotic drug offences and the extradition of narcotics offenders' (1960) *Bulletin on Narcotics* 1 at 7.

clauses;⁵ next, it examine the nature of the conduct itself, that is, the various forms of conduct that describe unlawful actions relating to drugs; and finally, it examines the mental element required to establish criminal liability for the conduct, that is, whether such unlawful conduct must be performed consciously or whether negligent or no-fault liability may be applied by the Parties.

3.2.2 The offences stipulated by the 1961 Convention as amended by the 1972 Protocol

3.2.2.1 The 1961 Convention's penal provisions in general

The 1961 Convention focuses on the illicit traffic, which it defines as cultivation or trafficking contrary to its provisions.⁶ Article 36, entitled 'Penal Provisions', is for the purposes of the criminalisation of drug related conduct the central article in the 1961 Convention. It is drafted in fairly general terms in order to make it more acceptable to a large number of states and so avoid the fate of the 1936 Convention.⁷ It is important to note at this stage that article 36 was not intended to be self-executing, even in Parties whose constitutions make provision for the self-execution of international treaties.⁸ This is made abundantly clear by article 36(4) which states that:

Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

3.2.2.2 Article 36(1)'s offences

Article 36(1), which is left unaltered by the 1972 Protocol,⁹ specifies and proscribes the various drug related offences. Its relevant provisions read:

⁵ The former clauses make the Parties' obligations subject to constitutional principles or basic concepts of their legal systems, the latter make these obligations subject to their domestic law and other legal concepts and principles - see Sproule DW, St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 at 270 fn's 29 and 30.

⁶ Article 1(1)(l). The *1961 Commentary* notes at 11 that the 'term "trafficking" not only includes all forms of trade and distribution, but also manufacture and "production", i.e. the "separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained".'

⁷ Statement of the Canadian delegate - *1961 Records* vol.I at 122.

⁸ *1961 Commentary* at 440.

⁹ Article 14 of the 1972 Protocol simply changes article 36(1) into article 36(1)(a) and adds a provision on rehabilitation as article 36(1)(b).

1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation, and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

Article 36(1) imposes a duty on Parties to make intentional conduct contrary to the provisions of the Convention offences under their national law. The provision anticipates that Parties 'shall adopt' the necessary measures, thus confirming that the obligation is not self-executing. The duty to criminalise such conduct has in most cases been executed through some form of drug control legislation, but a few Parties insist that they may also use administrative measures.¹⁰ Illicit or unlawful conduct is defined as being 'contrary to the provisions' of the 1961 Convention as a whole. However, while conforming to the general requirements of international law, the substance and execution of domestic drugs legislation is a matter of a Party's domestic law because article 36(4) makes it clear that these offences 'shall be defined, prosecuted and punished in conformity with the domestic law of a Party'. Moreover, article 36(1) makes it clear that the criminalisation of conduct takes place subject to each Party's 'constitutional limitations'. Thus if it is legally impossible due to a constitutional provision for a Party to criminalise a particular form of conduct, then the Convention permits this exception.¹¹ However, it seems

¹⁰ See, for example, Austria's declaration upon accession to this effect (1/2/1978 - *Multilateral Treaties Deposited* (1997) at 282.

¹¹ If, however, it is not the constitution but some less significant domestic law that precludes the operation of the article, the elaboration of this proviso in article 36(2) to 'subject to the constitutional limitations of a Party, its legal system and domestic law' tends to indicate that under article 36(1), the overruling of criminalisation of the listed forms of conduct cannot be based on anything less than the constitution. On the difference between the two escape clauses, see *1961 Records* vol.II at 236-7.

unlikely that any constitutional limitations preventing a Party from implementing article 36(1) exist.¹²

With respect to the conduct criminalised, article 36(1) takes a two pronged approach, viz.: it specifically enumerates different forms of conduct and, in addition, provides a general formula to cover actions contrary to the provisions of the 1961 Convention that are not enumerated. The enumeration of specific forms of drug related conduct is an attempt by the drafters of the Convention to describe fairly exhaustively the range of illicit conduct that can be associated with drugs.¹³ It thus complements the general obligation on Parties in terms of article 4(c) 'to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.' These forms of conduct must be seen against the background of the very general definition of 'illicit traffic' in article 1(1)(m) as the 'cultivation or trafficking in drugs contrary to the provisions of this Convention.' It is not clear whether article 36(1)'s authors anticipated Parties enacting separate offences with respect to each form of conduct listed, or whether they accepted that Parties would enact catch-all offences that would criminalise each form of conduct under one or a few offences. Thus an offender who simultaneously engaged in cultivation, sale and transport, might in state A be liable for three different offences while in state B he might be liable for three counts of the offence of, for instance, 'drug trafficking'. In practice, many states have criminalised some but not all of the forms listed¹⁴ or have relied on generic terms to cover them.¹⁵ Ultimately, the question of how the provision is applied is a domestic affair. It is not the intention of this study to provide an exhaustive

¹² The *1961 Commentary* submits at 429 that should a federal state lack the constitutional authority to enact article 36(1)'s provisions into domestic law, it is obliged to obtain the necessary action by the legislatures of its component states/provinces. It is arguable that rights to freedom of commercial activity conflict with article 36(1)'s obligation, but it is likely that Parties will consider the domestic application of these rights in respect of drug trafficking offences to be necessary.

¹³ The enumeration of these activities closely follows the list in article 2(a) of the 1936 Convention - see Chapter Two at foot-note 53.

¹⁴ For example, section 6(1) of the Austrian Narcotic Drugs Amendment Act of 1977, Bundesgesetzblatt No. 1978/532, provides: 'Persons who wittingly and in violation of these provisions produce, import, export or trade in narcotic drugs in such quantities as to constitute a general danger to human life or health shall be guilty of an offence against the public health ...'.

¹⁵ In South Africa, for example, the Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971, made 'dealing' in drugs an offence (sections 2 and 3), and then defined dealing (section 1) as 'performing any act in connection with the collection, importation, supply, transshipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription' of drugs.

commentary on each form of conduct, but it will provide a definition and description of each form in order to illustrate that they do refer to quite distinct forms of conduct.¹⁶

The first five forms of conduct mentioned relate to the creation of drugs. 'Cultivation' according to the definitions article 1(1)(i) 'means the cultivation of the opium poppy, coca bush or cannabis plant' and of no other plant as the 1961 Convention does not deal with any other plant. 'Cultivation' involves the fostering or nurturing of the growth of the plants while they are still in the ground; to cultivate is to 'till, prepare for crops, manure, plough, dress, sow, and reap, manage and improve by husbandry'.¹⁷ 'Production' according to article 1(1)(t) 'means the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained,' an agricultural operation as distinct from the industrial process involved in the manufacture of drugs.¹⁸ 'Manufacture' according to article 1(1)(n) 'means all processes, other than production, by which the drugs may be obtained and includes refining as well as the transformation of drugs into other drugs.' 'Manufacture' is the industrial process complimentary but distinct from 'production'. It covers a wide range of substances and processes¹⁹ but does not include the transformation of drugs into substances not covered by the Convention. No definition is given for 'extraction' under section 1 but it will involve the derivation of drugs or the taking out of drugs from a substance; to extract is 'to draw out or forth'.²⁰ Nor does section 1 define the verb 'preparation' which involves the preparation of a substance for use as a drug; to prepare is to 'to make ready'.²¹ It is

¹⁶ While all of these forms of conduct stand alone, the *1961 Commentary* at 428 notes that some of them 'may not be considered to be [the conduct] of "principal actors" as this term is understood in some penal codes, but only as forms of "participation" as defined in [article 36] paragraph 2, subparagraph (a) clause (ii), and would therefore also be punishable in terms of that clause.'

¹⁷ *Black's Law Dictionary* (3ed 1951) at 454.

¹⁸ See *1961 Commentary* at 26. The *Commentary* points out at 27 that it follows from the limitation of the production of drugs to the plants listed that the separation of drugs from any other plants will be 'manufacture'. So too will be the separation of any other drugs than those listed from the plants listed. The separation of drugs from poppy straw is not production and is covered by an entirely separate regime.

¹⁹ The *1961 Commentary* at 14-21 sets out in some detail the various facets of the manufacturing process as contemplated by the 1961 Convention. It includes the refining of drugs, the transformation of drugs into their salts, the manufacture of isomers, esters and ethers of scheduled substances (if possible), and the conversion of drugs into other drugs. It notes that 'conversion' must include in certain circumstances the conversion of drugs into substances not classified as drugs under the 1961 Convention, although it is clear that the authors of the 1961 Convention did not intend to criminalise such manufacture because they did not consider these substances harmful. 'Manufacture' does not include fabrication of the preparations of drugs or the production of drugs from the plants defined in 'production', but includes the separation of any new drugs from those plants and from other plants. The *1961 Commentary* also notes at 428 that 'manufacture' covers 'extraction' and 'preparation' and explains the overlap because article 36(1) closely follows article 2(a) of the 1936 Convention.

²⁰ *Black's Law Dictionary* (3ed 1951) at 698.

²¹ *Black's Law Dictionary* (3ed 1951) at 1344.

submitted, however, that preparation of a drug by a user for immediate use, for example the rolling of cannabis into a cigarette, is not preparation because if it were it would blur the distinction between drug supply, which is criminalised, and drug use, which is not. Domestic application of the defined forms of producing drugs is not coherent. While the forms appear to be specifically defined by article 36, they are used interchangeably in the domestic legislation that has resulted from observance of the 1961 Convention.²²

‘Possession’ is a legal term of art in most jurisdictions. Its meaning usually includes an element of physical control and a consciousness of control, although it takes on a variety of forms, such as actual and civil possession, specific to certain situations.²³ When exploring the meaning of ‘possession’ in article 36(1) it is useful to begin by noting that ‘use’, which Noll argues equals personal consumption of drugs, is not listed in article 36.²⁴ Therefore, in spite of the fact that article 4(c) of the Convention requires Parties to limit ‘the use and possession’ of drugs to medical and scientific purposes, no obligation exists under the 1961 Convention to punish unauthorised use in international law.²⁵ Conceding that article 36 is intended to fight the illicit traffic and that unauthorised use does not constitute such traffic, the *1961 Commentary* believes that it has been left to the discretion of each Party to decide whether to punish use or whether to rely on legal measures controlling the illicit traffic to control use indirectly.²⁶ The meaning of possession is more controversial. Besides article 4(c)’s general obligation to limit possession to medical and scientific purposes, article 33 makes it clear that Parties must not permit the possession of drugs except under legal authority and then only for medical and scientific purposes, and article 36(1) obliges Parties to make possession a punishable offence. However, with regard to the obligation to penalise possession a distinction has been made between possession for personal use (simple possession) and

²² For example, in domestic drugs law, conversion of one drug to another can mean ‘production’ and not manufacture - see sections 4 and 37 of the UK’s Drug Trafficking Offences Act, 1986.

²³ See *Black’s Law Dictionary* (3ed 1951) at 1325ff.

²⁴ Noll A ‘International treaties and the control of drug use and abuse’ (1977) 6 *Contemporary Legal Problems* 17 at 24.

²⁵ In ‘Drug abuse and penal provisions of the international drug control treaties’ (1977) 19 *Bulletin on Narcotics* 41 at 44, however, Noll argues that article 4 does preclude the legalisation of drugs in the sense of making them freely available for non-medical and non-scientific use. But he notes that the 1961 Convention does not oblige Parties to achieve this goal through criminalisation of use or simple possession. It can do so through other legislative and administrative steps.

²⁶ *1961 Commentary* at 111 and 428.

possession for trafficking.²⁷ As the whole thrust of the penal provisions of the Convention is the prohibition of drug trafficking, there appears little doubt that Parties are obliged to criminalise possession for trafficking. Parties, however, take different approaches to the penalisation of simple possession.²⁸ The *1961 Commentary* states:

Some Governments seem to hold that they are not bound to punish addicts who illegally possess drugs for their personal use. This view appears to be based on the consideration that the provisions of article 36 ... are ... intended to fight the illicit traffic, and not to require the punishment of addicts not participating in that traffic.²⁹

The *1961 Commentary* notes that this view is supported by the drafting history and context of article 36.³⁰ Given that use has not been criminalised, criminalisation of simple possession which amounts in effect to criminalisation of use appears not to have been contemplated by the drafters of the Convention. It thus does not appear that article 36(1) obliges Parties to criminalise possession of drugs for personal use.³¹ Anticipating that some Parties were likely not to criminalise simple possession, the *1961 Commentary* suggests a *via media* which has had a strong influence on state practice with respect to possession under the Convention:

It has ... been pointed out, particularly by enforcement officers, that penalisation of all unauthorised possession of drugs, including that for personal use, facilitates the prosecution and conviction of traffickers, since it is very difficult to prove the intention for which the drugs are held. If Governments choose not to punish

²⁷ Possession for trafficking would in this sense mean all forms of possession when the possessor had the intention of engaging in any of the other forms of conduct enumerated in article 36(1) or in any form of conduct contrary to the Convention other than personal use.

²⁸ *1961 Commentary* at 112.

²⁹ *1961 Commentary* at 112. An example is section 31 of South Australia's Controlled Substances Act, 1984, which makes simple possession of drugs an offence but then in section 35 provides for the diversion of alleged offenders to a drug assessment and aid panel rather than face prosecution.

³⁰ In the Third Draft of the Convention article 36 (then draft article 45) was included in Chapter IX entitled 'Measures against illicit traffickers' before all chapter headings were deleted from the Convention. It is still included in that part of the Convention preceded by article 35 entitled 'Action against the illicit traffic' and followed by article 37 entitled 'Seizure and confiscation'. See *1961 Commentary* at 112.

³¹ Noll A 'International treaties and the control of drug use and abuse' (1977) 6 *Contemporary Legal Problems* 17 at 25.

possession for personal consumption or to impose only minor penalties on it, their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution. It could also be stipulated that this presumption becomes irrebuttable if the amount in the possession of the offender is in excess of certain limits.³²

Such presumptions are fairly common in domestic drug suppression legislation.³³ They are vulnerable to constitutional challenge,³⁴ but so is criminalisation of simple possession.³⁵

Actions involving drug-related conduct of a transactional nature are an essential part of trafficking and present less of a problem than possession. 'Offering' is not defined in article 1 but involves the tendering of a drug to a potential consumer for acceptance or refusal; an offer is 'a proposal to do a thing'.³⁶ 'Offering for sale' involves the tendering of a drug to a potential purchaser for acceptance or refusal. 'Distribution' involves the dispersal of drugs among consumers; to distribute is 'to deal or divide out in proportion or in shares'.³⁷ 'Purchase' involves the buying of drugs; the 'transmission of property from one person to another by voluntary act and agreement, founded in valuable consideration'.³⁸ While it is clear that the purchase of drugs for resale must be criminalised under the 1961 Convention, it seems, following the argument relating to

³² 1961 *Commentary* at 113.

³³ See, for example, section 37 of the Malaysian Dangerous Drugs Amendment Act 390 of 1977 (Amending the 1952 Act) which deems possession of more than 100gms of heroin or morphine (later 15gms), 200gms of cannabis or cannabis resin, 1kg of prepared opium, or 5kg of raw opium, enough to prove an intent to traffic.

³⁴ Presumptions of trafficking based on possession of more than a certain amount of a drug have been found to be unconstitutional in a number of states. For example, see the Canadian decision of *R v Oakes* (1986) 50 CR (3d) 1, 24 CCC (3d) 321 (SCC) where the reverse onus provision of section 8 of the Narcotic Control Act, RSC 1985, c.N-1 was held to be inoperative because of the right of an accused to be presumed innocent under section 11(d) of the Canadian Charter of Rights and Freedoms. See also the South African decision *S v Bhulwana* 1995 (2) SACR 748 (CC). The then Chief Justice of India complained at the New Delhi International Conference on Global Drugs Law, 27 February 1997, that 'the basis of arriving at these amounts' as indicated in India's Narcotic Drugs and Psychotropic Substances Act of 1985, was 'uncertain'. But see *contra*, the *Salabiaku* Case ECHR Series A vol.141-A (1988), where a possession based presumption that the accused was smuggling in article 392(1) of the French Customs Code was held to be compatible with the presumption of innocence in article 6(2) of the 1950 European Convention on Human Rights *ETS* 46.

³⁵ The criminalisation of simple possession has been ruled as unconstitutional in Colombia (*Time* 23 May 1994) and Germany (*Newsweek* 4 July 1994), although in the latter case the INCB clarified that this was confirmation of an existing German policy of diversion of occasional drug users to rehabilitation - INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 48.

³⁶ *Black's Law Dictionary* (3ed 1951) at 1233.

³⁷ *Black's Law Dictionary* (3ed 1951) at 562.

³⁸ *Black's Law Dictionary* (3ed 1951) at 1395.

'possession' for personal use, that Parties are not obliged in terms of article 36 to criminalise purchase of drugs for personal use. Article 36 is directed at illicit traffickers, those who make some profit from the trafficking of drugs, and purchasing for use cannot logically be regarded as trafficking.³⁹ 'Sale' involves the disposal of drugs for some consideration, 'an agreement by which one gives a thing for a price in current money and the other gives the price in order to have the thing itself'.⁴⁰ 'Delivery on any terms whatsoever' involves an 'act by which the *res* or substance thereof is placed within the actual or constructive possession or control of another'⁴¹ on any terms whatsoever. This would seem to cover disposal of drugs to another without consideration, including giving drugs as a gift.⁴² 'Brokerage' involves acting as a middleman or agent for either purchaser or seller in drug transactions and thus facilitating the transaction.⁴³

The following forms of conduct all involve aspects of the transport of drugs. 'Dispatch' involves the sending off of drugs⁴⁴ while 'dispatch in transit' involves the sending off of drugs through the territory of a Party but not to a destination within that Party's territory. 'Transport' involves the conveying of drugs from one place to another.⁴⁵ With respect to 'importation, and exportation', article 1(1)(m) of the 1961 Convention defines the import and export of drugs as the 'physical transfer of drugs from one State to another State, or from one territory to another territory of the same State.' What is contemplated here is the movement of drugs across either international boundaries or the internal frontiers in states where territories are treated as separate entities for the purposes of drug control.⁴⁶ The export and the import of the drugs take place in two different jurisdictions, and have held to be two separate offences even if they involve the movement of a consignment of drugs from one Party to another.⁴⁷

³⁹ The South African Appellate Division in *S v Solomon* 1986 (3) SA 705 held at 710B that purchasing for personal use was possession of drugs, not dealing in drugs.

⁴⁰ *Black's Law Dictionary* (3ed 1951) at 1503.

⁴¹ *Black's Law Dictionary* (3ed 1951) at 515.

⁴² This is how it was interpreted in section 1 of the South African Abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971.

⁴³ *Black's Law Dictionary* (3ed 1951) at 241.

⁴⁴ *Black's Law Dictionary* (3ed 1951) at 357 uses the words 'delivery' or 'discharge' of goods.

⁴⁵ *Black's Law Dictionary* (3ed 1951) at 1670.

⁴⁶ *1961 Commentary* at 12-13.

⁴⁷ See the decision in *Batkoun* (1988) 73 ILR 248. Batkoun transported 50kgs of heroin in his car from France to Canada. He was charged in both France and Canada, but although in Canada the charge of illegal importation of drugs failed through lack of proof of knowledge of the offence, in France he was convicted of illegal export of drugs in violation of article L627 of the Public Health Code. His ground of appeal in France was that the export and import of the drugs were a single offence and was now *res judicata* due to the Canadian decision. The French Appeal Court dismissed his appeal, holding that they

Finally the article provides a catch-all provision to deal with forms of trafficking related conduct not contemplated by the framers of the Convention.⁴⁸ It obliges Parties to criminalise ‘any other action which in the opinion of such Party may be contrary to the provisions of this Convention’. The list of proscribed forms of conduct is not a *numerus clausus*. The Convention anticipates that gaps may exist and thus through this provision obliges Parties to treat any other action that contravenes the provisions of the Convention as an offence. The Parties retain the discretion to extend the list of offences or not, but the *1961 Commentary* notes that they are obliged to act bona fide in this regard.⁴⁹ As all of the listed forms of conduct are trafficking related, it is arguable that any extension of the listed forms of conduct must be trafficking related, and that Parties are not obliged to criminalise simple possession or use in terms of this provision. Malekian points out that a problem with such extensions is that they are unlikely to be the same and will therefore cause difficulties for extradition because the double criminality rule insists that extradited crimes be recognised by both Parties.⁵⁰

With respect to the fault element of crime, the article has as a general principle, wisely it is submitted, adopted the rule that each of the proscribed acts must be ‘committed intentionally’, including those acts contrary to the Convention but not listed in the article.⁵¹ This implies that the criminal conduct must be performed consciously, wilfully or knowingly.⁵² Just how each Party defines such consciousness and whether they include controversial concepts such as constructive intention (*dolus eventualis*) or recklessness is solely a question of their domestic law. It does, however, mean that acts committed negligently are not considered punishable offences under article 36. In most legal systems it is accepted that criminal liability should in principle be founded on conscious conduct and not on the failure to achieve a particular standard of reasonable behaviour, something which should only lead to criminal liability in exceptional

were separate offences under French law and under international law. It stated at 251 that in article 36(1) ‘the terms “importation and exportation of drugs” constitute two separate offences and not simply two different aspects of the same offence.’

⁴⁸ *1961 Records* vol.II at 238.

⁴⁹ *1961 Commentary* at 428.

⁵⁰ Malekian F *International Criminal Law: The Legal and Critical Analysis of International Crimes* Volume II (1991) at 182. An example of such an extension is the US’s Racketeer Influenced Corrupt Organisations Act (RICO), 18 USC sections 1961-1968, which provides for a major extension of criminal liability unpalatable to many states to which the US makes extradition requests.

⁵¹ The US delegation’s objection that criminal offences included intention by definition was overridden in order to restrict the imposition of negligent/ and or strict liability to drug offences - *1961 Records* vol.I at 123.

⁵² The first adverb is mine, the second and third come from the *1961 Commentary* at 428.

circumstances. Drug trafficking is not one of these. Nonetheless, many Parties appear in their domestic practice to have rendered negligent drug related criminal conduct an offence. The 1961 Convention does not oblige Parties to do so, but neither does it prevent them from doing so, a major omission from the point of view of protection of an alleged offender's rights.

3.2.2.3 Complicity, inchoate offences and 'financial operations' under the 1961 Convention

Article 36(2)(a)(ii) provides for criminal liability for non-perpetrators and for inchoate offences.⁵³ It reads:

2. Subject to the constitutional limitations of a Party, its legal system and domestic law:

(a)(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connection with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;...⁵⁴

These offences oblige Parties to render criminal the participation of any persons other than the perpetrator in the commission of the offences specified in article 36(1),⁵⁵ to criminalise inchoate or uncompleted forms of those offences and to provide for the criminal liability of persons engaged in financial operations in connection with all illicit trafficking offences. They appear to be generally directed against organised crime, because, for example, a developed conspiracy theory permits the prosecution of the entire drug trafficking operation rather than just those physically involved in moving the drugs, while the prosecution of those involved in financing large scale operations also reaches out to those who seldom have any contact with drugs at all, yet make the traffic

⁵³ The 1972 Protocol did not amend article 36(2)(ii).

⁵⁴ These offences were included in article 2 paragraphs (b), (c) and (d) of the 1936 Convention.

⁵⁵ *Socius criminis, particeps criminis*, accomplice liability, aiders and abettors, whatever term a particular legal system uses, what is dealt with here are the participants in a crime who are not the actual perpetrators of the offence. These participants may participate at different levels of engagement, hence degrees of complicity or participation.

possible.⁵⁶ The effectiveness of these provisions depends to a large extent upon their recognisability as valid criminal law principles by the states called upon to apply them.

Once again it is the Convention which renders the forms of conduct unlawful. Article 36(2) of the 1961 Convention binds Parties to make provision in their domestic law for the criminalisation of these forms of conduct, but with the proviso that such criminalisation is 'subject to the constitutional limitations of a Party, its legal system and domestic law'. The provision recognises that article 36(2) is subordinate to each Party's constitution, which means that the remarks made above in respect of article 36(1) are equally pertinent here. But article 36(2) is, in addition, subordinate to other provisions of the domestic law⁵⁷ not embodied in the constitution. Such subordination means that Parties whose domestic legal systems do not criminalise inchoate offences and the participation of *socii* are not obliged to do so under the Convention. The Canadian delegate at the 1961 Conference rationalised this subordination on the basis that these forms of conduct were not considered as offences under certain legal systems or domestic laws and an international convention had to take account of differences in legal systems while simultaneously trying to ensure that all types of offence would be punished in all countries.⁵⁸ The *1961 Commentary* argues, however, that it was not intended to exempt them completely from taking legislative action to implement the article but only to provide that they were not obliged to change their basic legal principles relating to complicity or inchoate offences in implementing article 36(2)(a)(ii).⁵⁹ The final qualification on article 36(2)(a)(ii) is that it, along with the rest of the penal provisions in article 36, is in accordance with article 36(4) implemented indirectly through the Party's domestic laws and regulations enacted to carry it out.

Article 36(2)(a)(ii) describes two general categories of criminal liability relating to article 36(1)(a) offences. The division of the inchoate forms of conduct into conspiracy, attempts and preparatory acts as separate forms of conduct reflects the strong influence on the drafters of the Convention of an anglo-american criminal jurisprudence

⁵⁶ Barnett JR 'Extradition treaty improvements to combat drug trafficking' (1985) 15 *Georgia Jnl of Int. and Comp. Law* 285 at 307.

⁵⁷ The *1961 Commentary* submits at 430 that 'domestic law' does not have a very different meaning from 'legal system', because the latter refers to the basic legal principles of a Party. It explains at 430-1, however, that domestic law may well include widely applied concepts extending beyond basic legal principles, and the Convention's authors probably intended that the Parties were only obliged to implement article 36(2)(a)(ii) to the extent compatible not only with their basic legal principles, but also with the broader concepts of their domestic law.

⁵⁸ *1961 Records* vol.II at 236-7.

not easily translatable into the domestic law of many states. Chatterjee complains that their use has clouded the prospects of launching an effective fight against the illicit traffic because they are very similar.⁶⁰ But the terms do refer to distinct forms of conduct, although some overlap is possible given different domestic interpretations of these terms.⁶¹

'Conspiracy' is made criminal even though it is a type of offence peculiar to common law systems. Usually taken to mean an agreement to engage in criminal activity,⁶² its parameters vary depending on the jurisdiction. For instance, in many states in the United States 'conspiracy' has a very wide ambit,⁶³ whereas in some states its ambit is very strictly curtailed⁶⁴ and civil law states like France and Spain do not recognise it as a separate offence.⁶⁵ Although the *1961 Commentary* suggests that they should do so,⁶⁶ protected by the domestic law proviso in the opening paragraph of article 36(2), the latter Parties are not obliged to criminalise conspiracy to commit drug trafficking offences. However, those Parties that do recognise it as a separate offence in their domestic law are obliged to punish any conspiracy to commit the offences listed in article 36(1)(a).

'Attempts' to commit offences are by contrast the most universally recognised inchoate crime. The *1961 Commentary* notes, however, a distinction between states that only consider an attempt to have begun when the stage of execution of the offence has actually been reached, and states that extend liability for attempts to include actions

⁵⁹ *1961 Commentary* at 430.

⁶⁰ Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 445.

⁶¹ See, for example, the statement by the Norwegian delegate to the 1961 Conference to the effect that in Norway 'conspiracy' was classified as a 'preparatory act', and 'preparatory acts' were not punishable - *1961 Records* vol.I at 126.

⁶² *Black's Law Dictionary* (3ed 1951) at 382 defines a conspiracy as '[a] combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act or some act which is innocent in itself, but becomes unlawful when done by the concerted actions of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.'

⁶³ Bernholz SA, Bernholz, MJ, Herman JN 'International extradition in drug cases' (1985) 10 *North Carolina Jnl. of Int. Law and Commercial Regulation* 353 at 377 complain that in the US conspiracy is so vague that it fails to present a clear charge to which a foreign judicial official could respond to in an extradition request.

⁶⁴ For example, the Netherlands delegate to the 1961 Conference stated that conspiracy was not punishable in Netherlands law except as a preparatory act in the case of the most serious offences and only when they had begun to be executed - *1961 Records* vol.I at 123.

⁶⁵ The *1961 Commentary* notes at 433 fn4 that this may be the reason why the French and Spanish texts of the Convention do not use the direct translation of conspiracy (*conspiration* and *conspiracion* respectively).

⁶⁶ The *1961 Commentary* at 433. It argues that such offences are serious and notes that exempted Parties could do so simply by including what amounts to a conspiracy as a 'preparatory act'.

taken prior to this stage. For the former states the transfer of money to a cocaine broker before delivery of cocaine would amount to an attempted purchase of cocaine while a simple enquiry about the price of cocaine would not, but the latter group of states may consider both actions to amount to an attempted purchase of cocaine.⁶⁷ Parties are, of course, not obliged to change their legal definition of attempt because this provision is subject to the 'domestic law' proviso.

'Preparatory acts' are steps taken towards the perpetration of an offence that have not yet passed the stage of commencement of consummation of the offence, and are thus not regarded as attempts in many domestic legal systems.⁶⁸ In 1961 such acts were not generally subject to penal sanctions.⁶⁹ Nonetheless article 36(2)(a)(ii) obliges Parties to criminalise such acts if they are able to do so in terms of their legal systems, and the *1961 Commentary* recommends that Parties which only punish preparatory acts carried out with the intention of committing serious offences should include drug trafficking offences among those serious offences.⁷⁰ In practice, these offences have been adopted by states that do not usually recognise such offences.⁷¹

'Financial operations' are regarded as inchoate offences because they must be connected to an article 36 offence. However, they include financial operations in connection with article 36(1) offences as well as with the other article 36(2)(a)(ii) offences.⁷² Although the provision was introduced to criminalise the conduct of individuals who financed drug transactions,⁷³ the provision does not specify the nature of the link between the operation and the offence and it could include a whole range of operations connected to the illicit traffic. A major lacunae that results from the characterisation of financial operations as a preparatory offence is the exclusion of

⁶⁷ See generally the *1961 Commentary* at 432ff. The division can be seen as a division between those states insisting on objective proof of an offender's intention to carry out the completed offence through evidence of his having gone a considerable way towards the commission of the actual offence, and those that insist that any evidence of a subjective intention to carry out the offence, however slight, constitutes sufficient evidence for conviction of an attempt to commit the offence.

⁶⁸ *1961 Commentary* at 433.

⁶⁹ The Netherlands delegate to the 1961 Conference stated that such acts fell outside the scope of the 1961 Convention - *1961 Records* vol.I at 123.

⁷⁰ *1961 Commentary* at 433.

⁷¹ For example, sections 15-25 of India's Narcotic Drugs and Psychotropic Substances Act, 1985, makes an attempt to prepare to commit any of the offences under the Act an offence in itself, something not generally punishable under Indian law.

⁷² Statement of the Canadian delegate - *1961 Records* vol.I at 146.

⁷³ These offences were justified on the basis that these operations often involved the biggest traffickers who were the hardest to bring to justice, and because judges were extremely cautious in cases where no

money laundering which takes place as a result of a completed article 36 offence. The *1961 Commentary* notes that although financial operations are covered by the other provisions of article 36(2)(a)(ii), they were referred to expressly to draw the Parties' attention to them.⁷⁴

With respect to degrees of complicity, article 36(2)(a)(ii) refers only to 'intentional participation'. It thus avoids specifying in any detail the various degrees of complicity Parties are obliged to criminalise. The *1961 Commentary* notes that the wording 'covers all kinds of complicity and accessory acts, which may in different countries be divided into different categories.'⁷⁵ Liability for these offences depends on there having been a principal offender, but it is left to the Party to decide whether that offender should actually have been apprehended and/or convicted.

Before concluding the examination of article 36(2)(a)(ii)'s penal provisions, it is important to note that because criminal liability will attach to the completed forms of conduct criminalised in article 36(1)(a) only if they are performed intentionally as opposed to negligently, so too must the incomplete forms of conduct criminalised by article 36(2)(a)(ii) be performed intentionally for criminal liability to attach to them. The same logic applies to the various participants other than the actual perpetrator of the offences who must, to be held liable, have been acting intentionally rather than negligently.

3.2.2.4 The 1961 Convention's penal provisions appraised

The offences in the 1961 Convention and particularly those in article 36(1) served as the source for most existing domestic drugs legislation suppressing drug trafficking.⁷⁶ Even notions of conspiracy were accepted by civil law states.⁷⁷ The fact that article 36's

drugs had been seized - Interpol representative's statement to the ad hoc Committee on draft article 45, *1961 Records* vol.II at 234.

⁷⁴ *1961 Commentary* at 433-4.

⁷⁵ *1961 Commentary* at 432.

⁷⁶ For example, Malaysia's Dangerous Drugs Act 234 of 1952 defines 'drug trafficking' in section 2 as 'manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing and dangerous drug'. Some states simply enacted one statute. Others, like the UK, criminalised the import and export of drugs under customs legislation (Customs and Excise Management Act of 1979) while leaving the rest of the offences in a special drug offences statute (Misuse of Drugs Act of 1971). The US, by contrast, enacted a plethora of legislation much more sophisticated than existing international provisions.

⁷⁷ The French *Code de Sante Publique* art. L. 627 (1975) criminalises, exceptionally in French law, conspiracy to violate drugs laws. Paragraphs 2 and 3 of the law refer to the crimes of *association* or *entente* with a view to violating French drugs law, and render them as punishable as a completed offence. Negotiations for the purpose of obtaining, manufacturing or selling illicit drugs suffice to establish such

obligations were not particularly extensive or progressive - they were meant to constitute a set of general principles rather than an extensive international penal code⁷⁸ - lead to easy compliance. The adoption of the enumerative method had obvious limitations but it was effective in globalising the basic kinds of conduct the 1961 Convention seeks to criminalise. What is surprising is that despite article 36(4) reserving definition of the offences to the Parties, many Parties simply lifted the wording of article 36's offences and used it in their legislation. Escape clauses were not heavily used. While this resulted in little tension in the relationship between international and national drug control law, the short-sightedness of the authors of the Convention in creating penal provisions modelled on those in the 1936 Convention meant that these provisions were unable to counter a rapidly evolving illicit drugs market and that further modification of the international drug control system became necessary.

3.2.3 The offences stipulated by the 1971 Convention

3.2.3.1 The 1971 Convention's penal provisions generally

The 1971 Convention extended the material scope of existing international penal drug control provisions to include psychotropic substances. It makes provision for very similar penal measures to those contained in the 1961 Convention, following much the same scheme with separate provisions on specific drug offences and accessory offences. The central focus is once again on the illicit traffic, and article 22 contains the key provisions. As with article 36 of the 1961 Convention, article 22(5) makes it clear that article 22 was not intended to be self-executing. It provides:

Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

an *association* or *entente*, even before agreement is reached among the parties - see generally Blakesly C 'Extraterritorial jurisdiction' in Bassiouni MC (ed) 2 *International Criminal Law: Procedure* 3 at 51 and cases cited at fn199.

⁷⁸ See the statement of the Yugoslavian delegate - 1961 *Records* vol.II at 238.

3.2.3.2 Article 22(1)(a)'s penal provisions

Article 22, entitled 'Penal Provisions', reads:

1.(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty or deprivation of liberty.

Article 22(1)(a) obliges Parties to render offences under their national law all forms of intentional conduct contrary to the law or regulations adopted in pursuance of the 1971 Convention. Unlawful conduct is defined as conduct 'contrary to a law or regulation adopted [by a Party] in pursuance of its obligations under this Convention.'⁷⁹ The substance and execution of the legislation adopted to put article 22 into effect is a matter of a Party's domestic law, as article 22(5) makes it clear that these offences 'shall be defined, prosecuted and punished in conformity with the domestic law of a Party.' As with the 1961 Convention, an escape clause is also provided by article 22(1)(a) itself. Its obligations are made subject to the 'constitutional limitations' of the Party. The same considerations that apply to article 36(1) thus also apply here. It is enough to note that the 1971 Convention permits exceptions to the duty to criminalise conduct contrary to its obligations if to criminalise would be in violation of the Party's constitution, but the escape clause is not operative with respect to violations of other ordinary domestic law.⁸⁰

When it comes to the conduct element of the drug offences created by article 22(1)(a) the obvious difference between it and article 36(1) of the 1961 Convention is that it does not list specific offences. Adopting a general formula, it provides that intentional 'actions' contrary to laws or regulations adopted by Parties in pursuance of

⁷⁹ In the *1971 Records* vol.II at 44 the Legal Adviser to the 1971 Conference explains that this provision differs from article 36(1) of the 1961 Convention, which provides for penalisation of conduct 'contrary to the provisions' of that Convention, because of the realisation in 1971 that in non-self-executing treaties such as the drug conventions the offences whose punishment they require must be contrary to national legislation and not to international law.

⁸⁰ The *Commentary on the Convention on Psychotropic Substances, 1971* (1976) (hereinafter the *1971 Commentary*) at 352-3 notes that federal states constitutionally incapable of enacting penal law are nonetheless bound to obtain the required enactment of legislation from their component provinces or states having penal jurisdiction.

their obligations under the Convention shall be treated as punishable offences.⁸¹

Although it does not use the terms specifically, it is probable that in its use of the term 'actions' the article is referring to 'illicit traffic' in drugs. 'Illicit traffic' is defined by article 1(j) as 'manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention,'⁸² where 'trafficking' means all forms of unauthorised trade and distribution, while 'manufacture' is self-explanatory.⁸³ However, 'illicit traffic' is contrary to the provisions of the Convention, while article 22(1)(a) envisages actions contrary to the laws and regulations adopted by the Parties to apply the Convention, so they are not necessarily coextensive in meaning.⁸⁴ But the *Commentary on the Convention on Psychotropic Substances, 1971* (hereinafter the *1971 Commentary*) assumes 'that the 1971 Conference intended that all actions in the illicit traffic should be punishable offences pursuant to article 22(1), subparagraph (a).'⁸⁵ It was not the intention of the drafters to define the specific forms of conduct that make up trafficking, but it is safe to assume that it was their intention that the Parties adopt measures criminalising different forms of conduct such as those set out in article 36(1)(a) of the 1961 Convention and the latter may serve as a useful guide in this context.⁸⁶ In practice, Parties have criminalised these forms of conduct relating to trafficking in psychotropic substances.⁸⁷

The one form of conduct that does require comment in the context of article 22(1)(a)'s general formula is possession. As with article 36 of the 1961 Convention, it is submitted that article 22(1)(a) was not intended to criminalise use, acquisition for use or simple possession of psychotropic substances. The *1971 Commentary* notes that in terms of article 5 'use' of psychotropic substances is limited to medical and scientific

⁸¹ Although draft article 18 followed the enumeration of offences in article 36(1) of the 1961 Convention, the drafting committee decided to switch to the general formula because enumeration was regarded as 'cumbersome' and was not exhaustive in any event - see the comments of the Yugoslavian delegate and the legal adviser, *1971 Records* vol.II at 44.

⁸² The *1971 Commentary* notes at 25 that the unlike under the 1961 Convention (article 1(1)(i)), the term 'illicit traffic' in article 1(j) does not cover the cultivation of plants from which psychotropic drugs can be obtained. It suggests at 25, however, that cultivation may constitute an attempt or preparatory act in terms of article 22(2)(a) to commit an offence under article 22(1)(a).

⁸³ *1971 Commentary* at 25.

⁸⁴ *1971 Commentary* at 26.

⁸⁵ *1971 Commentary* at 26.

⁸⁶ See Noll A 'Drug abuse and penal provisions of the international drug control treaties' (1977) 19 *Bulletin on Narcotics* 41 at 47.

⁸⁷ Thus Portugal's Act No.21 of 1977 in sections 19 to 21 renders the unauthorised purchase and sale of psychotropic substances an offence.

purposes.⁸⁸ It submits, however, that, apart from the requirement that possession of such substances for use requires authorisation in terms of article 7(b), these limitations relate to the supplier and not the consumer.⁸⁹ Use, together with acquisition for use are, according to the *1971 Commentary*, unauthorised actions, but they are not 'actions' contrary to the laws and regulations that a Party is obliged to adopt under the Convention; they both imply possession and whether they are unlawful in terms of the Convention depends on whether possession is an offence under article 22(1)(a).⁹⁰ Whether possession is criminalised under the 1971 Convention or not is a question that has a two part answer.

The first part of the answer depends on whether there are provisions in the Convention other than article 22(1)(a) which oblige Parties to render possession unlawful. With regard to substances in Schedules II, III and IV it appears no such obligation exists with respect to possession. Article 5(3) does state that it is 'desirable' that their 'possession' not be permitted except under 'legal authority'.⁹¹ But this provision leaves this decision in the hands of the Party, and criminalisation of possession is not required by article 22(1)(a) as article 5(3) is not a 'law or regulation' that the Parties are obliged to adopt rendering such possession for use unlawful.⁹² Some confusion is caused by article 5(2)'s obligation on Parties to 'limit by such measures as it considers appropriate the ... use and possession of' these substances, but in order to reconcile this provision with article 5(3), appropriate measures must include non-penal

⁸⁸ Article 5(2) limits the use of Schedule II, III, and IV substances to medical and scientific purposes. Article 5(1), limits the use of Schedule I substances as provided in article 7, which prohibits their use except for 'scientific and very limited medical purposes'. It is arguable that in terms of the latter provision, use of Schedule I substances for any purpose is an action in violation of an obligation under the Convention and is thus in terms of article 22(1)(a) a criminal offence. However, the tenor of article 7 which is devoted to control of supply of such substances suggests that prohibition of use only for the purposes of trafficking is contemplated.

⁸⁹ *1971 Commentary* at 349. At fn1122 it notes that requirements for prescriptions for Schedule II, III and IV substances are directed at sellers of such substances and not buyers.

⁹⁰ *1971 Commentary* at 349.

⁹¹ The original draft of this provision proposed prohibition of possession except under legal authority. It was changed because of the delegates' concerns that prohibition of these substances that were often the subject of youthful experimentation would be ineffective and counterproductive, as well as concerns about whether 'legal authority' meant refraining from proscribing possession or acting positively and providing for something akin to licensed possession - see *1971 Records* vol.II at 164-166. The compromise leaves each Party to deal with possession as it sees fit, but what exactly the desirable 'legal authority' means remains unclear.

⁹² *1971 Commentary* at 350.

measures.⁹³ With regard to substances in Schedule I, special obligations are set out in article 7. Article 7(b) requires that possession be under ‘special licence or prior authorisation’. It appears that there is an obligation to prohibit possession of such substances where no such authorisation exists, although it is arguable that the whole tenor of article 7 suggests that it refers to possession for the purpose of trafficking.⁹⁴

The second part of the answer depends on whether possession of Schedule I substances is an ‘action’ in the sense that that term is used in article 22(1)(a). If possession is simply a passive state of affairs, then it is difficult to regard it as an ‘action’. The *1971 Commentary* submits that possession in the sense in which it is used in the Convention means more than just a state of affairs, it means some form of positive action, for example, ‘holding’ a substance, ‘preserving’ it, ‘hiding’ it, ‘moving it from one place to another’.⁹⁵ It submits that according to this interpretation of ‘action’, possession for personal use of a Schedule I substance is an ‘action’ and an offence under article 22(1)(a), and notes that this was the view of many of the participants at the 1971 Conference.⁹⁶ Clearly possession in its most limited sense involves a state of affairs, but such a situation must be created and changed by the positive conduct to which the *1971 Commentary* is referring. It is arguable that in the context of the Convention this moving of the substance from one place to another, hiding it, preserving it, all beg the question - with what intention? If the individual’s intention is to preserve it for personal use then it is arguable that such conduct is not an ‘action’, if it is to preserve it with the intention of trafficking, it is an ‘action’. Nonetheless, subsequent state practice has not indicated a change from the views of the majority of state representatives at the Conference that article 22(1)(a) does criminalise possession and despite the suggestion of the *1971 Commentary*⁹⁷ there has been no ICJ advisory opinion on the matter.

A final comment on article 22(1)(a)’s general offences is that, as with article 36 offences in the 1961 Convention, the mental element of criminal liability insisted upon by the provision is intention. Only actions committed ‘intentionally’ and not actions committed ‘negligently’ are criminalised by article 22(1)(a).

⁹³ Article 9 appears to require that such substances be dispensed only through medical prescription, but in order to reconcile article 5(3) with article 9, acquisition illicitly cannot be regarded as a criminal offence in terms of article 22(1)(a).

⁹⁴ The provision reads: ‘In respect of substances in Schedule I, the Parties shall: ... (b) require that manufacture, trade, distribution and possession be under special license or prior authorization; ...’.

⁹⁵ *1971 Commentary* at 351.

⁹⁶ At 351 citing *1971 Records* vol.II 164-166.

3.2.3.3 Complicity, inchoate offences and 'financial operations' under the 1971 Convention

Article 22 provides:

2. Subject to the constitutional limitations of a Party, its legal system and domestic law: ...

(a)(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connection with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

The provisions in article 22(2)(a)(ii) are identical to the provisions in the 1961 Convention's article 36(2)(a)(ii) and thus the discussion of that provision applies equally here. The provision has been devised to oblige Parties to criminalise the inchoate forms of and the different degrees of complicity in the offences provided for by article 22(1)(a). The obligation on Parties to implement article 22(2)(a)(ii) renders that conduct unlawful, but it is subject to two restrictions, viz: the general restriction in article 22(5) which provides that the substance and execution of the article is a domestic affair; and the specific restriction contained in article 22(2)'s opening paragraph that it is subject to the Party's 'constitutional limitations',⁹⁷ 'legal system and domestic law'.⁹⁹ The latter proviso was intended to ensure that Parties were not obliged to change their basic legal principles relating to complicity or inchoate offences in implementing article 22(2)(ii), that is, they need not change their basic concepts of 'intentional participation', 'conspiracy', 'attempts' or 'preparatory acts' or introduce such notions if they are

⁹⁷ 1971 *Commentary* at 351.

⁹⁸ The 1971 *Commentary* notes at 355 that a Party with a federal constitution is obliged to ensure that its constituent states or provinces enact the necessary laws and regulations with respect to article 22(2) even though these component parts have jurisdiction over penal law.

⁹⁹ The 1971 *Commentary* at 356 notes that making the obligations under article 22(2) subject to 'domestic law' in addition to its 'legal system', gives the Parties greater freedom of action, because it subjects the implementation of article 22(2)'s provisions not only to the Parties' basic legal concepts but also to the broader concepts of their domestic law.

foreign to their penal law.¹⁰⁰ Thus it requires legislative action from compatible systems and not from incompatible systems.

With respect to the forms of conduct criminalised by article 22(2)(a)(ii), the article provides that certain inchoate forms of the conduct criminalised by article 22(1)(a) must be criminalised by Parties.¹⁰¹ 'Attempts' are the most advanced of the incomplete forms of conduct criminalised by article 22(2)(a)(ii). The distinction between 'attempts' and 'preparatory acts' may be difficult to draw in the domestic law of many of the Parties.¹⁰² The *1971 Commentary* states, however, that attempts refer only to the actual commencement of the execution of offences.¹⁰³ With respect to 'preparatory acts', the *1971 Commentary* states that such acts only refer to the devising or arrangement of the means or measures necessary for the commission of an offence up to but not including the threshold of the commencement of its execution.¹⁰⁴ A 'conspiracy' in the context of this provision is an agreement between two or more persons to commit an article 22(1)(a) offence jointly. In many states it is not regarded as a separate offence but simply as a 'preparatory act'.¹⁰⁵ 'Financial operations in connection with the offences referred to in this article' is a special form of inchoate offence included in the Convention's penal provisions in order to ensure that participation in such financial operations is criminalised, even though this conduct is covered by the other forms of inchoate conduct enumerated.¹⁰⁶ The provision is vague, however, as to the meaning of 'financial operations'. With respect to complicity, the phrase 'intentional participation' is a catch-all that includes all forms of participation in the offences envisaged by article 22(1)(a). The division of these forms is a domestic matter, but the *1971 Commentary* notes that it includes participation after the fact.¹⁰⁷

Finally, it is worth noting that negligence will not be sufficient to establish liability for participation, and nor will it suffice for liability for the various inchoate

¹⁰⁰ *1971 Commentary* at 356.

¹⁰¹ The *1971 Commentary* notes at 359-60 that while plants from which psychotropic substances are obtainable are not subject to the 1971 Convention, their cultivation may be regarded as one of the forms of inchoate offence set down if such cultivation is for use in illicit manufacture.

¹⁰² For example, 'preparatory acts' in terms of article 22(2)(a)(ii) appear to refer to conduct which in South African law is classified as incomplete attempts.

¹⁰³ *1971 Commentary* at 358.

¹⁰⁴ *1971 Commentary* at 358.

¹⁰⁵ *1971 Commentary* at 359.

¹⁰⁶ *1971 Commentary* at 359.

¹⁰⁷ *1971 Commentary* at 358.

offences listed by article 22(2)(a)(ii). The fault element for all these forms of conduct is intention.

3.2.3.4 The 1971 Convention's penal provisions appraised

The penal provisions in the 1971 Convention are not adventurous. They do little more than reiterate many of the provisions of article 36 of the 1961 Convention. Their adoption was necessitated by the narrow application of the 1961 Convention to narcotic substances, and the need to expand the scope of drug trafficking offences to include the new psychotropic substances that were entering the illicit drugs market. Their one distinguishing feature, the use of the general formula for criminalisation, was unlikely to result in much change to domestic drug law as Parties were simply left to extend the application of existing domestic drug offences to psychotropic substances, and these offences had been shaped by article 36(1) of the 1961 Convention. The cumulative effect of article 36(2)(a)(ii) of the 1961 Convention and article 22(2)(a)(ii) of the 1971 Convention can be seen in the specialised drug legislation that began to emerge after the adoption of the 1961 and 1971 Conventions. It provided for increased criminal responsibility for preparatory actions and attempted crimes, frequently transforming these preliminary phases into separate crimes.¹⁰⁸ It also enlarged the circle of criminal liability to include all persons who in some way or other induce, organise, assist, shelter or finance the illicit production, cultivation, trafficking, acquisition, possession and consumption of drugs.¹⁰⁹ However, the constant flow of new substances entering the market, the market's massive expansion in size and the enormous growth of the profits generated, demanded new responses. Some states reacted to the growing drug problem and its effect on the financial system by criminalising the acquisition, possession, transfer or laundering of the proceeds derived from the illicit traffic and by enlarging their jurisdiction to allow confiscation of illicitly derived property and proceeds. But in doing so they went beyond the 1961 and 1971 Conventions and beyond international law. The 1988 Convention was the international community's attempt to make sure that other states caught up.

¹⁰⁸ Cotic *D Drugs and Punishment* (1988) at 115.

¹⁰⁹ Cotic *op cit* at 115.

3.2.4 The offences stipulated by the 1988 UN Drug Trafficking Convention

3.2.4.1 The 1988 Convention's penal provisions generally

The 1988 Convention attempts to suppress by criminalisation all the forms of activity involved in modern drug trafficking. Its provisions represent a dramatic extension and elaboration of criminalisation of drug related conduct beyond the limited provisions of the 1961 and 1971 Conventions. Nonetheless, the penal provisions in the older conventions continue to play an important role in the suppression of such conduct because they provide the foundation in the criminal laws of Parties upon which the 1988 Convention builds its more extensive provisions.¹¹⁰

The new provisions are contained in article 3 which obliges Parties to 'legislate as necessary to establish a modern code of criminal offences relating to illicit trafficking in all its different aspects.'¹¹¹ However, while the article provides a detailed guide to the Parties on how to shape their drug offences, it also makes it clear that the fleshing out of these offences and the admission of appropriate defences to them remains a domestic affair, as article 3(11) provides:

11. Nothing contained in this article shall affect the principle that the description of offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.¹¹²

It is also important to note that the whole Convention labours under the restrictions contained in article 2 which in paragraph 1 provides that

¹¹⁰ For example, the 'Review Group Report' *1988 Records* vol.II at 60 notes that the majority of delegates insisted that 'illicit traffic' as used in the new convention retained the definition given to it in the earlier conventions.

¹¹¹ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 5 citing the Home Office *Criminal Justice (International Co-operation) Bill: Explanatory Memorandum on the Proposals to Implement the Vienna Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1989) at 28.

¹¹² The 'Expert Group Report' *1988 Records* vol.I at 16 supported the inclusion of this provision in the Convention on the basis that it was not a limitation clause covering all the provisions of article 3, but rather its objective was to 'indicate that the procedural modalities for the execution of [article 3's] obligation ... would be within the purview of [the Party's] respective domestic law.' Nevertheless, the provision can be interpreted as a limitation clause.

[i]n carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

Article 3's penal provisions are not self-executing; they are indirectly applied through the law of the Parties.

The Convention's penal provisions are concerned with the 'illicit traffic' as a whole, which it states in article 1(m) 'means the offences set forth in article 3, paragraphs 1 and 2, of this Convention.'¹¹³ These offences include most of the activities prohibited by article 36 of the 1961 Convention, plus a range of new offences, all of which are specifically enumerated and detailed in separate sub-paragraphs. The use of the word 'means' in the definition suggests that the list is closed and there can be no other forms of illicit traffic for the purposes of this Convention. The enumeration of these offences in detail indicates the intention of the Conference to stipulate specific obligations as a way of combating the illicit traffic. However, in order to address the fears of drug producing states that they would have to shoulder most of the burden of a Convention whose obligations had been drawn up and defined by drug consumer states, these provisions extend beyond the production and supply of drugs to include the consumption of drugs.¹¹⁴

¹¹³ Draft article 1(i) originally defined 'illicit traffic' by enumerating most of the activities finally enumerated in the separate sub-paragraphs of article 3(1) of the Convention, and then draft article 2(1)(a) simply obliged Parties to criminalise this already defined 'illicit traffic' - see *1988 Records* vol.I at 4. There followed a long dispute about the meaning of illicit traffic - see *1988 Records* vol.I at 12-14, 60-1, and vol.II at 52-54. Only in the Working Group of Committee I were the existing expanded offences in article 3(1) agreed upon and the definition of 'illicit traffic' finally settled as referring to those offences - see *1988 Records* vol.I at 107. Ironically, the term is rarely used in the Convention as most provisions refer to the specific offences in article 3.

¹¹⁴ Draft article 1(i) did not include use or simple possession under the conduct criminalised in article 3(2). Sproule and St-Denis *op cit* at 266 fn18 that in the substantial dispute about the definition of 'illicit traffic' at the Conference, producer states emphasised the consumption of drugs and consumer states the movement of drugs. Mexico proposed an expansive definition of 'illicit traffic' (*1988 Records* vol.I at 89) which included use, possession and purchase for possession. Western states argued that these actions did not form part of the illicit traffic. The adoption of article 3(2) criminalising possession and the inclusion of this offence within the Convention's definition of illicit traffic in article 1(m) suggests that the producer states were largely successful in their endeavours, but the separation of article 3(1)'s supply related offences from the consumption offences in article 3(2) and the restriction of operation of the Convention's provisions for co-operation to the former indicates the influence of consumer states. Sproule and St Denis note at 270 that the words 'illicit traffic' were substituted by 'offences established in accordance with Article 3, paragraph 1' in order to make the distinction between supply offences to which the co-operation provisions applied and possession offences to which they did not apply, possible. They note at fn28 that 'illicit traffic' was retained in articles 17 (illicit traffic by sea), 18 (free trade zones and free Ports) and 19

3.2.4.2 Supply related offences under the 1988 Convention

3.2.4.2.1 The offences created by article 3(1) of the 1988 Convention generally

The offences that Parties are obliged to create under article 3(1) of the 1988 Convention relate to drug trafficking in all of its modern manifestations. Article 3(1)'s opening paragraph makes it clear that the provision is not self-executing. It reads:

Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

These “offences” are, like the offences in the earlier conventions, to be transformed into domestic law, but not necessarily through legislation. ‘Necessary measures’ may include administrative measures.

The provision is broken up into divisions and subdivisions in order to distinguish between the different forms of conduct involved. The basic scheme of the provision is as follows: article 3(1)(a) offences are the traditional drug trafficking offences relating to the production and supply of drugs set out in the earlier conventions with some extension; article 3(1)(b) offences are new offences relating to property conversion and the laundering of the profits of trafficking; and article 3(1)(c) offences are offences involving the infrastructure of drug trafficking, inchoate versions of the drug trafficking offences and complicity in drug trafficking offences. Interestingly, while article 3(1)(a) and (b) are mandatory and they are not subject to any specific constitutional or domestic law safeguard clauses, indicative of how seriously the Conference viewed these obligations,¹¹⁵ the separate list of inchoate offences in article 3(1)(c) are made subject, together with article 3(2)'s offence of possession, to the constitutional principles and the

(use of the mails) because it made little difference to the actual effect of these articles. Thus although it is literally possible to board and confiscate a ship in terms of article 17 on the basis of simple possession of drugs by someone on board, the content of the article makes this highly unlikely. Finally, it is interesting to note that the whole effort to criminalise simple possession rests on the assumption made at the Conference that it had not been established as an offence by either the 1961 or 1971 Convention - see *1988 Records* vol.II at 151.

¹¹⁵ Draft article 2 originally subjected the obligation to criminalise all offences to ‘the constitutional limitations, legal system and domestic law’ of the Parties. There was strong opposition to this limitation clause in the Expert Group because of the way it weakened one of the basic articles of the draft Convention and because it was not in conformity with the usually accepted practice in other international penal instruments - see *1988 Records* vol.I at 12. The suggestion at the Expert's meeting to subject some of the offences to a limiting clause eventually evolved into the separate sub-set of offences provided for in article 3(1)(c) which are subject to a limiting clause.

basic concepts of the Parties' legal systems because of concerns about their compatibility with the Parties' penal law.¹¹⁶ Finally, for the purposes of the rest of the provisions in the Convention, article 3(1) offences are the most important because it is to them that the provisions allowing confiscation (article 5), extradition (article 6) and mutual legal assistance (article 7) apply.

3.2.4.2.2 The general trafficking offences

Article 3(1)(a)(i) obliges Parties to criminalise:

(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 and the 1971 Convention;... .

Article 3(1)(a)'s listed forms of conduct are rendered unlawful when they are contrary to the provisions of 1961 Convention, the 1961 Convention as amended and the 1971 Convention.¹¹⁷ The existing conventions thus describe both what is lawful and what is unlawful conduct with respect to drugs. However, to constitute a violation of article 3(1) it must be conduct that assumes one of the forms listed.

The forms of conduct enumerated in article 3(1)(a)(i) include almost all of the forms of conduct in article 36(1) of the 1961 Convention. The comments made in the latter's respect above apply equally here. These forms of conduct are now commonly criminalised by Parties.¹¹⁸ Not included, however, are cultivation, possession and purchase. Cultivation is covered in article 3(1)(a)(ii) but only with respect to specific plants. It will be discussed below. The latter two forms of conduct were excluded

¹¹⁶ See Sproule and St-Denis *op cit* at 270.

¹¹⁷ The authors of this provision have ignored the fact that unlawful conduct is logically conduct contrary to the legislation transforming the earlier conventions into domestic law and not conduct contrary to the conventions themselves.

¹¹⁸ For a modern example, see section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. This act anticipates that dealing in drugs will be an offence in Australian State law and section 6(1) reads: '(1) For the purposes of this Act, each of the following is a dealing in drugs: ... (b) the separation of opium, coca leaves, cannabis or cannabis resin from the plant from which they are obtained; (c) the manufacture, extraction or preparation of a narcotic drug or psychotropic substance; (d) ...; (e) the sale, supply, ... of a narcotic drug or psychotropic substance; (f) the importation into Australia, exportation from Australia, ... of a narcotic drug or psychotropic substance; ...'.

because the authors of article 36(1)(a)(i) saw them as unconnected to the main target of the Convention, the illicit traffic.¹¹⁹ It is important to note that the fact that article 3(1)(a)(i) is not identical to article 36(1) of the 1961 Convention does not admit the possibility of derogation from the provisions for offences in the earlier Conventions; article 23 of the 1988 Convention does not permit such derogation.¹²⁰

The mental element of criminal liability for article 3(1)(a) offences is clear; the opening paragraph of article 3(1) provides that these offences must be committed 'intentionally'. The 1988 Convention goes further, however. Article 3(3) provides that '[k]nowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.' This provision does not refer to the level of proof required to establish fault. In simple terms it allows fault to be established circumstantially.¹²¹ Parties have responded positively.¹²²

3.2.4.2.3 The cultivation offence

Article 3(1)(a)(ii) obliges Parties to criminalise:

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provision of the 1961 Convention or the 1961 Convention as amended;... .

¹¹⁹ See the remarks of the chairman of the Working Group of Committee I - *1988 Records* vol.II at 150.

¹²⁰ Article 23 provides that the provisions of the 1988 Convention shall not derogate from any of the rights enjoyed or obligations endured under the earlier conventions.

¹²¹ This provision was introduced by the Netherlands delegation at the Conference to assist state authorities in establishing the knowledge requirement in the property handling offence (now article 3(c)(i)) - see *1988 Records* vol.I at 101. But the Netherlands delegate's explanation of the necessity for and purpose of this provision applies to all the offences in article 3 that require proof of intention: 'The basic question was, how to ascertain that someone could be considered as knowing that certain property was derived from crime. It could be assumed that the person did not need to know all the particulars of the crime committed. If it was necessary for it to be established in court that the person had actual knowledge, that would be tantamount to depending on a confession by the offender, which would obviously present insuperable difficulties. Some legal systems had incriminated acts of handling where negligence was involved; in other words the offender was criminally liable if in the circumstances he ought to have understood that the property was of criminal origin. In other legal systems it was possible, without expressly making such negligence criminal, to infer someone's knowledge from facts other than the confession of the offender. The term *dolus eventualis* was used in this respect, but it was very difficult to draw a distinction between that and *culpa* in the abstract. The proposed paragraph 1 *bis* [now paragraph 3] was designed to make it clear beyond doubt that, when appraising the evidence establishing knowledge, courts should not have to depend on the confession of the offender but could rely on objective facts from which the knowledge possessed by the offender might be inferred.' - *1988 Records* vol.II at 52-3.

¹²² For example, section 8A.(1) of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, reads: 'If a particular knowledge, intent or purpose is an element of an offence against this Act, that knowledge, intent or purpose may be inferred from objective factual circumstances.'

This provision criminalises the cultivation of the plants which today are a common source of drugs. Under this provision it is the 1961 Convention and its amended version which defines what is lawful conduct with respect to cultivation of plants from which drugs are produced. Thus unlawful conduct is conduct contrary to their provisions.¹²³

The provision demands the criminalisation of 'cultivation', but it links 'cultivation' directly to the provisions of the 1961 Convention. Thus the list of plants is a *numerus clausus* and no new plants can be added without the amendment of the 1961 Convention as well as this provision. There were objections at the 1988 Conference to the inclusion of coca-leaf 'cultivation' as an offence on the basis that this went beyond the stipulations of the 1961 Convention.¹²⁴ Some Parties have made reservations to article 3(1)(a)(ii) because it does not distinguish sufficiently between licit and illicit cultivation.¹²⁵ Yet Parties have criminalised this conduct.¹²⁶

Finally, the opening paragraph of article 3(1) provides that these offences must be committed 'intentionally', and article 3(3) provides that such intention can be inferred from the evidence.

3.2.4.2.4 The offence of possession for the purposes of trafficking

Article 3(1)(a)(iii) obliges Parties to criminalise:

(iii) The possession of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;... .

'Possession' in terms of this provision is rendered unlawful by reference through article 3(1)(a)(i) to conduct contrary to the 1961 Convention, its amended version and the 1971 Convention.

¹²³ The 1971 Convention and the production of psychotropic substances are not mentioned, but it was suggested at the 1988 Conference by the Soviet delegate that production of psychotropic substances is an offence under article 3(1)(a) - *1988 Records* vol.II at 30.

¹²⁴ See the reservation of the Bolivian delegate who stated that such criminalisation in his country would result in massive overcrowding of jails - *1988 Records* vol.II at 154.

¹²⁵ For example, Peru (20/12/1988 – Multilateral Treaties Deposited (1997) at 305) upon signature. Peru also reserved its position in respect of the scope of the 'illicit traffic' as defined in article 1 insofar as it refers to article 3(1)(a)(ii).

¹²⁶ See again, for example, section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. The Act makes dealing in drugs an offence and section 6(1)(a)-f reads: '(1) For

As to the conduct itself, this provision echoes the provision in article 36(1) of the 1961 Convention which can be interpreted to the effect that it criminalises possession for the purposes of trafficking, but not simple possession. Here that distinction is made clear: the criminalised form of conduct is possession, but it is a specialised form of possession because it must be coupled with an intention to carry out one or more of the trafficking offences listed in article 3(1)(a)(i). Parties have responded by enacting such offences.¹²⁷

With respect to the mental element of criminal liability, the opening paragraph of article 3(1) provides that such possession must be intentional, while article 3(3) provides that this intention may be ‘inferred from objective factual circumstances.’

3.2.4.2.5 The offences of the manufacture, transport or distribution of materials used in drug trafficking offences

Article (3)(1)(a)(iv) obliges Parties to criminalise:

- (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;... .

This is an innovatory provision, intended according to the United States delegation to criminalise the conduct of ‘those who knowingly supply essential materials or chemicals to produce or cultivate illegal drugs’.¹²⁸ The existing conventions do not regulate the forms of conduct mentioned in connection with the materials mentioned. It is the 1988 Convention itself which now regulates these forms of conduct in connection with these

the purposes of this Act, each of the following is a dealing in drugs: (a) the cultivation of the opium poppy, coca bush or cannabis plant for the purpose of producing drugs....’.

¹²⁷ See for example, section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. This act makes dealing in drugs an offence and section 6(1)(a)-(f) reads: ‘(1) For the purposes of this Act, each of the following is a dealing in drugs: ... (d) the possession of a narcotic drug or psychotropic substance for the purpose of the manufacture, extraction or preparation of another drug or substance; (e) ... possession for the purpose of sale or supply, of a narcotic drug or psychotropic substance; (f) ... possession for the purpose of such importation or exportation, of a narcotic drug or psychotropic substance; ...’.

¹²⁸ ‘Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 27.

materials and which renders this conduct criminal, but only if they are connected with 'the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances'.

This offence deals essentially with conduct relating to preparatory stages of the illicit creation of drugs, and appears to overlap with article 3(1)(c)(iv) which relates to inchoate offences and degrees of complicity. It involves the 'manufacture',¹²⁹ 'transport' and 'distribution', that is, the making, taking and dispersal of 'equipment', 'materials' or the 'substances' listed in the tables. The 'substances' listed in the tables are precursor substances, substances that are frequently used in the illicit manufacture of narcotic drugs or psychotropic substances. Their diversion into the illicit traffic is regulated by article 12, but these substances are not contraband unless they are dealt with in preparation for the production or manufacture of drugs. The same applies to the 'equipment' and 'materials' mentioned; whether they fall in or out of the scope of the provision depends not so much on the definition of 'equipment' or 'materials' but on the purpose for which they are to be used, that is, illicit drug trafficking.

As with all the other offences governed by the opening paragraph of article 3(1), these offences must be committed 'intentionally'. However, these offences demand a knowledge of a particular kind for criminal liability to follow. The provision itself requires that the alleged offender must have dealt with the materials and so on 'knowing that they are to be used in or for' the proscribed purposes.¹³⁰ Article 3(3) provides that such knowledge may be inferred from the facts.

Parties have put article 3(1)(a)(iv) into operation,¹³¹ although some have extended liability beyond that demanded by its provisions.¹³²

¹²⁹ 'Manufacture' under article 1(1)(n) of the 1961 Convention 'means all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs'.

¹³⁰ The 'Expert Group Report' *1988 Records* vol.I at 12 notes that several of the experts at the meeting which examined the draft of this article (draft article 2(3)) opined that in order for such activities to be criminal 'they had to be undertaken intentionally and with knowledge of their illicit objective' and suggested that establishment of the offence depended on 'prior knowledge of the actual use of materials and equipment for illicit production and manufacture'.

¹³¹ See, for example, section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, which provides that dealing includes: '(1) (fa) the manufacture, transport or distribution of any substance listed in Table I or Table II in the Annex to the Convention or of equipment and materials ...' with the knowledge that they are going to be used for dealing.

¹³² The US's Chemical Diversion and Trafficking Act of 1988, 21 USC section 960(d) (1990), extends liability beyond what article 3(1)(a)(iv) requires, imposing criminal liability on any person who intentionally or knowingly imports or exports a listed chemical, or any person who reasonably believes

3.2.4.2.6 The offences of the organisation, management or financing of drug trafficking

Article 3(1)(a)(v) obliges states to criminalise:

The organisation, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;....

This provision is intended to suppress the logistical backup for illicit drug trafficking and to criminalise the activities of individuals who may never come into contact with drugs, but without whom the illicit traffic could not operate at its present scale. It is designed to reach the highest levels of drug trafficking, levels not reached by the 1961 Convention because the 1961 Convention only addresses the financing of drug trafficking and subjects the obligation to criminalise financing to a domestic limitations clause.¹³³

This provision renders the ‘organisation, management or financing’ of any of the forms of conduct criminalised in the earlier sub-paragraphs of article 3(1)(a) unlawful. What is unlawful conduct then depends on these earlier provisions. The ‘organisation’ of these other offences implies making arrangements for their execution, ‘management’ implies their administration, while ‘financing’ involves provision of pecuniary resources so that they may be carried out. These offences are accessory in nature in that they depend on the commission of other drug offences. It is submitted, however, that they should not depend on the apprehension or conviction of offenders for these primary offences.

Article 3(1)’s opening paragraph provides that these offences must be committed intentionally, while article 3(3) provides that such intention can be inferred from the facts.

that drug traffickers may divert and use a regulated chemical to produce illegal drugs and supplies it to them.

¹³³ ‘Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ from *United Nations Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 27-8. The criminalisation of such conduct has been a priority in the US. Stewart DP ‘Internationalizing the war on drugs: the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ (1990) 18 *Denver Jnl of Int. Law and Policy* 387 at 392 fn17 notes that this paragraph would include such offences under US law as money laundering, 18 USC sections 1956-1957 (Supp 1989); Racketeer Influenced Corrupt Organisations or RICO, 18 USC

Responding to the calls to act against the organisation of drug crime, Parties have enacted article 3(1)(a)(v) offences.¹³⁴

3.2.4.2.7 Laundering offences

Mounting international concern about the use to which the financial system was being put for the “laundering” of the profits of drug trafficking lead to article 3(1)(b)’s inclusion in the 1988 Convention.¹³⁵ It requires Parties to criminalise the following conduct:

(b)(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph;....

Rooted in United States law,¹³⁶ these provisions create new offences¹³⁷ aimed at curtailing money laundering, which in this case is the attempt to convert, conceal,

sections 1961-1968 (Supp. 1989); and Continuing Criminal Enterprises or CCE, 21 USC section 848 (Supp. 1989).

¹³⁴ See again section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, which provides that dealing includes: ‘(1)(fb) the organising, managing or financing a dealing in drugs ...’.

¹³⁵ See generally Magliveras KD ‘Defeating the money launderer - the international and European framework’ (1992) 3 *Journal of Business Law* 161-177.

¹³⁶ See generally Hernandez BE ‘RIP to IRP - Money laundering and drug trafficking controls score a knockout victory over bank secrecy’ (1993) 18 *North Carolina Jnl of Int. Law and Commercial Regulation* 235 at 265-275. The money laundering provisions are in the Anti-Drug Abuse Act of 1986, collectively called the Money Laundering Control Act (MLCA) of 1986 (as amended in 1988 and codified in 18 USC sections 1956 and 1957).

¹³⁷ The incorporation of this provision originally in draft article 3(2) and then in draft article 1(c) did not occur without resistance, some members of the Expert Group complaining that the ambiguous provisions were likely to lead to the criminalisation of *bona fide* business persons and unnecessarily limit free trade - see the 1988 *Records* vol.I at 12. Yet their adoption at the 1988 Conference was not contentious -

transfer or disguise the proceeds of illicit drug trafficking and render them reusable.¹³⁸ Their authors sought not only to criminalise this conduct, but also to bring to bear for the first time the rest of the international system against the practice of laundering drug profits, allowing confiscation, mutual legal assistance and extradition of offenders.¹³⁹

Article 3(1)(b) renders unlawful the 'conversion or transfer' of property or the 'concealment or disguise' of property in the circumstances specified. The tainted nature of this property stems from the fact that it is derived from the illicit trafficking criminalised in article 3(1)(a). These offences are dependent on the enactment and commission of an article 3(1)(a) offence; they are accessory in nature.¹⁴⁰ However, it does not matter whether the offender in the predicate offence has been apprehended or convicted for the offender in the accessory offence to be found liable.¹⁴¹ In some legal systems, if the same person was responsible for the predicate offence and the laundering, he could not be held liable for the laundering.¹⁴² But other Parties provide that these offences can be committed by the drug trafficker who launders his own profits.¹⁴³ It was also suggested at the 1988 Conference that the offences to which this offence is accessory must have been established and committed in the jurisdiction of a Party other than the one in which the offender commits this offence.¹⁴⁴ In the past Parties established

Rouchereau F 'La Convention des Nations Unies Contre le Trafic Illicite de Stupefiants et de Substances Psychotropes' (1988) 34 *Annuaire Francais de Droit Internationale* 601 at 603.

¹³⁸ In money laundering jargon 'placement' involves the physical introduction of the drug proceeds into the financial system, through for example a cash deposit, 'layering' involves the disguising of the origins of the proceeds by creating complex layers of financial transactions, and 'integration' involves the integration of the layered funds back into the economy as legitimate funds. Friman notes: 'Methods used range from simple cash exchanges, cash smuggling, and purchases of bearer instruments (bearer bonds, money orders, cashiers checks, certificates of deposit) to routing funds by means of wire transfer through foreign banks, trusts, shell corporations and brokerage houses. Cross national differences in bank secrecy, tax, and monitoring regulations have offered launderers an array of opportunities to utilize bank transactions.' - Friman HR 'International pressure and domestic bargains : regulating money laundering in Japan' (1994) 21 *Criminal Law and Social Change* 253 at 254.

¹³⁹ See Gilmore *op cit* at 6.

¹⁴⁰ Jurisdictional problems occur if the predicate offence, the article 3(1)(a) offence, has not been criminalised in the domestic law of the Party in which it occurred. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime ETS 141 avoids this problem in article 6(2)(a) by simply applying universal jurisdiction to the predicate offence to which its laundering offence is accessory.

¹⁴¹ Comment of the Jamaican delegate - see 1988 *Records* vol.II at 152.

¹⁴² See, for example, Austria - 1988 *Records* vol.II at 30. Article 3(11) would protect Austrian law in this regard.

¹⁴³ McClean D *International Judicial Assistance* (1992) at 175 contrasting the position under section 24 of the UK's Drug Trafficking Offences Act, 1986, which was remedied by section 14 of the Criminal Justice (International Co-operation) Act., 1990.

¹⁴⁴ See the statement of the Netherlands delegate - 1988 *Records* vol.II at 29.

jurisdiction over the offence only if the predicate offence occurred within their territorial jurisdiction.¹⁴⁵ Today, however, Parties apply the offence to laundering that takes place within their territory whether the predicate offence occurred within their territory or extraterritorially.¹⁴⁶ Finally, some Parties have gone further than required by article 3(1)(b) and extended the offence of money laundering to any other offence to which a link to drugs exists.¹⁴⁷

While article 3(1)(b) provides some detail as to the scope of the offences, it provides no detail as to the institutions or offenders which are covered. It appears to apply to any person, juristic or natural, that engages in money-laundering, and necessarily provides for a comprehensive response to the activity. To ease drafting, the offence has been split into two general forms of conduct.¹⁴⁸

Sub-paragraph (b)(i) relates to the 'conversion or transfer' of the proceeds of article 3(1) offences, that is, of the illicit traffic. Both forms of conduct involve transfer of the title in the property, such transfer being of obvious use to drug traffickers seeking to launder their profits. 'Conversion' involves either the change or alteration of the condition of the property. 'Transfer' involves in its ordinary sense the conveyance or movement of property from one place or person to another¹⁴⁹ These terms are vague, but must include movement or conversion of proceeds by electronic transmission.¹⁵⁰ The words 'from an act of participation in such offence or offences' were included to ensure that the laundering of property derived from conspiracy offences was covered by the offence.¹⁵¹

¹⁴⁵ See Taisch F 'Swiss statutes concerning money laundering' (1992) 26 *The International Lawyer* 695 at 697 setting out the pre-1990 position in Switzerland.

¹⁴⁶ See, for example, section 14 of Botswana's Proceeds of Serious Crime Act 19 of 1990 which makes it an offence to launder 'the proceeds of a serious offence, whether committed in Botswana or elsewhere'. See also the 1990 amendment to the Swiss Penal Code (article 305bis) which provides in subparagraph 3: 'The perpetrator shall also be punished if the principal offence has been committed abroad ...'. Recommendation 4(b) of the 'Report of the Caribbean Drug Money Laundering Conference, 1990' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 25 at 26 is to the same effect.

¹⁴⁷ For example, the UK in its Drug Trafficking Offences Act, 1986. The Financial Action Task Force (FATF) in recommendation 5 of its 1988 Report recommended other states consider doing the same.

¹⁴⁸ 1988 *Records* vol.II at 151.

¹⁴⁹ In its narrow legal sense it is an act by 'which the title of the property is conveyed from one person to another' - *Black's Law Dictionary* (6ed 1990) at 1497.

¹⁵⁰ Draft article 1(j) defined 'laundering' as 'the concealment or disguise of the true nature, source, disposition, movement or ownership of proceeds and includes the movement or conversion of proceeds by electronic transmission;' - see UN Doc. E/CN.7/1987/2.

¹⁵¹ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations*

The language of article 3(1)(b)(i) requires that the conversion or transfer be carried out with the specific intention of either hiding the illicit origin of the property or assisting someone to evade discovery of his illegal actions or the illicit source of his income. These purposes are limiting. For example, a bank that merely transfers funds which it knows to be property derived from an offence will not, absent either purpose, commit an offence under article 3(1)(b)(i).¹⁵² Spencer argues that knowledge of the source of these funds is a weak foundation for attributing either of these two purposes to the bank, and submits that to commit such an offence a bank would have to participate more actively in the scheme.¹⁵³ In essence, knowledge plus action does not always equal purpose. Whether these specific purposes can be inferred will depend on the evidence in any given case, but Spencer's point does illustrate the ambiguity of the provision with regard to the extent to which and the conditions under which someone can be held liable for holding or transferring property which they know is tainted. This ambiguity is further illustrated by Zagaris's point that article 3(1)(b)(i)'s provision that the conversion or transfer of money must be for the purpose of assisting an individual to 'evade the legal consequences of his actions' appears to make it an offence to convert or transfer property for the purpose of providing a legal counsel or defence to the accused.¹⁵⁴

Sub-paragraph (b)(ii) appertains to laundering in the strict sense; it involves the intentional deception of others, especially law enforcement agencies, as to how the property was acquired or derived. Thus the offender must have sought to disguise any of the listed characteristics, viz.: its 'true nature', the essential quality of the property as being derived from trafficking; its 'source', the origin of the property in trafficking; its 'location', the site or place where the trafficking derived property is located; its

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Senate Executive Report 101-15, 101st Congress, 1st Session at 28.

¹⁵² Spencer DE 'Bank liability under the UN Drug Trafficking Convention' (1990) 9 *International Financial LR* 16 at 17.

¹⁵³ *Op cit* at 17.

¹⁵⁴ Zagaris B 'Developments in international judicial assistance and related matters' (1990) 18 *Denver Jnl of Int. Law and Policy* 339 at 343. At 345 he suggests that legal counsel may be protected by article 5(8)'s protection of the rights of *bona fide* third parties in confiscation proceedings, but how such a provision can provide a general excuse in respect of a criminal offence not necessarily involving confiscation is difficult to understand. But he adds that article 3(1)(b)(i) seems only to forbid such transfer or conversion if the person is guilty, and that if it turns out he was not, then such conversion or transfer would not be an offence. The US delegation's answer to the dilemma was to interpret 'evasion' as implying a criminal purpose, and not legal avoidance through the *bona fide* representation of a defence attorney - 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against*

'disposition', the transfer, alienation or giving up of the property derived from trafficking; its 'movement', the change in position or location of the property; the 'rights with respect to' the property, the fact that the rights in the property are held by traffickers; and its 'ownership', the fact that traffickers have *dominium* in the property. There is no requirement that such concealment or disguise must have been made with the intention of facilitating the illicit trafficker in any way, which suggests that the offence has a very broad ambit. Nevertheless, again Spencer doubts whether article 3(1)(b)(ii) would criminalise the conduct of a bank that merely transferred funds at the request of a trafficker that was its customer even with knowledge of the criminal origins of the funds.¹⁵⁵

Both the forms of conduct criminalised relate to 'property' which article 1(q) defines as 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets'. Article 1(p) defines 'proceeds' as 'any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1'. Money being laundered through the international banking system is the main form of 'proceeds' being targeted by this offence.

The opening paragraph of article 3(1) provides that these offences must be committed intentionally, while article 3(3) provides that such intention may be inferred from the 'objective factual circumstances'.¹⁵⁶ These offences demand, however, a special form of knowledge. Both require that the offender must have known that the property was derived from an article 3(1)(a) offence or offences, or from an act of participation in such an offence or offences. It is interesting that in practice, some states

Illicit Traffic in Narcotic Drugs and Psychotropic Substances Senate Executive Report 101-15, 101st Congress, 1st Session at 28.

¹⁵⁵ *Op cit* at 17. He argues that a bank might be considered to conceal or disguise such property only if it helped, 'for example, the trafficker to set up a tax haven corporation with bearer shares and/or "nominee" directors or shareholders to which the bank would transfer the proceeds of an offence.' Yet in reality, the simple transfer of funds is probably the most efficient and rapid method of disguising their origins. It remains arguable on a literal interpretation of the provision that any dealing by a bank or financial institution with the funds constitutes sufficient conduct for a violation of the offence.

¹⁵⁶ Article 305bis of the Swiss *Code Penal* provides that knowledge for the offence of laundering may be established directly by showing actual knowledge or constructive knowledge, or indirectly by reckless disregard or wilful blindness. The position of enforcement officers appears to be that requiring proof of an actual intention as opposed to a suspicion by the launderer of the criminal origins of laundered funds would make successful prosecution very difficult - see comments of Association of Chief Police Officers (ACPO) in House of Lords Select Committee on the European Communities *Report: Money Laundering* (HL Paper 6, HMSO, London, 1990) at 12.

apply negligence as the mental element of laundering offences, and the dominant international trend seems to be in this direction.¹⁵⁷

Article 3(1)(b)'s criminalisation of money laundering is part of the 1988 Convention's general strategy against the financial aspects of drug trafficking. Article 3(1)(c)(i), discussed below, criminalises another aspect of money laundering. All three provisions are complemented by the provision for confiscation in article 5(a) of the proceeds of article 3(1) offences, by the provisions for co-operation in investigating and sharing information on laundering in article 9(b)(ii), and by the provisions for training in uncovering laundering in article 9(2) sub-paragraphs (d) and (e). Compliance with these provisions requires Parties to enact implementing legislation, and Parties have responded positively.¹⁵⁸ Some have enacted new legislation,¹⁵⁹ while others have amended their existing legislation to bring it into line with the provisions' requirements.¹⁶⁰ Indeed, the 1988 Convention's provisions today remain central to the generation of the broadest

¹⁵⁷ The United States Anti-Drug Abuse Act of 1986 which criminalises money laundering extends criminal liability to individuals and financial institutions that 'knew or would have reason to suspect' that 'the property involved in a financial transaction represents the proceeds of some unlawful activity.' The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime *ETS* 141 suggests negligence as the basis for a laundering offence in article 6(3)(a), as do article 2 of the 1992 OAS Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences and Recommendation 6 of the 1990 FATF Recommendations. Recommendation 33 of the 1990 FATF Recommendations is to the effect that national differences in this *scienter* element should not affect the ability or willingness of states to provide each other with mutual legal assistance in regard to combating laundering.

¹⁵⁸ Recommendation 4 of the FATF Report calls for such criminalisation of money laundering in accordance with the 1988 Convention. By 1990 money laundering was already an offence in most FATF states - see the 'FATF Money Laundering Report, 1990' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 4 at 15.

¹⁵⁹ Magliveras *op cit* at 174-177 records the rash of European legislation in the late 1980s and early 1990s criminalising money laundering.

¹⁶⁰ The UK Parliament, for example, had to include specific provisions in the Criminal Justice (International Co-operation) Act, 1990, in order to bring section 24 of the Drug Trafficking Offences Act, 1986, into line with article 3. Dickson A 'Taking dealers to the cleaners' (1991) 141 *New LJ* 1068-1069 (part one of two part article) notes that while section 24 of the 1986 Act only prevented the laundering of proceeds by a third party and not by the drug trafficker himself and also required that there must be a retention of the benefit for the drug trafficker, article 3(1)(b) applied to both categories of persons and made laundering an offence no matter whom the money was intended to benefit. Section 14(1) of the 1990 Act, which brought English Law into line with article 3(1)(b)(i), made it an offence for a person to: '(a) Conceal or disguise any property which is, or in whole or in part directly represents, his proceeds of drug trafficking; or (b) Convert or transfer that property or remove it from the jurisdiction, for the purpose of avoiding prosecution of a drug trafficking offence or the making or enforcement in his case of a confiscation order.' Section 14(2) of the 1990 Act brought English law into line with article 3(1)(b)(ii) by creating offences committed by those who conceal, disguise, convert or transfer the property of a third person, knowing or having reasonable grounds to suspect that it is, or in the whole or in part directly or indirectly represents, another persons proceeds of drug trafficking. Section 14(3) of the 1990 Act, in line with article 3(1)(c)(i), made it an offence for a person to acquire property for inadequate or no consideration when he knows or has reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's drug trafficking proceeds.

possible mobilisation to counter money laundering, a centrality attributable inter alia to it being the only treaty of global reach that criminalises this activity.¹⁶¹

The 1988 Convention's provisions are adequate, but they do not go as far as some would have liked. Gilmore¹⁶² points to their failure to criminalise negligent conduct in respect of money laundering and to provide for the criminal liability of corporations as distinct from their employees.¹⁶³ In addition, they do not criminalise failure to report suspicious currency transactions (suspicion based reporting), or currency transactions over certain thresholds (threshold reporting) or the purchase of certain types of highly mobile financial instruments such as bank cheques and payment orders. Nor do the provisions criminalise the failure to keep correct records on the identification and reporting of the nature, sources, disposition, movement, and ownership of funds. Threshold reporting and record keeping requirements were first developed in the United States.¹⁶⁴ They have proved to be effective weapons against money laundering because they focus on the cash deposit at the bank, the weak link in the money laundering chain as once a deposit is accepted and the bank transfers the funds, the detection of tainted funds by other banks or government authorities becomes highly problematic, especially with electronic transfers. These objective mechanical rules apply whether or not the bank knows or suspects that the funds are tainted. Spencer's argument with respect to the non-

¹⁶¹ Gilmore WC 'International initiatives' in Parlour R (ed) *Butterworths International Guide to Money Laundering Law and Practice* (Butterworths, London, 1995) 15 at 19. Zagaris B, Castilla SM 'Constructing an international financial enforcement subregime: the implementation of anti-money laundering policy' (1993) 19 *Brooklyn JIL* 871 at 908 states that the principle of criminalising money laundering derives primarily from the 1988 Convention.

¹⁶² Gilmore *op cit* at 20-21.

¹⁶³ Unlike recommendation 7 of the FATF Recommendations and article 14(2) of the OAS Model Regulations.

¹⁶⁴ DeFeo MA 'Depriving international narcotics traffickers and other organized criminals of illegal proceeds and combating money laundering' (1990) 18 *Denver Jnl of Int. Law and Policy* 405 at 411 reports on the success of such laws in the US, particularly the Comprehensive Crime Control Act of 1984, Pub. L No. 98-473, 98 Stat. 1976 (1984). The US developed this law over time. In terms of the authority granted in section 5316 of the Currency and Foreign Transactions Reporting Act of 1970, 31 USC sections 5311-5324, the Secretary of the Treasury promulgated regulations requiring banks and other financial institutions to submit detailed Currency Transaction Reports (CTRs) for all cash transactions greater than ten thousand dollars, and Currency and Monetary Instrument Reports (CMIRs) for cross-border transport of cash in excess of five thousand dollars. The Anti-Drug Abuse Acts of 1986 and 1988 (codified in scattered sections of 12 USC, 18 USC and 31 USC) extended these monitoring provisions from cash to bearer instruments ten thousand dollars or more in value, and introduced new prohibitions against structuring multiple transactions to circumvent reporting requirements (see particularly 31 USC section 5324). See also Grilli AM 'Preventing billions from being washed offshore: a growing approach to stopping international drug trafficking' (1987) 14 *Syracuse Jnl of Int. Law and Commerce* 65-88; O'Brien P 'Tracking narco-dollars: the evolution of a potent weapon in the drug war' (1990) 21 *Inter-American LR* 637-677. In 1996 the US made it a legal requirement for financial institutions to file a

applicability of article 3(1)'s laundering provisions to banks that accept and transfer tainted funds knowingly, suggests that the 1988 Convention should have gone further with regulation of professionals operating in the financial sector.¹⁶⁵ It should have imposed 'know your customer' or 'due diligence' provisions,¹⁶⁶ suspicious transaction reporting requirements¹⁶⁷ and threshold reporting requirements.¹⁶⁸ But in 1988, agreement on monitoring and record keeping provisions for certain types of deposit was unlikely, because they are very costly¹⁶⁹ and also raise difficult questions of criminal liability. Although since 1988 there has been a lot of development at the international level in this area,¹⁷⁰ harmonisation of national laws has still not been achieved, and it is difficult to address the need to suppress money laundering without imposing undue burdens on the financial system.

Suspicious Activity Report (SAR) on transactions of five thousand dollars or more that involve potential money laundering or violations of the Bank Secrecy Act.

¹⁶⁵ See Zagaris B 'The emergence of an international anti-money laundering regime' in Atkins D (ed) *The Alleged Transnational Criminal* (1995) 127 at 156.

¹⁶⁶ Article 305ter of the Swiss Penal Code provides: 'Any person who professionally accepts, keeps on deposit, manages, or transfers assets belonging to a third party, and fails to establish with all due diligence the identity of the beneficial owner, shall be punished by imprisonment up to one year's detention or a fine.' See also recommendation 12 of the 1990 FATF Recommendations.

¹⁶⁷ See, for example, recommendation 16 of the 1990 FATF Recommendations. Section 31(1) of South Africa's Proceeds of Crime Act 76 of 1996 makes it an offence not to report a suspicion of laundering but provides that attorney-client privilege remains unaffected, an issue of some concern in other jurisdictions.

¹⁶⁸ See, for example, Australia's Financial Transaction Reports Act, 1988, which provides in section 7 for threshold reporting of all transactions over \$10000, in section 17B for reporting of all electronic fund transfers out of or into Australia, and in section 16 for suspicion based reporting.

¹⁶⁹ Clutterbuck R *Drugs, Crime and Corruption* (1995) reports that US banks make some 6 million CTRs per annum at a cost of \$17 each. UK banks are opposed to currency reporting provisions - See UK Home Affairs Committee Report: *Drug Trafficking and Related Serious Crime* vol.II (1989) at 106.

¹⁷⁰ Hernandez *op cit* at 274 points out that the US has been negotiating bilateral agreements with a number of states to enforce the adoption of US regulations with respect to reporting and record-keeping in amounts in excess of 10 000 dollars, eg. the Agreement between the United States and Venezuela Regarding Co-operation in the Prevention and Control of Money-Laundering arising from Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, 5 November 1990, US Treaty Doc. No.43, 102nd Con., 1st Sess. (1991). Note also that article 3 of the 1991 European Union Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering (Council Directive 91/308, OJ 1991 L166.77) imposes strict identification requirements on anyone opening a bank account or engaging in a transaction of over 15 000 ECUs. The 1992 OAS Model Regulations requires financial institutions to record and verify information about their clients (article 10), make such information available on request to authorities (article 11), record cash transactions in excess of a specified amount and treat multiple cash transactions as a single transaction (article 12), and report suspicious transactions (article 13).

3.2.4.2.8 Offences relating to the handling of property derived from drug trafficking

Article 3(1)(c)(i) criminalises:

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;... .

Article 3(1)(c)(i) criminalises various ways of handling property derived from drug trafficking. It is one of the four permissive provisions in the 1988 Convention, that is, the Parties' obligation to implement is subject to the 'constitutional principles and the basic concepts' of their legal systems.¹⁷¹ Sproule and St Denis explain that this reflects the concerns of many delegates at the experts' meetings that the establishment of these offences would conflict with the basic concepts of their legal systems.¹⁷² The United States delegation noted that one of the reasons for this limitation was that some states did not grant much discretion to prosecutors or police, and it was important to formulate offences that all Parties could agree to that would not sweep innocent conduct such as a purchase by a bona fide purchaser for value within the definition of proscribed conduct.¹⁷³ Although modelled on the limitation clause in article 36(2) of the 1961 Convention which subjects that provision to 'the constitutional limitations of a Party, its legal system and domestic law', the limitation clause in article 3(1)(c) is narrower, reflecting the desire of the delegates to reduce the emphasis on domestic law.¹⁷⁴

¹⁷¹ Colombia has made an express declaration to this effect (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304).

¹⁷² *Op cit* at 270. The Austrian delegation was 'strongly opposed' to the elimination of limitation clauses because certain of these offences were incompatible with Austrian law - *1988 Records* vol.II at 55.

¹⁷³ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 21.

¹⁷⁴ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 7 notes that the draft provisions wording had been much closer to article 36(2) - see *1988 Records* vol.I at 77.

'Constitutional principles' were intended by the Convention's authors to mean written or unwritten basic principles that amount to something less than constitutional limitations so as to avoid the situation where constitutionally enforced freedoms, such as the freedom of expression, provided insurmountable obstacles to criminalisation of some of the forms of conduct listed in article 3(1)(c).¹⁷⁵ 'Basic concepts of the legal system' was intended to refer to the basic principles governing the law of each Party, and thus to reflect the differences in the penal legislation and judicial decisions of civil and common law systems in respect of the offences enumerated, for example, the differences in treatment of the offence of receiving criminal property and the incompatibility of the common law offence of conspiracy with the criminal law of civil law countries.¹⁷⁶

The forms of conduct criminalised by article 3(1)(c)(i) include the acquiring, possessing or using of property that has been used in one of the drug trafficking offences set out in article 3(1)(a). The provision criminalises the conduct of people to whom a drug trafficker gives or sells his property, so that taking such property becomes an offence.¹⁷⁷ Many states had already criminalised dealing in criminal proceeds,¹⁷⁸ but this offence seems to go further, because for one thing, it does not insist that the handler retain a benefit in the property.¹⁷⁹ The offence appears to be directed at integral aspects of money laundering or at the consequences of money laundering, depending upon how widely one defines that activity.¹⁸⁰ It could involve the acquisition of any property or rights in property, something which may lead to absurd results.¹⁸¹ The Netherlands delegate explains the necessity for making the ambit of the offence so wide:

The aim was to criminalise not only the concealment of specific facts regarding the origin, nature and location of the property constituting proceeds itself, but also the concealment of personal or real rights vested in such property. It seemed vital that law enforcement authorities should be aware of any possible third Party

¹⁷⁵ See generally the statement of the Netherlands delegate - *1988 Records* vol.II at 153.

¹⁷⁶ *Ibid.* See also the Working Group of Committee 1 - *1988 Records* vol.I at 104.

¹⁷⁷ Dickson *op cit* at 1069.

¹⁷⁸ For example, the US Anti-Drug Abuse Act of 1986, 31 USC section 5324.

¹⁷⁹ Unlike section 24 of the UK's Drug Trafficking Offences Act, 1986, which was amended by the Criminal Justice (International Co-operation) Act, 1990.

¹⁸⁰ See the debate in the *Financial Action Task Force on Money Laundering: Report* (1990) cited by Gilmore WC *op cit* at endnote 33.

¹⁸¹ For example, the Japanese delegate pointed out that 'it could even cover the purchase of ... oranges at supermarkets.' - *1988 Records* vol.II at 153.

implications including the existence of sham constructions intended to obstruct their possibilities of seizure and confiscation.¹⁸²

The opening paragraph of article 3(1) provides that this offence must be committed intentionally. The handler of the property must know at the time of receiving it that it constitutes proceeds of crime. A person who receives in good faith and then later learns of the criminal origin of the proceeds commits no offence. Thus a bank which accepts a deposit that it does not know is tainted but which it later learns is of criminal origin, commits no offence under article 3(1)(c)(i). If however, the person subsequently deliberately conceals or disguises the criminal origin of the property from investigating authorities he will violate article 3(b)(ii), the laundering offence proper. If the person subsequently uses the knowledge he has acquired to make an unjustified profit for himself or another by converting the proceeds into other property or by transferring them, then he will violate article 3(b)(i).¹⁸³ Article 3(3) provides that '[k]nowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.'

Despite its novelty and the potentially broad net of criminal liability that it creates, states have enacted this offence.¹⁸⁴

3.2.4.2.9 Offences relating to the possession of equipment, materials or substances to be used in the illicit cultivation, production or manufacture of drugs

Article 3(1)(c)(ii) criminalises:

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit

¹⁸² *1988 Records* vol.II at 52.

¹⁸³ See the remarks of the Netherlands delegate - *1988 Records* vol.II at 52.

¹⁸⁴ For example, section 6 of the South African Drugs and Drug Trafficking Act 140 of 1992, entitled 'Acquisition of proceeds of defined crime', reads: 'No person shall acquire any property, knowing that any such property is the proceeds of a defined crime.' Defined crimes include all the drug and economic offences proscribed in article 3(1) of the 1988 Convention.

cultivation, production or manufacture of narcotic drugs or psychotropic substances;... .

Almost identical to the provision in article 3(1)(a)(iv) which criminalises the manufacture, transport or distribution of materials used in drug trafficking offences, because of the controversial nature of the material to which it applies, this offence was dissociated from that provision in order to allow it to be subject to the constitutional principles and the basic concepts of the Parties' legal systems.¹⁸⁵

As to the conduct itself, the provision anticipates that equipment, materials or the substances in Tables I and II will be used in the creation of drugs, and thus criminalises their possession if that is their purpose. The processes of creation, manufacture, cultivation and production were defined originally in the 1961 Convention.¹⁸⁶

Finally, the opening paragraph of article 3(1) provides that these offences must be committed intentionally. However, the provision requires that the offender must have known that the material was being or was going to be used for the creation of drugs in any of the ways stipulated. Article 3(3) provides that such intention and knowledge can be 'inferred from objective factual circumstances.'

Although this provision is novel with regard to the material to which it applies, Parties have responded positively.¹⁸⁷

3.2.4.2.10 Incitement or induction offences

Article 3(1)(c)(iii) criminalises:

(c) Subject to its constitutional principles and the basic concepts of its legal system:

¹⁸⁵ 1988 *Records* vol.I at 14.

¹⁸⁶ 'Manufacture' under article 1(1)(n) of the 1961 Convention 'means all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs'; 'cultivation' according to 1(1)(i) 'means the cultivation of the opium poppy, coca bush or cannabis plant' and no other plant as the 1961 Convention does not deal with any other plant; and 'production' under article 1(1)(t) means 'the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained.'

¹⁸⁷ Section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, provides that dealing includes: '(1) (g) the possession of any substance listed in Table I or Table II in the Annex to the Convention or of any equipment or materials, ...' with the knowledge that they are going to be used for dealing.

(iii) 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;... .

This provision is designed to penalise any act of 'overt encouragement which might induce persons to participate in any aspect of illicit drug trafficking.'¹⁸⁸ A novel provision, it is among those offences subject to the constitutional principles and the basic concepts of the Parties' legal systems.¹⁸⁹

The provision criminalises the incitement or induction, by any means, of others to commit any of the article 3 offences or to use illicit drugs (use not being an offence under article 3). This offence is among those criminalising inchoate conduct; the inciter does not complete the drug offence himself, he encourages others to do so by some form of communication which must reach the mind of the incitee. It is immaterial whether the person being encouraged actually commits the offence. Induction involves the introduction of someone to trafficking or using drugs. Whether or not they actually do so is irrelevant.

The opening paragraph of article 3(1) provides that these offences must be committed intentionally while article 3(3) provides that such intention 'may be inferred from objective factual circumstances.'

Parties have also responded positively to this provision, broadening their legislation in respect of incitement of drug offences.¹⁹⁰

¹⁸⁸ See the remarks of Mexican delegate who introduced the original much more extensive version of this provision - *1988 Records* vol.II at 53.

¹⁸⁹ The United States delegation were concerned that it was unconstitutional - 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 28.

¹⁹⁰ Section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, provides that dealing includes: '(2) (c) inciting to, urging or encouraging, any conduct that is, under subsection (1), a dealing in drugs.' Incitement of drug offences was an offence in many jurisdictions prior to the 1988 Convention, eg. section 17 of the UK's Misuse of Drugs Act, 1971. But these earlier inchoate offences were limited by the narrow scope of then applicable drug trafficking offences.

3.2.4.2.11 Inchoate drug trafficking offences and degrees of complicity in drug trafficking offences

Article 3(1)(c)(iv) criminalises:

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Of the offences provided for in article 3(1)(c), it is probably the inchoate offences and degrees of complicity provided for in article 3(1)(c)(iv) that the authors of the article had in mind when they subjected the provision to the constitutional principles and the basic concepts of the Parties' legal systems. These offences were specifically in the author's minds because they include concepts that are not universally recognised, such as 'conspiracy'.¹⁹¹

The inchoate forms of conduct criminalised includes 'attempts' and 'association or conspiracy', examined above under article 36 of the 1961 Convention. All are accessory in nature in that they depend on the commission of one of the other article 3 offences. Complicity here includes 'participation in' and 'aiding, abetting, facilitating and counselling', all forms of participation which involve some furthering or promotion of the offence committed by another. This provision potentially criminalises a broad range of conduct. It is intended to help prosecutors who cannot show actual sale and so on of drugs or laundering of proceeds by accused persons but against whom there is strong evidence of participation in an overall trafficking scheme. But it may go too far. Spencer questions, for example, whether the provision criminalises the simple transfer of

¹⁹¹ See the 'Expert Group Report', *1988 Records* vol.I at 14. Although limited under both the 1961 and 1971 Conventions, the corresponding provision was not limited in the 1936 Convention and its limitation in the 1988 Convention has been questioned in the light of the seriousness of the conduct involved and particularly because it involved the brains behind drug trafficking - see the statement of the Indian delegate in plenary, *1988 Records* vol.II at 30, 53. But the US delegation noted that conspiracy offences are not titled the same in different states and do not have the same elements - 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in*

funds during a normal banking transaction by a bank at the request of the customer when the bank knows the funds to be the proceeds of a drug trafficking offence.¹⁹² He suggests that some further active participation in an offence would be necessary, but upon a strict construction, such a transfer may be interpreted as facilitating the commission of one of the laundering offences or even the trafficking offences in article 3(1) and thus it falls under article 3(1)(c)(v).

In terms of article 3(1) these offences must be committed intentionally, and article 3(3) provides that such intention 'may be inferred from objective factual circumstances.'

In practice, Parties have enacted broad provisions in this regard.¹⁹³

3.2.4.3 Demand related offences under the 1988 Convention

Early drafts of the Convention failed to address the issue of personal use offences.¹⁹⁴ 'Illicit traffic' was defined so as to include most of the offences contained in article 36 of the 1961 Convention, but possession was limited to possession for the purpose of distribution. Successive drafts omitted simple possession reflecting the general view among delegations that the Convention was a tool for the suppression of what they considered to be the more serious aspects of the drugs problem rather than for criminalising trivial conduct like possession for personal consumption. The Mexican delegation, opposing the general view because it assigned responsibility for illicit drug suppression to the producer states, an imbalance reflected in the Convention's provisions, argued that the Convention should address all aspects of the illicit drug problem including personal use. Delegations opposed to the inclusion of a personal use offence, particularly delegations from consumer states like the United States, argued that it would be impractical to require Parties to render expensive and time-consuming legal assistance for relatively minor offences. As a compromise between the two positions, the Conference agreed that although a personal use offence should be added to the

Narcotic Drugs and Psychotropic Substances Senate Executive Report 101-15, 101st Congress, 1st Session at 28.

¹⁹² *Op cit* at 18.

¹⁹³ Section 6 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, provides that dealing includes: '(2) (a) a conspiracy or attempt to engage in conduct that is, under subsection (1), a dealing in drugs; (b) being a party to any dealing in drugs referred to in subsection (1); (ba) aiding, abetting, counselling or procuring, or being by act or omission in any way directly or indirectly knowingly concerned in, any conduct that is, under subsection (1), a dealing in drugs; ... '

Convention, it should not be a subject of co-operation among Parties as provided for in other articles. Article 3(2) is the net result:

(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.¹⁹⁵

Article 3(2) represents an apparent victory for the producer states in their dispute with consumer states about what is the root of the drug problem, that is, production or consumption. But we cannot ignore the fact that many producer states also have large numbers of consumers in their populations and therefore criminalising possession for use under the Convention is self-directed.

The major distinction that is drawn between the drug trafficking offences in article 3(1) and the personal use offence in article 3(2) is that the obligations imposed in respect of extradition, confiscation and mutual legal assistance do not apply to the latter. As well as avoiding expense and logistical problems, this distinction also allows Parties to impose alternative sanctions such as treatment and rehabilitation to article 3(2) offences rather than be obliged to incarcerate such offenders.¹⁹⁶

It is not surprising that article 3(2)'s controversial obligation is made subject to the 'constitutional principles and basic legal concepts of [the Party's] legal system'. Thus Parties would not violate the Convention if criminalisation of its personal use offences was held to be unconstitutional.¹⁹⁷ Whether legislative decriminalisation of, for example

¹⁹⁴ See generally Sproule and St-Denis *op cit* at 269-270 citing UN Doc. E/CONF.82/3 20 July 1988 at 13 and UN Doc. E/CONF.82/C.1/SR.24 at 4.

¹⁹⁵ Article 3(2) is not the only consumption related measure in the Convention. Article 14(4) also attempts to balance the distribution of obligations between producer and consumer states by providing that consumer states 'shall adopt measures aimed at reducing or eliminating illicit demand for narcotic drugs and psychotropic substances...'. The wording of the provision as a whole suggests that these measures should be non-penal in nature (see Chapter Six below).

¹⁹⁶ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 30.

¹⁹⁷ In spite of this, the Colombian Constitutional Court's declaration in May 1994 that the possession and consumption of small quantities of cannabis, cocaine and methaqualone was in effect legal was viewed as

possession of cannabis, could be seen to be part of the 'basic concepts' of a legal system and thus also escape article 3(2)'s obligation is unclear.¹⁹⁸ Yet some Parties have made reservations to article 3(2)'s criminalisation of personal use on constitutional grounds and because it conflicts with the basic concepts of their legal system.¹⁹⁹ Other Parties have anticipated that the basic concepts of their legal systems may change, obviously anticipating that changes such as decriminalisation may occur in future.²⁰⁰

The provision criminalises possession, purchase and cultivation for use 'contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.' Once again the earlier conventions define what is lawful and by implication what is unlawful possession, purchase and cultivation. Given the ambiguities surrounding the delimitation of lawful conduct under these earlier conventions²⁰¹ as pointed out particularly in the discussion above of possession as an offence under the 1971 Convention, it is not easy to discern what conduct is rendered unlawful by article 3(2). One might question, for example, whether possession of a Schedule II psychotropic

'not in conformity with the provisions of the international drug control treaties' by the INCB - INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 33. Given the chapeau in article 3(2), such statements and decisions like that of the South African court in *Prince v President of the Law Society, Cape of Good Hope and Others* 1988(8) BCLR 976 (Cape) rejecting a claim that the possession of cannabis was protected by constitutional right to freedom of religion (the appellant was a Rastafarian) inter alia because international law obliged South Africa to criminalise such conduct (at 985), are wrong.

¹⁹⁸ The INCB clearly does not believe it can because the INCB stated that Italian legislation repealing the non-medical prohibition on drugs passed after a referendum in April 1993 was not in line with article 4(c) and 33 of the 1961 Convention or article 3(2) of the 1988 Convention - INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 52.

¹⁹⁹ Bolivia has made a reservation (20/8/1990 - *Multilateral Treaties Deposited* (1997) at 303) to the effect that article 3(2) is inapplicable in Bolivia to the extent that it may be interpreted as establishing 'as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption'. It declares that such an interpretation 'is contrary to principles of its Constitution and basic concepts of its legal system which embody respect for the culture, legitimate practices, values and attributes of the nationalities making up Bolivia's population.' Bolivia justified the making of the reservation on the basis of the historical use of coca leaf, pointing out that it is not a drug, its use does not cause significant harm, it is widely used for medicinal and industrial purposes, criminalisation of its consumption would result in a large part of the Bolivian population being criminals and its transformation into cocaine etc. takes place using precursors that do not originate in Bolivia. Colombia only goes as far as declaring that article 3(2)'s obligation is conditional upon respect for its constitutional principles (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304).

²⁰⁰ See the declaration made by the Federal Republic of Germany (20/11/1993 - *Multilateral Treaties Deposited* (1997) at 304).

²⁰¹ The authors of article 3(2) must have had in mind the obligation on Parties in the earlier conventions to limit use and possession to medical and scientific purposes (article 4(c) of the 1961 Convention and article 5(2) and (3) of the 1971 Convention). But the extent of that obligation depends to a large extent on the type of substance involved and under which control regime it falls in terms of the general scope of control provisions (articles 2 and 3 of the 1961 Convention and article 2 of the 1971 Conventions), as well as the impact of any special provisions relating to that substance (for example article 28(3) of the 1961 Convention relating to the misuse of cannabis leaves).

substance is an offence under article 3(2) when the 1971 Convention provides in terms of article 5(3) that it is only 'desirable' that the Parties do not permit possession except under legal authority of the substances in Schedules II, III and IV. The precise material delimitation of the scope of article 3(2) is beyond the scope of this study, but it would require careful investigation in respect of each particular substance.

The provision criminalises three forms of conduct associated with personal use of drugs, but it is interesting that use of drugs itself is not criminalised. 'Possession' involves some form of control of the drug and knowledge of control but must be distinguished from 'possession' in article 3(1)(a)(iii) because in article 3(2) the purpose of possession is not drug trafficking, it is personal use. 'Purchase' involves the buying of drugs but once again it must be for the purpose of use and not drug trafficking, in order to distinguish it from 'purchase' in article 3(1)(a)(iii). Finally 'cultivation', which involves the nurturing of a plant from which drugs are produced, is also only criminal under this provision if it is done with the purpose of use and not trafficking, in order to distinguish it from 'cultivation' in article 3(1)(a)(ii).

Article 3(2) makes it clear that the personal use offences must be 'committed intentionally'. Such intention can be inferred in terms of article 3(3).

The 1988 Convention's criminalisation of simple possession indicates that demand reduction can involve the application of the criminal law. But whether the criminalisation of such conduct will achieve a reduction in consumption is uncertain. Moreover, as Chatterjee points out, 'according to criminologists, social workers, medical practitioners and psychologists attribution of criminality to drug addicts may conflict with the process of therapy and treatment.'²⁰² The reality is, however, that the developing states who sponsored article 3(2) seldom have the financial wherewithal to engage with users in any other way than treating them as criminals, and because there are so many users developing states choose to ignore them. State practice in the developed world has shown a steady trend toward the *de facto* decriminalisation of simple possession. It seems unlikely that the massive invasion of human rights associated with the draconian law necessary to suppress demand is possible in the developed world, given the growing tolerance of drug use. While most states still criminalise possession, a growing trend towards legalisation or decriminalisation of

²⁰² Chatterjee SK *Drug Abuse and Drug Related Crimes* (1989) at 65.

possession can be identified.²⁰³ Leroy submits that the 1988 Convention's provision in article 3(4)(d) for measures of treatment and so on to be applied by Parties as an alternative to or in addition to conviction or punishment, allows Parties a measure of discretion in whether they criminalise possession in terms of article 3(2) through repressive provisions or health measures.²⁰⁴ With respect, however, article 3(4)(d) only provides an escape route from violation of the 1988 Convention's obligation in article 3(2) to those Parties that criminalise and then choose as a matter of administrative policy not to prosecute or punish.²⁰⁵ Those Parties that actually remove all legal sanction from the possession of even small amounts of drugs violate article 3(2) and the 1988 Convention unless their actions fall within article 3(2)'s escape clause.

3.2.4.4 The 1988 Convention's penal provisions appraised

Sproule and St Denis argue that article 3(2)'s criminalisation of possession for personal use confirms that demand is a major part of the international drug problem.²⁰⁶ The focus of the Convention's penal provisions is, however, obviously on supply. Article 3(1) broadened the scope of the offences contained in earlier conventions in response to the perceived international threat presented by traffickers who never handle drugs but organise, finance, and profit from international trafficking.²⁰⁷ Commission by offenders of one or more of these more extensive offences relating to the 'illicit traffic' triggers the extensive provisions for co-operation in respect of enforcement and prosecution of offenders. These "core" offences are the key to the rest of a system of international co-operation which is rapidly growing more extensive and complex in response to a parallel growth in the size and complexity of the illicit drug traffic.

These offences suffer from ubiquitous problems of international criminal legal instruments - the necessity of accommodating both the technical differences between the different criminal legal systems of states in order to get uniformity, and the

²⁰³ As noted, the Colombian Constitutional Court legalised possession of small amounts of drugs in May 1994, and in April 1993 the German Constitutional Court ruled that possession of small amounts of drugs need no longer be prosecuted - *Newsweek* 4 July 1994. In November 1996, California legalised the use of cannabis for medical purposes and Arizona allowed doctors to prescribe any drug for medical treatment and approved treatment and not incarceration for illegal possession - *The Guardian* 22 February 1997.

²⁰⁴ Leroy B 'European legislative systems in relation to demand in 1993: recent developments and comparative study' in Estievenart G (ed) *Policies and Strategies to Combat Drugs in Europe* (1995) 112 at 114.

²⁰⁵ The position in the Netherlands.

²⁰⁶ *Op cit* at 291.

unwillingness of states to accept in practice the burdens imposed by international law

- both problems being overcome, from international law's point of view, by the questionable method of reliance on limitation clauses. States have a different view of the creation of "international crimes". The Venezuelan delegate to the 1988 Conference illustrated this when he queried the application of the limitation clause only to article 3(1)(c); he said '[f]or the recognition of any offence, at least in Venezuela, it was a *sine qua non* that the domestic legal system must be respected.'²⁰⁸ The transformation of article 3's "offences" into concrete provisions with practical effect by the Parties will be the measure of their success. Wells notes that

while the general level of legislative implementation of the more "classical" trafficking activities has been broadly satisfactory, it has been much less so with the newer offences relating to the crucial facilitating or support activities of money laundering and illicit precursor supply.²⁰⁹

3.2.5 Conclusion - criticisms of the provisions for offences

The international provisions for drug offences can be criticised in terms of the three aspects of criminal liability, viz.: unlawfulness, conduct and fault.

Drug associated conduct becomes unlawful through the translation into a Party's domestic law of its international obligations under the drug conventions, limited by the existence of the constitutional and domestic safeguard clauses in these conventions. The conventions do not have the same normative strength with respect to Parties as domestic legislation has with respect to its subjects. The existence of the limitation clauses and the broadness and ambiguity of the Conventions' provisions allows domestic encroachment on almost all international obligations. This encroachment is not uniform from Party to Party and leads to irregular domestic drug offences. Lack of uniformity undermines the concept of an international criminal drugs law. Differences in the national grammars of criminal law means that the drug conventions can only provide frameworks for

²⁰⁷ Gianaris WN 'The new world order and the need for an international criminal court' (1992/3) 16 *Fordham ILJ* 88 at 99.

²⁰⁸ See 1988 *Records* vol.II at 152.

²⁰⁹ Wells A *International Legal and Policy Framework* (unpublished conference paper, New Delhi Global Drugs Law Conference, 1997) at 13.

harmonisation of drug suppression law. Agreement on a core of general principles is necessary for the growth of a uniform international criminal law suppressing drugs.

With respect to the conduct itself, specifying the forms of conduct has proved more popular than using a general formula. In result, international law has had a greater impact on the shaping of domestic criminal law than it would otherwise have had. However, the detailing of these obligations is still unlikely to result in a uniform global illicit drugs law. Each of the foundation offences set out in the conventions involves attaching a particular verb, such as 'sale', to a noun, usually 'drugs' or some type of material used in the drug traffic, with the intention of covering most of the facets of demand and supply of illicit drugs. Whether this approach covers all the facets of 'illicit drug traffic' is a matter of interpretation. The conventions have on the whole left the definition of these verbs and thus the definition of the content of the offences to the Parties. The official UN commentaries and the conference records only provide a supplementary guide for states about what the international community believes the contents of these offences should be. These offences were of course drafted with particular activities in mind, and as has been seen, it is not difficult to give a definition to each of them. But it is possible at the domestic level to construe each offence to mean something different, and this has happened.²¹⁰ Loose definition of non-self-executing international penal provisions inhibits the growth of an international criminal law of drugs. This criticism is probably most apposite to offences which Parties find difficult to adapt their law to, such as the inchoate offences and complicity, where wide domestic variation necessitated the broadest of provisions. While these provisions successfully accommodate domestic variation they do not provide a specific and rigorous guide to the Parties on how to formulate their law. Internationally they make possible a common terminology, not content, harmony, not uniformity. Broad implementation has been the focus of international law rather than accurate definition. The international drug control organs have been primarily concerned with getting states to implement the various offences as broadly defined. It appears that the classic trafficking offences relating to illicit cultivation, production, manufacture, trafficking, possession for trafficking and so on set out in all three of the major conventions are fairly commonly legislated by states, although offences relating to incitement to traffic and purchase for traffic are not as

common.²¹¹ The international obligations to criminalise preliminary drug supply and production actions such as attempts and conspiracy, as well as all forms of participation in drug production and supply not only by principals but by accomplices, all appear to have been complied with by states.²¹² Some of the more abstract trafficking related offences, most of which were introduced in the 1988 Convention, such as holding of equipment, trafficking in precursors, money laundering, receiving and or possessing the proceeds of trafficking are not as commonly legislated.²¹³ Personal use offences, laid down clearly in the 1988 Convention, are commonly legislated, although state practice is inconsistent.²¹⁴ It appears that the 1988 Convention's new offences are not as widely

²¹⁰ Cotic D *Drugs and Punishment* (1988) at 100 fn10 points out, for example, that while in Japan forty two offences relate to drug production in four separate laws, in the Cote d'Ivoire there is only one such offence.

²¹¹ Wells *op cit* reveals in Appendix E the UNDCP's broad survey of domestic legislation penalising drug offences. While some of this information is outdated and many Parties that may well have enacted these offences have not supplied the UNDCP with information, it does reveal broad trends:

<u>Trafficking Offences</u> (out of 91 states)	
Illicit cultivation (1961;1971;1988)	82
Production/manufacture (1961;1971;1988)	90
International trafficking (1961;1971;1988)	91
Domestic trafficking (1961;1971;1988)	91
Trafficking by users (1961;1971;1988)	90
Incitement of trafficking (1988)	41
Possession of drugs for trafficking (1961;1971)	88
Acquisition of drugs for trafficking (1961;1971)	65

Cotic *op cit* notes that surveys of the legislation and practice of 31 selected states from three major areas - Europe, Africa/Asia, and South America reveals that most states are carrying out their international obligations to punish drug production and supply (he discusses Europe at 22,34; Africa/Asia 65; Latin America 93).

²¹² Cotic *op cit* at 99.

²¹³ See Wells *op cit* who gives the following figures in Appendix E:

<u>Trafficking Related Offences</u> (out of 99 states)	
Possession/holding of equipment (1988)	43
Trafficking in precursors (1988)	33
Organisation/financing/direction of traffic (1961;1971;1988)	71
Laundering (1988)	43
Receiving/possessing/trafficking property/proceeds (1988)	44
Regulatory offences (licit activities) (-)	53
Aggravating circumstances (1988)	47

²¹⁴ See Wells *op cit* in Appendix E:

<u>Use and related offences</u> (out of 97 states)	
Use (-)	66
Possession/holding/acquisition for personal use (1988)	75
Incitement to use (-)	57
Facilitating use (-)	74

conformed to as the offences introduced in the older conventions, which indicates that the general process of indirect application of international drug crime is slow. With regard to the actual prosecution of such offences information is limited, but it appears from the practice of states that personal use offences still account for the vast majority of prosecutions,²¹⁵ followed by general trafficking offences, with relatively few prosecutions of the 1988 Convention's new offences.²¹⁶

The mental element of criminal liability for these drug offences suffers from the same problems of definition as the conduct element. While it appears to be precisely defined by being limited with respect to all the international drug offences to 'intention', no effort to define intention is made and variations in definition will occur from Party to Party. While Parties are allowed through the rules of treaty interpretation to interpret these provisions in accordance with their own practice, the application of dangerous notions like conscious negligence as the fault element of drug offences, remains possible. Therein lies the dilemma of those attempting to formulate an international criminal law of drugs: more specific provisions may mean either more universal uniform law, or non-compliance with conventional obligations and no law at all. The key is the willingness of states to adapt entrenched principles to suit new international legislation, an international legislation with a distinct common law bias.

Although there has never been a systematic investigation of the extent to which Parties have established the offences and provided for the penalties set out in the drug conventions,²¹⁷ a uniform system of domestic drug offences does not appear to exist at present. Bassiouni suggests that the way to overcome these problems is to attach to a

Convenience prescriptions (-)	65
Use of falsified prescriptions (-)	49

Cotic op cit reveals the ambivalence of state practice with respect to possession, particularly in Europe (at 46) where some states adopt a much more repressive approach than others, and most states distinguish possession for use and possession for gain. Only two states do not incriminate possession for personal use - Denmark and the Netherlands. In Africa/Asia (at 80) possession was equalised with trafficking and production, and there was little legislation allowing for lighter punishment. In Latin/America (at 94) a distinction was made between possession for use and possession for trafficking, although all states criminalised possession.

²¹⁵ This is true for example, in respect of Australia, see Allsop S, Nicholas R 'Harm minimisation' in *Souvenir Brochure of the International Conference on Global drugs Law* (Indian Law Institute, New Delhi, 1997) 22 at 23.

²¹⁶ Prosecution of these offences in jurisdictions such as the US where they have been in place for some time is common, but in less sophisticated jurisdictions or those untouched by money laundering etc. prosecution appears uncommon. For example, while South Africa has had the latter offences in place for six years, it had not by 1997, to the author's knowledge, prosecuted any of them.

²¹⁷ INCB *Report of the International Narcotics Control Board for 1994* UN Doc. E/INCB/1994/1 at 6.

comprehensive convention on drug control a proposed model statute that would set out the offences in detail and which could be adopted by each state according to its national legal system.²¹⁸ Such a solution would involve a fairly extensive intrusion of international law into the domestic domain. The present approach is a half-measure dictated by the attitude of an international society unready to shoulder the obligation of a uniform system of drug related offences. The success of a suggestion like Bassiouni's depends on the growth of a shared perception by most nations that no other alternative is possible.

In addition to resistance of domestic penal law systems to change, a uniform international criminal drugs law must also overcome the political dynamic impacting on the drug conventions. Supply states want consumer states to take more responsibility for the drug problem and thus they have forced the criminalisation of personal use offences. The dominance of consumer states means that supply states and transit states carry much of the burden of international obligations directed at the illicit traffic, a burden beyond the latter's capacity. Uniformity of state practice is not likely to flow from provisions that reflect these divisions in opinion on who bears responsibility for the drug problem. The criminalisation of supply and demand is seen by Rouchereau to be logical in terms of effective drug prohibition which must fight both production and use.²¹⁹ It is logical in terms of international prohibition, but it is illogical if we look beyond prohibition to the possibility of treating drug use as a social and medical problem, while maintaining an umbrella of legal protection over users through the prohibition of supply. Supply and consumer states are caught up in the same legal paradigm of control; each holds the other responsible, each tries to use international law to fix that responsibility. Progress will depend upon stepping out of that paradigm.

²¹⁸ See Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 523.

3.3 Penalties

3.3.1 Introduction

May records that the Turkish Sultan Murad IV (1612-1640) forbade the use of opium on pain of death.²²⁰ Yet until relatively recently in historical terms, drug use and drug trafficking either went unpunished, or else it was sporadic and varied in nature and severity from state to state. The advent of international regulation, however, prompted a general movement towards ever more uniform and ever more severe punishment. Commenting on the need for the 1936 Convention, Bailey remarked that penalties for drug traffickers should not be merely pecuniary, nor consist only of short terms of incarceration, and that the major profits made by traffickers should mean heavy sentences.²²¹ International attitudes to punishment of drug traffickers have generally followed this line. Thus, for example, a 1961 CND Resolution called for 'adequate' sentences and this was interpreted by many CND members as severe punishment.²²² The drafters of 1961 Conventions were also motivated by the desire to punish drug offenders heavily.²²³ The motivation to punish drug offences heavily is one which originates in the domestic practice of certain states, especially the United States.²²⁴ The transfer of the notion of the necessity to punish drug offences severely through the medium of international law to other states is easy to identify.²²⁵

²¹⁹ *Op cit* at 603.

²²⁰ May HL 'The evolution of the international control of narcotic drugs' (1950) 2 *Bulletin on Narcotics* 1 fn 1.

²²¹ Bailey SH *The Anti-Drug Campaign: An Experiment in International Control* (1935) 115.

²²² See Bruun K, Pan L, Rexed I *The Gentlemen's Club* (1975) at 238.

²²³ See, for example, the various statements of delegates in the *1961 Records* vol.II at 238ff.

²²⁴ The template for punishment of drug offences was designed in modern US law during the period before and after the Second World War. In 1953, Anslinger and Tompkins in the *Traffic in Narcotics* advocated the following approach which gained widespread legislative approval: for addicts they supported lengthy probation periods with enforced submission to hospital treatment, enforced monthly medical examinations as a probation condition, regular reports after discharge and comprehensive follow up care; for traffickers they advocated maximum sentences with no probation, parole or suspension of sentence, minimum sentences of five years except for informers, no plea-bargaining for lighter sentences, prosecution of every case and maximum sentences for sale to minors.

²²⁵ Dorn N, Murji K, South N *Traffickers: Drug Markets and Law Enforcement* (1992) give a short history at 177-179 of the punishment of drug offences in the UK, which serves as a good example. It was only after World War One that the modern drug control structure emerged. Motivated by the need to ratify international treaties, Parliament made it an offence in the Dangerous Drugs Act, 1920, to import, distribute or possess morphine, heroin and cocaine. The maximum penalty was six months in prison or a fine of £200. The Dangerous Drugs and Poisons (amendment) Act, 1923, increased the penalties to £1000 or ten years. The Misuse of Drugs Act, 1971, brought Britain into line with post-war international conventions and distinguished in penalty terms between possession offences and supply offences. In the 1980s drug dealing became drug trafficking, an image-shift to a more violent character deserving of the far more severe punishment made possible by the Drug Trafficking Offences Act, 1986.

The major problem confronted by the international illicit drug control system when it began to attempt to harmonise punishment was that some states had much harsher sentencing policies than others. Similar offences were punished completely differently. A UN study of the sentencing policies of selected states in 1972 concluded that there was an 'obvious lack of a common international view on the subject.'²²⁶ The study noted vastly different concepts of what constitutes fit punishment for a particular offence, but ascribed these differences to differences in local conditions. The study urged harmonisation of legislation on drug penalties, prompting Bruun et al to comment that the CND's pursuit of uniformity was effectively a pursuit of greater severity.²²⁷ A later UN study revealed that trafficking and production offences were more likely to receive severe punishment than simple possession, and in respect of both types of offences, the quantity of drugs involved²²⁸ and the dangerousness of the drugs played a large role in determination of sentence, with some states differentiating between hard drugs such as heroin, cocaine, opium and morphine, and soft drugs such as cannabis and its products.²²⁹ But this study also revealed that harsh legislation and maximum sentencing provisions were not usually applied, and in most states authorities applied a great number of suspended sentences and fines.²³⁰

Unsurprisingly, given the expansion of the drug market, the major emphasis of the international system today is on the severe punishment of producers and traffickers. Severe sentences are intended to function mainly as a deterrent, but coupled with prosecutorial discretion they also act as an enforcement tool against the illicit traffic.²³¹ Driven to punish severely, the modern punishment options for trafficking offences are still fairly limited.

²²⁶ Memorandum on Penal Sanctions for Narcotics Offences, 1972 MNAR/3/72 - cited by Bruun et al *op cit* at 238.

²²⁷ *Op cit* at 239.

²²⁸ For example, Afghanistan's Law on Combating Drugs, 1991, punishes the production of cannabis as follows: less than 50gms of cannabis with less than three months imprisonment; 50gms - 1kg with a short term of imprisonment of more than three months; 1 - 10kgs with a long term of imprisonment; more than 10kgs with from 7 years to life.

²²⁹ *Cotic op cit* at 118. For example, in Vietnam the import or export of opiates may in terms of Decree No. 008-TT/SLU may result in the death penalty in certain circumstances, where as the most severe penalty for the same conduct in respect of cannabis is forced labour for life.

²³⁰ *Op cit* at 12, 119.

²³¹ In many common law systems the prosecutor or the police manipulate the charge and plea bargain process with the motive of pressurising the accused person to co-operate with the police in getting at traffickers.

At the top of the list in terms of severity and human rights abuse is capital punishment. The death penalty for drug related offences is the source of many of the official executions taking place in the world today.²³² It is applied by states largely as a way of avoiding the need to tackle the real problems of enhanced law enforcement necessary to achieve sustained results against the illicit traffic. It is often used by developing states as a sop to international pressure for greater drug control because they can ill-afford the levels of drugs-policing being called for by developed states.²³³ Okagbue notes that there is little uniformity in its use; it may depend on the particular drug involved, on previous convictions, or on the nature of the offence.²³⁴ Its use has provoked outrage²³⁵ while its efficacy has also been trenchantly criticised both generally²³⁶ and particularly as a pointless application of the drug war model to drug control.²³⁷

The most popular punishments for traffickers involve some form of incarceration. There has been an upward escalation in imprisonment in most countries for trafficking.²³⁸ Increases in penalties, the setting of minimum penalties, refusal of

²³² It is available in over twenty states and has been used in eight Asian countries for drug related offences. See, for example, Harring SL 'Death, drugs and development: Malaysia's mandatory death penalty for drug traffickers and the international war on drugs' (1991) 29 *Columbia Jnl of Transnational Law* 364-405. Harring notes that the Malaysian Dangerous Drugs Act 234 of 1952, was amended by Act 293 of 1975 to make the death penalty possible for drug trafficking and then by Act 553 of 1983 to include section 39B making the death penalty for drug trafficking mandatory. From 1975-1990 approximately 300 traffickers were sentenced to death and 104 hanged.

²³³ Okagbue I *The Death Penalty as an Effective Deterrent to Drug Abuse and Drug Trafficking: Myth or Reality* (1991) at 22-23.

²³⁴ *Op cit* at 20-21 she notes that while the death penalty is usually limited to trafficking offences, the definition of trafficking is stretched to include presumptive trafficking based on possession of small amounts of drugs, eg. section 37 of Malaysia's Dangerous Drugs Act, 1952, or includes the simple giving of drugs for no consideration, eg. section 2 of Singapore's Misuse of Drugs Act, 1973.

²³⁵ Anderson M *Policing the World* (1989) 113-114 at n1 notes that there has been an outcry in the West when it has been used on Westerners which has lead to complaints of double standards by the executing states who point out that the West complains they do nothing about drugs and when they do something they are subject to criticism.

²³⁶ See Okagbue *op cit* at 21ff. She notes that its deterrent effects are questionable given *inter alia*: the huge profits made available to poor people and the amount of violence implicit in the drug trade already; the fact that retribution provides little ground for the death penalty because most drug transactions are consensual; and because the cost of someone's life outweighs the costs to society from drug trafficking and use. Its effectiveness against traffickers when applied by hesitant courts seeking cast-iron cases before they apply it is questionable.

²³⁷ See Harring *op cit* at 404-405 who points out that Malaysia's "mandatory" death penalty is not mandatory as so many trafficking arrests lead to dispositions other than death, and that its application has not affected Malaysia's high levels of drug dependence or trafficking.

²³⁸ Dorn et al *op cit* at XVII. At 184ff they refer to the modern British approach which provides a good example. The Misuse of Drugs Act, 1971, increased the maximum penalties for trafficking from 10 to 14 years and the Controlled Drugs (Penalties) Act, 1985, increased the maximum penalty to life. The Appeal Court in *R v Aramah* (1983) CLR 271-273 set down guidelines for sentencing. For supply of heroin Lord Lane CJ held three years to life depending on the degree of involvement, amount of trafficking and value

parole and so on can be seen as a result of the hardening of official attitudes. The merits of these measures have not been demonstrated.²³⁹ Dorn et al argue that although long terms of imprisonment are expensive and have little deterrent value, they remain popular because they are expressive of societal disapproval of drug trafficking. In other words, they argue, these sentences are symbolic, and this symbolism, like calls for the death penalty, has driven these sentences upward culminating, for example, in life imprisonment in the UK.²⁴⁰ However, in spite of the successful prosecution and incarceration of key traffickers, drug markets continue to expand in most countries.

Financial penalties, especially fines, have grown steadily in importance as an alternative to imprisonment, a growth made possible by the growth of a money economy and general prosperity in consumer nations.²⁴¹ Whether they are effective against impoverished peasants and wealthy traffickers is debateable. The latest financial penalty is asset confiscation. The idea is to confiscate either the profits or proceeds (the criminal's original investment plus profit) of drug trafficking. Although attractive because it encourages enforcement to be self-financing, the negative aspect of confiscation is its effect on innocent parties whose property gets mixed up with the profits or proceeds of the illicit traffic.

Other punishments available against supply related offenders include the closure of businesses and the suspension or removal of licenses from individuals in whose business premises drugs were being trafficked or used. Corporal punishment is also applied, often by states that apply capital punishment.²⁴²

With respect to personal use offences, penal and fiscal punishments remain popular. Demand reduction measures emphasising preventive and health care steps backed up by administrative or penal sanctions, although common in more developed states, may be completely unavailable in less developed states. Alternatives to

of drugs being handled. In the 1980s trafficking of a kilogram of heroin/cocaine (a class A drug under the Drug Trafficking Offences Act, 1986) generally got the offender ten years. Several such consignments or larger amounts was awarded with fourteen years plus. Trafficking in a few kilograms of amphetamines (a class B drug) was awarded with five years.

²³⁹ Indeed, they have been counterproductive. Commenting on the practical effect of minimum sentences in the Indian Narcotic Drugs and Psychotropic Substances Act, 1985, the Chief Justice of India remarked in 1997 that their net result is a low conviction ratio - Speech by Chief Justice A.M.Ahmadi at the New Delhi International Conference on Global Drugs Law, 27 February 1997.

²⁴⁰ *Op cit* at 198.

²⁴¹ Dorn et al *op cit* at 179.

²⁴² Section 39A of Malaysia's Dangerous Drugs Act 234 of 1952 makes provision for mandatory whippings for those convicted under the Act.

convictions such as police cautions,²⁴³ diversions and conditional discontinuances²⁴⁴ are becoming more popular in developed states.²⁴⁵ The emphasis is moving beyond fines, suspended sentences, parole, and probation to the use by administrative and multi-disciplinary tribunals of a range of sanctions such as non-institutional detention, weekend detention, community service orders, and other short-term measures of deprivation of liberty.²⁴⁶ Other such sanctions include temporary prohibitions on freedom of movement and of association, and temporary withdrawal of rights and benefits such as passport and driving licenses.²⁴⁷

Against this background, let us turn to a discussion of the punishment provisions of the drug conventions.

3.3.2 Penalty provisions under the 1961 Convention

3.3.2.1 The 1961 Convention's penalty provisions generally

The 1961 Convention's penalty provisions attempt to complement its provisions for offences. They represent an uneasy compromise between the international system's emphasis on severe punishment for illicit drug traffickers, the major thrust of the penalty provisions of the 1936 Convention and of CND statements up until 1961, and new, at least in 1961, concerns with the purpose and nature of punishment.

3.3.2.2 Penalties for article 36(1) offences

Article 36(1) of the 1961 Convention obliges Parties, subject to their constitutional limitations,²⁴⁸ to provide for in their legislation or through administrative measures²⁴⁹ for

²⁴³ Possessors are separated from their drugs and warned but never formally enter the criminal justice system.

²⁴⁴ Users who go forward to trial are given the option of attending a community based programme instead of imprisonment.

²⁴⁵ Dorn N, Murji K 'Low level drug enforcement' (1992) 20 *International Jnl of Sociology of Law* 159 at 163-165.

²⁴⁶ The development of specialised 'drug courts' to deal with user offenders by implementing combinative strategies of treatment, rehabilitation, counselling etc. combined with progressive incarceration and other forms of punishment in operation immediately upon conviction, is becoming popular in the US and has shown signs of success - see Tauber J 'A systems participants glossary of a drug court' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 159-166.

²⁴⁷ Wells *op cit* at 12.

²⁴⁸ It is important to recall that article 36's provisions are not self-executing; article 36(4) makes it clear that they are to be 'punished in conformity with the domestic law of a Party.'

two standards of punishment. The general standard provides that all the forms of drug related conduct enumerated in article 36(1) shall be 'punishable offences'. The general standard does not direct the Parties to do anything other than punish the offender. How they choose to do so is at their discretion.

The special standard provides that 'serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.' There are three variables here, all to be defined by the Parties.

First, the Parties determine whether or not such an offence is 'serious' and thus liable to punishment by imprisonment or some other form of deprivation of liberty. Obviously, what is a 'serious' offence may be viewed differently in different legal systems, thus the selection of offences themselves will almost certainly be different.

Second, the obligation to apply 'adequate' punishment to these 'serious' offences does not stipulate what is adequate. This means that different Parties will apply different punishments for essentially the same offences²⁵⁰ or essentially the same punishments for different offences. Fundamentally different attitudes at the 1961 Conference towards punishment forced the use of the phrase 'adequate punishment' instead of 'severe punishment'.²⁵¹ The *1961 Commentary* submits, however, that

in order to be "adequate" for the fight against serious offences of the illicit traffic, the penalties must be sufficiently severe to have the desired deterring effect under the special conditions of the country in which they are imposed. This idea is also embodied in the requirement that the "adequate punishment" should be meted out "particularly by imprisonment or other penalties of deprivation of liberty". The imposition of fines alone would in no case constitute an "adequate" punishment for serious offences of the illicit traffic.²⁵²

²⁴⁹ Austria declared upon accession to the 1961 Convention that article 36(1)'s obligation 'may also be implemented by administrative regulations providing adequate sanction for the offences enumerated therein.' - 1/2/1978.

²⁵⁰ See the opinion of the Soviet delegate - *1961 Records*, vol.II at 238.

²⁵¹ Despite the fact that article 2 of the 1936 Convention used the phrase 'severely punishing', use of 'severe' was opposed at the Conference because degrees of severity might differ widely from state to state and because 'severe' carried overtones of retributive punishment which at least some delegates rejected as a legitimate purpose of punishment. See *1961 Records* vol.II at 234-239, and particularly the remarks of the executive secretary of the Conference at 237.

²⁵² *1961 Commentary* at 429.

Of course Parties are not obliged to follow this suggestion, and ultimately the determination of appropriate punishment remains with them.²⁵³ Whether a Party which tended, for example, to only fine traffickers of small quantities of drugs would be in violation of this article would be extremely difficult to say, because it would have to be shown that the Party was obliged to regard the offence as serious before it could be argued that the punishment was inadequate.

The third variable is how the Parties interpret 'imprisonment or other penalties of deprivation of liberty'. In its broad sense 'imprisonment' includes all forms of 'deprivation of liberty'. The additional wording 'or other penalties of deprivation of liberty' refers to incarceration other than imprisonment.²⁵⁴

It is clear that these provisions, both general and special, apply to illicit trafficking offences. They do not apply to personal use offences as 'use' is not listed in article 36(1), and 'possession' and 'purchase' in article 36(1) have been restrictively interpreted as limited to possession or purchase for the purpose of trafficking.²⁵⁵ Thus, as Noll argues, the 1961 Convention does not require the imposition of harsh penal sanctions on users.²⁵⁶ In reply to Parties that argue that article 36 does oblige the criminalisation of personal use offences, the *1961 Commentary* points out that Parties may 'undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only minor penalties such as fines and even censure' and thus in effect not to treat possession for personal use as a 'serious' offence under article 36(1) deserving of imprisonment or other 'adequate punishment.'²⁵⁷ Parties may of course choose to impose punishment for simple possession or use in terms of article 39's provision for the adoption of stricter measures. Many Parties still punish personal use offences with custodial sentences even though they could simply confiscate the illicit

²⁵³ A fairly typical example is provided by section 6(1) of the Austrian Narcotic Drugs Amendment Act of 1977, Bundesgesetzblatt No. 1978/532, which provides that the offence of trafficking is *per se* regarded as serious enough to warrant adequate punishment by a short to medium term in prison. Coupled with aggravating circumstances, notably group involvement, the seriousness of the offence increases the adequate punishment to a maximum of ten years incarceration. The option of an additional rather than alternative fine up to 225000 schillings, indicates the seriousness with which the offence is viewed.

²⁵⁴ The wording follows article 2 of the 1936 Convention. The *1961 Commentary's* suggestion at 429 that it includes labour and re-education camps is *passee*.

²⁵⁵ Noll A 'International treaties and the control of drug use and abuse' (1977) 6 *Contemporary Legal Problems* 17 at 24-51 thus argues that criticism of the 1961 Convention by those who favour the decriminalisation of use and possession of drugs is misdirected.

²⁵⁶ Noll A 'Drug abuse and penal provisions of the international drug control treaties' (1977) 19 *Bulletin on Narcotics* 41 at 44.

²⁵⁷ See *1961 Commentary* at 112.

substance, caution them or fine them, and ideally, recognising their problem as a health issue, divert them to alternative measures such as treatment and rehabilitation so as to avoid leaving the official solution to their problems entirely in the realms of the criminal justice system. Parties are becoming more flexible in their punishment of use and simple possession.²⁵⁸

3.3.2.3 Penalties for complicity, inchoate offences and 'financial operations' under the 1961 Convention

Article 36(2)(a)(ii) provides that its various inchoate offences and degrees of complicity 'shall be punishable offences as provided in paragraph 1'. Thus the remarks made with respect to the punishment of article 36(1) offences apply equally here because the same dual system of punishment applies and the same broad punishments are available. The *1961 Commentary* notes, for instance, that if these offences relate to serious offences, then they must be liable 'to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.'²⁵⁹ Parties are obliged to, for example, render the attempted sale of a drug punishable, and should they regard sale of a drug as a serious offence they are obliged to punish such attempted sale 'adequately'. In practice, however, many domestic legal systems punish several of the categories of offenders dealt with in this provision, for instance accomplices, more lightly than the perpetrator of an offence, and the proviso in respect of domestic law in article 36(2) allows such distinctions to continue to be made.

3.3.2.4 Recidivism under the 1961 Convention

Article 36(2)(a)(iii)²⁶⁰ provides:

Foreign convictions for such offences shall be taken into account for the purposes of establishing recidivism;..

²⁵⁸ Fraser A, George M 'Cautions for cannabis' (1992) 8 *Policing* 88 at 91 and cases cited note that British Courts are likely to impose non-custodial sentences for simple cannabis possession and that custody is only considered after the fourth or fifth conviction.

²⁵⁹ *1961 Commentary* at 434.

²⁶⁰ Rooted in article 6 of the 1936 Convention, this provision was left unchanged by the 1972 Protocol.

Article 36(2)(a)(iii) obliges the partial recognition of foreign penal judgements with respect to recidivists, individuals who in this context habitually relapse into illicit drug trafficking. The term 'convictions' must be taken to include both conviction and sentence in Parties where these are two separate processes and proof of both conviction and sentence is required to establish recidivism.²⁶¹ In practice recidivism is regarded as an aggravating factor on punishment, and often as a condition for the classification of the offender as an habitual criminal to whom special restrictions apply.²⁶² Bassiouni complains that the obligation in article 36(2)(a)(iii) is 'without regard to the rights of the offender in such cases and fails to set forth the basis for such co-operation between states with respect to the recognition and consequences of foreign penal convictions.'²⁶³ The amplification of article 36(2)(a)(iii) is a domestic concern and one subject to the 'constitutional limitations of a Party, its legal system and domestic law'. This means in practice that a Party is not required to take into account foreign convictions of an alleged offender if its constitution, legal principles or domestic criminal law (the widest of the three) precludes it from doing so.²⁶⁴ In many states, at least in 1961, this was the case.²⁶⁵ The provisions for aggravating punishment in such Parties may well, however, be sufficient to cover foreign convictions.²⁶⁶

3.3.2.5 Confiscation as punishment

Article 37 of the 1961 Convention, entitled 'Seizure and Confiscation', provides for the seizure and confiscation of any drugs, substances and equipment used in or intended for the commission of any article 36 offences. Seizure and confiscation's initial function is in enforcement, and the article is discussed at length in the chapter on enforcement. However, confiscation also functions as a punishment with the aim of depriving the offender of his ill-gotten gains and the means to continue his criminal activities. Article 37 appears to oblige Parties to ensure that drugs, substances and equipment used in drug

²⁶¹ See the remarks of the US delegate - *1961 Records* vol.I at 123.

²⁶² *1961 Commentary* at 434. Cotic *op cit* at 110-112 discusses recidivism in respect of drug offences in 31 states, and notes that in addition to being an aggravating factor, it also functions to increase both maximum and minimum legal limits for punishment and sometimes to eliminate the possibility of the waiving or suspension of prosecution.

²⁶³ Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 519.

²⁶⁴ *1961 Commentary* at 430.

²⁶⁵ Henrichs *op cit* at 7 notes that in German law in 1960 recidivism was only applied in exceptional cases, and the courts invariably took the view that foreign convictions could not establish it.

²⁶⁶ *1961 Commentary* at 434.

offences are subject to confiscation²⁶⁷ as a type of non-custodial punishment with both deterrent and retributive effect because it removes such material from circulation and from the possession or ownership of the offender. Provisions providing for confiscation of these forms of material are common in practice.²⁶⁸ Confiscation of the proceeds of drug trafficking as a punishment had not been envisaged in 1961.

3.3.2.6 Alternatives to punishment for article 36 offences inserted by the 1972 Protocol

Article 36(1)(b) inserted by article 14 of the 1972 Protocol to the 1961 Convention provides Parties with the discretion to implement measures such as treatment, education, and rehabilitation as alternatives to conviction and punishment or in addition to conviction and punishment, no matter how serious the offence. Provision for Parties to set up facilities to make such alternative regimes available was made in article 38 of the Convention, one of the articles that was elaborated upon by the 1972 Protocol. These provisions are discussed in detail in the chapter dealing with alternatives to prosecution and punishment. While these alternatives specifically apply to article 36(1)(a) offences, by implication they must also apply to the additional forms of these offences set out in article 36(2)(a)(ii).

3.3.3 Penalty provisions under the 1971 Convention

3.3.3.1 The 1971 Convention's penalty provisions generally

The most innovatory provisions dealing with drug offenders in the 1971 Convention were those relating to their treatment and rehabilitation. Adopting an almost identical

²⁶⁷ Seizure is not applicable as it is a pre-conviction process and thus cannot serve as a punishment. Most domestic legislation allows for a confiscation order to be made by a court or competent authority on sentence following conviction, although confiscation prior to conviction is possible, for instance when a potential first offender is released on warning.

²⁶⁸ For example, section 6(3) and (4) of the Austrian Narcotic Drugs Amendment Act of 1977, Bundesgesetzblatt No. 1978/532, provide: '(3) The objects used in the punishable act [trafficking] or the proceeds there from shall be declared confiscated if they are owned by the offender or an accomplice or accessory to the offence or if they were owned by such persons at the time of seizure. In other cases, they may be declared confiscated. Similarly, materials and apparatus used for manufacture and processing may be declared confiscated, and also vehicles used for transport other than vehicles owned by a public transport undertaking if the owner of the vehicle was aware it was to be misused for unlawful purposes. (4) If the objects or their proceeds cannot be seized or declared confiscated, a fine equal to the value of such objects or their proceeds shall be imposed. ...'.

structure with respect to the punishment of drug offences as that in the 1961 Convention, the 1971 Convention does not develop international law any further in this regard.

3.3.3.2 Penalties for article 22(1)(a) offences²⁶⁹

Article 22 provides:

1.(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

As with the 1961 Convention, a dual punishment regime is envisaged by the 1971 Convention, viz.: ‘punishable offences’ and ‘serious offences ... liable to adequate punishment’. How punishable offences are to be punished is not stipulated by article 22(1)(a), and this remains an area of domestic discretion. It is assumed that punishable offences are not serious, but exactly what sort of offence was envisaged by the Convention’s drafters remains unstated. While the *1971 Commentary* argues that Parties must criminalise possession of Schedule I substances under article 22(1)(a), it notes that Parties need not treat such offences as serious offences and may limit themselves to ‘fining the offender, or even to only censuring or admonishing him’.²⁷⁰ If one accepts that use and possession for use of any substances are not criminalised by the 1971 Convention, then the question of their punishment is entirely a domestic affair should Parties choose to punish such conduct.

With respect to the selection of ‘serious offences’ for ‘adequate punishment’, the *1971 Commentary* suggests that they should be identified on the basis of their

²⁶⁹ It is important to note that article 22’s provisions are not self-executing; article 22(5) makes it clear that they are to be ‘punished in conformity with the domestic law of a Party.’

²⁷⁰ *1971 Commentary* at 351.

potential for causing, directly or indirectly, damage to the health of people other than the offender, particularly of people residing in other countries than that in which the offence is committed.²⁷¹

Clearly the *1971 Commentary* has trafficking in mind. As noted the *1971 Commentary* excludes simple possession, but it goes even further and suggests that Parties are not required to consider as a serious offence the possession of a small amount of a psychotropic substance for sale by users to finance their own dependency, or even for the purpose of supplying a friend without consideration.²⁷²

Article 22(1)(a) requires such 'serious' offences to be punished by 'adequate' penalties. The *1971 Commentary* notes that what is adequate may be construed differently by different Parties, but argues that such punishment must be adequate to achieve deterrence, and that it will only be adequate 'if it includes imprisonment or another form of deprivation of liberty.'²⁷³ However, use of 'particularly' in the provision suggests that while its authors may have had imprisonment in mind for serious offences, they envisaged that other forms of punishment would be used. It is submitted that any form will be suitable as long as it has sufficient deterrent effect in the particular context in which it is applied. The addition of the wording 'or another penalty of deprivation of liberty' to imprisonment, clarifies that confinement need not necessarily be in a prison.

3.3.3.3 Penalties for complicity, inchoate offences and 'financial operations' under the 1971 Convention

Article 22(2)(a)(ii) provides that the various forms of participation and inchoate conduct listed 'shall be punishable offences as provided in paragraph 1'. The *1971 Commentary* notes that the requirement of adequate punishment by imprisonment or some other form of deprivation of liberty applies to these forms of conduct criminalised under article 22(2)(a)(ii) if they are serious.²⁷⁴ It points out that although 'preparatory acts' are not punished by incarceration in many Parties unless undertaken for the purpose of committing a few very serious offences, the offences in article 22(1)(a) should be

²⁷¹ *1971 Commentary* at 348.

²⁷² *1971 Commentary* at 352.

²⁷³ *1971 Commentary* at 352.

²⁷⁴ *1971 Commentary* at 360.

considered among the most serious.²⁷⁵ ‘Conspiracy’ in many Parties is not considered a punishable offence separate from ‘preparatory acts’ and as such is also subject to penal sanctions only if very serious. The *1971 Commentary* suggests that such Parties, and Parties that do criminalise conspiracies but only to commit very serious offences, cannot use the escape clause in article 22 that subjects the Parties’ obligations to their domestic law and legal system, apparently because even these forms of article 22(1)(a) offences are very serious.²⁷⁶ Some Parties only punish ‘attempts’ at serious offences, but the *1971 Commentary* suggests that article 22(1)(a) offences are serious, they must be punished or at least dealt with under the alternative measures in article 22(1)(b), and the limitation clause will not avail these Parties.²⁷⁷ It is submitted, however, that while inchoate forms of and complicity in article 22(1)(a) offences may be punished as severely as the choate offences and principal offenders are punished, some gradation of punishment, depending on proximity to actual perpetration of the offence, is an adequate response to this provision. As with ‘financial operations’, the grading of such offences for punishment depends not so much on a broad categorisation of all such offences as serious on the actual facts of the case.

3.3.3.4 Recidivism under the 1971 Convention

Identical to article 36(2)(a)(iii) of the 1961 Convention, article 22(2)(a)(ii) provides that

‘[f]oreign convictions for such offences shall be taken into account for the purposes of establishing recidivism’.

The purpose of this provision is to enable foreign convictions to be taken into account in determining the severity of punishment. While this may be through declaration as an habitual criminal, it may only be in aggravation of sentence, depending on the circumstances and the Party’s domestic law. This provision’s subjection to the limitation clause means that a Party cannot be obliged to consider foreign convictions for the purpose of determining recidivism if its domestic penal law does not permit it to do so.²⁷⁸ The *1971 Commentary* submits that Parties in this situation may rely on the

²⁷⁵ *1971 Commentary* at 358.

²⁷⁶ *1971 Commentary* at 359.

²⁷⁷ *1971 Commentary* at 358-9.

²⁷⁸ *1971 Commentary* at 356.

provisions of their penal law allowing for consideration of aggravating circumstances in punishment to cover foreign convictions.²⁷⁹

3.3.3.5 Confiscation as a punishment under the 1971 Convention

Article 22(3) of the 1971 Convention provides for the seizure and confiscation of ‘any psychotropic substance or other substance, as well as any equipment, used in or intended for the commission of’ article 22 offences. As noted above, confiscation, although it functions as a form of punishment, is discussed under enforcement.

3.3.3.6 Alternatives to punishment under the 1971 Convention

Article 22(1)(b) provides:

(b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that abusers of drugs shall undergo measures of treatment, education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of article 20.

Article 22(1)(b) provides Parties with the discretion to implement measures such as treatment, education, and rehabilitation as alternatives to conviction and punishment or in addition to conviction and punishment, no matter how serious the offence.²⁸⁰ Article 20 sets out various provisions facilitating this alternative regime. While these alternatives specifically apply to article 22(1)(a) offences, by implication they must also apply to the accessory forms of these offences set out in article 22(2)(a)(ii). This provision is discussed separately in the chapter which deals with alternatives to prosecution and punishment.

²⁷⁹ *1971 Commentary* at 360.

²⁸⁰ The Mexican delegate to the 1971 Conference did suggest that the ‘a clear distinction should, however, be drawn between drug addicts, for whom measures of treatment were suitable, and traffickers, who should be liable to imprisonment’, a sentiment echoed by the Brazilian delegate - *1971 Records* vol.II at 30.

3.3.4 Penalty provisions under the 1988 Convention

3.3.4.1 The 1988 Convention's penalty provisions generally

By 1988 a UN study revealed a pattern in drug crime punishment.²⁸¹ States took a similar approach to punishing the illicit production and illegal trafficking of drugs. They considered these crimes the most serious and provided the harshest punishment for them.²⁸² With regard to the punishment of illicit possession and consumption, however, state practice differed enormously. Some states only punished such conduct when it was done with the intention of trafficking while others punished it *per se*, varying the sentence according to the intention.²⁸³

It is not surprising that delegates to the 1988 Vienna Conference were clearly divided on the issue of appropriate punishment for drug users.²⁸⁴ Nordic and European civil law states favoured flexible provisions allowing for alternatives to incarceration such as treatment, rehabilitation and aftercare for drug users, while producer states such as Mexico were concerned that this approach would signal that demand offences were not serious components of the drug trafficking problem.²⁸⁵ The fact that article 3(4)(d) allows treatment and rehabilitation to be used as alternatives in respect of punishment of article 3(2)'s personal use offences indicates a small victory for the former states. General support for a harsh regime for traffickers is clear from the fact that in respect of article 3(1) offences article 3(4)(b) allows treatment and so on 'in addition' to the fines and incarceration provided for in article 3(4)(a), except in minor cases as provided for in article 3(4)(c) where these methods may be used as 'alternatives'. In any event, article 3(11) provides that the offences set up by the 1988 Convention shall be punished in conformity with the domestic law of the Parties, so Parties that provide for mandatory alternatives to incarceration in their domestic law will be able to use this escape clause to

²⁸¹ Cotic *op cit* at 116-119.

²⁸² Cotic D *op cit* at 113. The study revealed an average punishment of five years imprisonment for the basic act, and a range of ten to fifteen years imprisonment for the more serious offences. The most common maximum penalty was ten years, with variations reaching twenty years, twenty-four years, life imprisonment and death. Many states had accepted the idea of a petty trafficking offence to which much less severe punishments such as six months imprisonment applied, although there was variation of the maximum up to five years.

²⁸³ Cotic *op cit* at 117 notes that determination of the motive for possession becomes a key issue, and states rely either on possession of a stipulated threshold mass to invoke a presumption of intent to traffic, or simply leave the determination of motive in the hands of the court.

²⁸⁴ See Sproule DW, St-Denis P *op cit* at 271 fn 31.

²⁸⁵ Draft article 2(2) had simply obliged Parties to punish adequately through imprisonment, fines and/or forfeiture the supply related offences it set out in draft article 2(1).

avoid the obligations in article 3(4). The multiplicity of options is, however, indicative of the disagreement among states on how drug offences should be punished.

3.3.4.2 Penalties for article 3(1) offences

Article 3(4) provides:

- (a) Each Party shall make the commission of the offences established in accordance with paragraph (1) of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

The intention of article 3(4)(a) is to ensure that the offences established by article 3(1) are punished by penalties that take into account their 'grave' nature. The provision appears to accept that such offences are in and of themselves always 'grave' and there can be no instances when they describe relatively minor infractions of the law.²⁸⁶ The enumeration of the punishments indicates how seriously these offences are viewed.²⁸⁷ The forms of punishment enumerated are not a *numerus clausus*. Other forms are possible at the discretion of the Party, but it would seem that they would have to be of a penal nature and not in the nature of treatment or rehabilitation as separate provisions exist for such measures. The enumerated forms are not necessarily cumulative; they function as alternatives or in combinations. Turning to the other extreme of the punishment spectrum, given international condemnation of the use of capital punishment, the exclusion of reference to the death penalty in article 3(4)(a) must have been deliberate. But the absence of express condemnation of such use in this provision indicates the unwillingness of its authors to take positive steps to protect basic human rights.

²⁸⁶ Draft article 2(1) had qualified all the offences listed therein as 'serious' but the 'Expert Group Report' 1988 *Records* vol.I at 12 notes that several experts suggested that the adjective be deleted since the offences described therein could include minor cases. Although there is no other obligation in the provision stating expressly that these are serious offences that must be punished severely, various experts recommended inter alia that the applicable sanctions should be sufficiently stringent to achieve a deterrent effect and that the penalty provisions should go further than those in the 1961 and 1971 Conventions. Only at the end of the experts' discussion of the draft article was the clause 'grave nature of the offences' agreed upon as the basis for emphasising how seriously the offences were to be viewed for punishment purposes, and it was agreed to delete 'serious' because such offences were inherently serious.

The first form is 'imprisonment or other forms of deprivation of liberty'. The Convention does not limit the form of incarceration to imprisonment. It contemplates other forms but does not specify these forms. They may not, however, include repugnant forms such as re-education camps.²⁸⁸ The provision does not lay down a minimum period of confinement. Draft article 2(1)(a) obliged Parties to incarcerate offenders for a 'substantial period of time', but this requirement was absorbed into the demand that Parties take into account the grave nature of drug offences when incarcerating them, a demand which must of necessity reflect on the place and duration of their incarceration.

The second form of punishment is 'pecuniary sanctions'. These include fines and other punishments of a pecuniary nature. In practice, fines are likely to be applied to the economic offences under article 3(1)(b).²⁸⁹

The third form is 'confiscation', defined by article 1(f) of the 1988 Convention as including forfeiture where applicable, and meaning 'the permanent deprivation of property by order of court or other competent authority.' Article 5, discussed in the chapter on enforcement, contains extensive provisions designed to oblige Parties to deter drug traffickers by enacting legislation for the purposes of confiscating profits, assets, and benefits derived from illicit drug trafficking. They also make provision for the identification, tracing, freezing and seizure of this property. Although confiscation was used in state practice before 1988,²⁹⁰ the Convention's sophisticated provisions serve as the means for introducing it into the domestic practice of most states.

States have responded to article 3(4)(a) as a whole by increasing penalties for familiar trafficking offences and imposing harsh penalties for new offences such as money laundering.²⁹¹

²⁸⁷ Some of the experts were opposed to this enumeration because of the difficulties of application to diverse legal systems, but their suggestion of a broad non-specific provision was rejected - see 'Expert Group Report' 1988 *Records* vol.I at 12.

²⁸⁸ 1988 *Records* vol.I at 13.

²⁸⁹ For example, article 30bis of Switzerland's *Code Penal* makes money laundering punishable by up to five years in prison and a maximum fine of one million Swiss francs.

²⁹⁰ For example, the United States Money Laundering Control Act of 1986, 18 USC sections 981-982.

²⁹¹ The 'FATF Money Laundering Report, 1990' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 4 at 12 reports that the penalties in member states for laundering offences 'are heavy fines, imprisonment up to 20 years, and sometimes prohibitions against engaging in certain professions.'

3.3.4.3 Factors aggravating the punishment of article 3(1) offences

The UN's 1987 Comprehensive Multidisciplinary Outline suggested that states take certain listed aggravating circumstances into account in connection with sentencing and parole.²⁹² It is thus not surprising that article 3(5) provides:

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of its offences established in accordance with paragraph 1 of this article particularly serious, such as:

- (a) The involvement in the offence of an organised criminal group to which the offender belongs;
- (b) The involvement of the offender in other international organised criminal activities;
- (c) The involvement of the offender in other illegal activities facilitated by the commission of the offence;
- (d) The use of violence or arms by the offender;
- (e) The fact that the offender holds public office and that the offence is connected with the office in question;
- (f) The victimisation or use of minors;
- (g) The fact that the offence is committed in a penal institution or in an educational institution or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;

²⁹² Paragraph 274 - *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (UN Publication St/Nar/14, UN Sales No. E.88.XI.1, New York, 1988) at 61.

- (h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of the Party.

The list of factors which a Party is obliged to allow their courts or competent authorities to take into account in deciding whether an offence is to be regarded as particularly serious is not a *numerus clausus*. It serves as a strong guide to the kind of factors regarded as aggravating by the Convention. While this innovatory provision is obviously designed to ensure that domestic legal systems treat drug offences sufficiently seriously, Sproule and St-Denis note that it fails to specify for what purposes courts or other competent authorities should take these factors into account.²⁹³ They presume that it must be for sentencing and submit that the provision did not specify this in order to leave the Parties with complete freedom of action.²⁹⁴ This vagueness in respect of application may lead to legal difficulties. Aggravating factors are a common law concept; the courts in common law countries are left with the discretion to apply them or not with or without express legislation to that effect. In the civil law tradition, however, the courts, while competent to apply extenuating factors, cannot apply aggravating factors without legislative authority.²⁹⁵ In any event, under the provision a Party's courts or competent authorities retain their independence and are not obliged to take these factors into account; the obligation is only mandatory on the Party to 'allow' or 'enable' them to take these factors into account.²⁹⁶ The 'courts' which take these factors into account are judicial tribunals, but 'other competent authorities' is not so easily defined. It appears, however, that they must have criminal and sentencing jurisdiction.²⁹⁷

As for the factors themselves, their meaning is not plain. For example, article 3(5)(a) does not define what an 'organised criminal group' is or just how an offender 'belongs' to such a group. Nor does article 3(5)(b) define either the degree of 'involvement' or the types of 'other international organised criminal activities' the

²⁹³ *Op cit* at 271 fn32.

²⁹⁴ The Jamaican delegate recommended that the words 'in considering the sanction to be imposed on the convicted offender' be inserted into the provision but they were not - *1988 Records* vol.II at 41.

²⁹⁵ See the remarks in the 'Expert Group Report' *1988 Records* vol.I at 14.

²⁹⁶ See the remarks of the German (FDR) delegation - *1988 Records* vol.II at 41-2.

²⁹⁷ See the statement of the Netherlands delegate - *1988 Records* vol.II at 42. In Ghana 'competent authorities' would thus include the special public tribunals set up to try drug offenders - *1988 Records* vol.II at 42.

offender must have been involved in.²⁹⁸ The same criticism applies to article 3(5)(c)'s reference to the offender's 'involvement in other illegal activities facilitated by the commission of the offence'. Although this appears to refer to the combination of drug offences with economic offences,²⁹⁹ it can on its face mean involvement in any illegal activities facilitated by the commission of the article 3(1) drug offence. The provision's reliance on very general terms, such as article 3(5)(d)'s use of 'violence or arms', is designed to ease domestic acceptance by legal systems that have struggled in their domestic law with defining these terms.³⁰⁰

The list does not go as far as it could. Thus the reference in article 3(5)(e) to holders of public office could well have been applied to holders of office in the private sector as long as these offices indicated positions of trust and leadership and the offender's conduct involved an abuse of this position.³⁰¹ This would have had a deterrent effect on drug traffickers with legitimate business fronts. Article 3(5)(f)'s reference to minors is also unduly limited. It could well have been extended to physically or mentally handicapped persons.³⁰² The fact that the age of minority is also left to be decided in accordance with each Party's domestic law, is indicative of the trend in the Convention to harmonisation rather than universalisation.

Article 3(5)(g) is an unusual provision. It exists to deter the sale of drugs in penal institutions and social service facilities, but especially to young people whether at school, sport or play in places where there is little or no supervision. It is the linking of penalty to place which is unusual. For instance, it would result in the presence of the offender in one of the places being regarded as aggravating even if the institution was empty of members of the target group. Much of the provision's wording is vague, for example, its reference to the 'immediate vicinity' of the institutions mentioned.³⁰³ Whether 'educational facility' includes tertiary educational facilities is uncertain, but the reference to 'students' implies that it does. 'Other places to which school children and students resort for educational, sports and social activities' includes museums, cinemas, theatres,

²⁹⁸ Remarks by various delegates indicate that international arms smuggling and terrorism were contemplated, but there was no agreement on what these activities meant or on the inclusion of a list of examples - *1988 Records* vol.II at 43-5.

²⁹⁹ See the 'Expert Group Report' *1988 Records* vol.I at 15.

³⁰⁰ See *1988 Records* vol.II at 45.

³⁰¹ See the remarks of the delegate from Papua New Guinea - *1988 Records* vol.II at 45-6.

³⁰² See the 'Expert Group Report' - *1988 Records* vol.I at 14.

³⁰³ The Mexican delegate explained the necessity of this wording because when traffickers were unable to enter schools they 'accosted young people in areas close-by.' - *1988 Records* vol. II at 44.

recreational areas, tourist areas,³⁰⁴ sports stadia and venues. There is little doubt that young people are a target group for drug traffickers, but whether prisoners and recipients of social services deserve the same protection was questioned; some Conference delegates felt the eradication of drug trafficking from penal institutions was utopian while others saw drugs as a problem impeding the rehabilitation of prisoners and deserving of action.³⁰⁵

Article 3(5)(h) is very specific, which may render it inapplicable in certain states. It refers to 'prior conviction', but there is a domestic limitation clause attached to this particular obligation because the domestic law of some states does not always allow them to take prior convictions into account on sentence.³⁰⁶ It is noteworthy that the Convention makes no specific provision, unlike the earlier conventions, for taking foreign convictions into account for the purposes of establishing recidivism, but article 3(5)(h) does allow foreign convictions to impact on punishment.³⁰⁷ The convictions taken into account are not necessarily limited to those for similar offences; they include any prior conviction.

In practice, Parties are likely to apply the aggravating factors listed in article 3(5) as they see fit and give them the legal content they deem appropriate. Many are already contained in general domestic law³⁰⁸ and do appear to be having some influence on state practice.³⁰⁹

³⁰⁴ See the remarks of the Argentinean delegate - *1988 Records* vol.II at 50.

³⁰⁵ See the remarks of the Netherlands delegate and the Mexican delegate respectively - *1988 Records* vol.II at 47.

³⁰⁶ See the remarks of the German delegate (FDR) - *1988 Records* vol.II at 42.

³⁰⁷ Draft article 2(5) was such a recidivism provision but was deleted by the Expert Group because of practical and legal difficulties with it. Article 3(5)(h)'s reference to prior convictions whether foreign or domestic as an aggravating circumstance was included instead - *1988 Records* vol.I at 13,16. Recidivism is not a universal concept, but the provision does allow Parties to take into account previous convictions which can then be used to establish recidivism or habitual criminality of drug offenders if the Party seeks to do so. As an example of this, section 31 of the Indian Narcotic Drugs and Psychotropic Substances Act, 1985, provides that previous convictions can be used as a basis to enhance the punishment of offenders, and for the purposes of the section any conviction under any corresponding law outside India shall be treated on a par with, and regarded as, a conviction in India.

³⁰⁸ See, for example, in the US the sentencing guidelines in 18 USC section 3553 and chapter 3.

³⁰⁹ For example, Taisch F 'Swiss statutes concerning money laundering' (1992) 26 *The International Lawyer* 695 at 700-701 discusses the factors enacted in the Swiss Penal Code which render the crime of money laundering more serious. Article 305bis provides in subparagraph 2 that 'a case is severe ... if the

3.3.4.4 Parole for article 3(1) offences

Article 3(7) provides:

7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

This innovatory provision³¹⁰ is designed to ensure that Parties do not allow parole³¹¹ to be a convenient means for drug offenders to avoid completing long terms of imprisonment or some other form of deprivation of liberty appropriate to the gravity of drug offences under article 3(1), especially where one or more of the aggravating factors enumerated in article 3(5) were present. In this regard, the provisions in article 3(6) with respect to limitation of prosecutorial discretion when plea-bargaining and in article 3(8) with respect to extended statute of limitations periods, are both intended to ensure that the offender receives an appropriate punishment and that its deterrent effect is not undermined by domestic practice. The provision does not require, however, that parole be deferred for every article 3(1) offender in every case; the Party is obliged to ensure that the courts or competent authorities take the offenders' conviction for these offences into account when granting parole and the courts/authorities retain the discretion to grant parole in any event. Whether this requires a Party to change its domestic legislation

perpetrator: a. acts as a member of a criminal organisation; b. acts as a member of a gang, formed with the purpose of continued money laundering;...'.
³¹⁰ Introduced in draft article 2(7), the Mexican delegate believed that the provision in its final form had been watered down. He stated that 'in the Mexican legal system the eventuality of early release or parole of the offenders in question was totally ruled out.' - *1988 Records* vol.II at 56.

³¹¹ The provision applies only to parole and not to release on bail before trial, although the CND had drawn attention to the fact that drug traffickers are wealthy enough to make bail payments and obtain release - see the comment of the Indian delegate, *1988 Records* vol.II at 57. Bail may, however, be covered by the restrictions in article 3(6).

dealing with parole is not clear, but it appears not.³¹² Some Parties have declared that they will apply it only in accordance with their legal systems.³¹³

3.3.4.5 Alternatives to punishment for article 3(1) offences

Article 3(4) paragraphs (b) and (c) provide for ‘treatment, education, aftercare, rehabilitation or social reintegration’ in addition to punishment for article 3(1)’s supply related offences, and in minor cases as an alternative to punishment, while article 3(4)(d) provides for these measures to be used both in addition to and as alternatives to punishment for article 3(2)’s demand related offences. No alternatives to punishment were contained in the original Draft Convention. They were introduced by the Expert’s Group that reviewed the Draft because of concerns that their absence would mean that Parties would no longer regard similar provisions in the amended 1961 Convention (article 36(1)(b) and the 1971 Convention (article 22(1)(b)) as binding.³¹⁴ They are discussed in the chapter on alternatives to punishment.

3.3.4.6 The punishment of the personal use offence under the 1988 Convention

The 1988 Convention’s provisions for punishment are directed almost entirely at the drug trafficking offences in article 3(1). The 1988 Convention’s only reference to punishment for the personal use offence in article 3(2) is the provision in article 3(4)(d) which allows Parties to ‘provide either as an alternative to conviction or punishment, or in addition to conviction or punishment’ for measures such as education and treatment. The Convention thus anticipates that Parties will punish such offenders, but not in every case. It does not stipulate the form such punishment will take, although the separation of article 3(4)(a)’s provision for the punishment of grave article 3(1) offences by imprisonment from the provision in article 3(4)(d) suggests that incarceration is not expected, although this remains at the discretion of the Party. Clearly cautioning of users

³¹² The Netherlands delegate at the Conference did not feel that the provision required a change in its relevant legislation to accommodate ‘the concerns expressed by the terms’ of this provision - *1988 Records* vol.II at 30. The Netherlands made reservations to this effect upon signature and upon acceptance (8/9/1993), the latter pointing out that it only accepts article 3(7) insofar as it accords with Dutch criminal policy and legislation.

³¹³ Colombia (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 303) declares that it will use discretion in this regard, somewhat ambiguously ‘taking into account the benefits of its policies regarding the indictment of and collaboration with alleged criminals.’

³¹⁴ *1988 Records* vol.I at 15.

or their diversion out of the criminal justice system remains possible under this provision.

3.3.5 Conclusion - criticisms of the provisions for penalties

The international illicit drug control system is striving for uniformity of punishment. The evidence of state practice does not suggest that uniformity has been achieved, but it reveals a general trend towards severity.³¹⁵

Most states do not distinguish legislatively between the punishments they apply to the various trafficking offences, although the punishments for cultivation offences and for incitement are sometimes lighter. Although some states apply the death penalty, most states rely on long terms of imprisonment. The range of terms of imprisonment varies from the trifling to life. Many states apply quite lengthy minimum terms. States apply fines either in the alternative or in addition to imprisonment and these are also usually quite weighty, with the range varying from zero to very large amounts. Some states apply minimum fines. Many states have also introduced confiscation of property as a punishment. The range of penalties for trafficking related offences such as laundering is very similar to that applied to trafficking offences themselves, but with a particular emphasis on fiscal penalties. Aggravating factors are provided for by some states and not by others. Involvement of minors is the most popular of these factors but the range is wide and includes involvement of women, the mentally handicapped, civil servants, banks or professionals, serious health risk, use of violence or intimidation, involvement of organised crime or gangs, involvement of large quantities of drugs, previous offences, and occurrence of the offence in an educational, sporting, cultural or military facility.

With respect to punishment for personal use offences, imprisonment is common. Maximum terms are fairly long and minimum terms are sometimes provided for.³¹⁶ Fines are also used and tariffs can be high. However, in some states such conduct is not criminalised and in others only administrative sanctions apply.³¹⁷ In a few states the death sentence applies. The UN recommends the use of non-custodial measures and the

³¹⁵ Wells *op cit* sets out in Appendix E the UNDCP's tables of the penalties states have applied to drug offences and although outdated and patchy, it does serve as a useful source of comparison across and within states.

³¹⁶ For example, from 4-20 years in Costa Rica in terms of Law no.2257 of 1991.

³¹⁷ For example, Spain where fire-arm licenses and driving licenses may be suspended.

provision of medical, psychological and social treatment programmes in appropriate cases.³¹⁸

A range of anomalies disturb the general picture of heavy prison sentences and heavy fines that appears to be called for by international law. In practice, the actual tariff varies widely, as do the conditions of imprisonment which range from forced labour to incarceration in open prisons. Aggravating factors can in some states result in the death sentence, in others no provision is made for them at all. Many states appear to ignore international law and adjust their punishment of drug offenders in response to considerations such as their domestic political and economic situation, popular perceptions of the domestic drug problem and popular perceptions of the international drug problem.³¹⁹ The differentiation in article 36(1) and article 22 of the 1961 and 1971 Convention between the punishment of 'serious' offences and those not serious is difficult to identify in domestic legislation.³²⁰ Finally, the UN's 1987 Comprehensive Multidisciplinary Outline recognises that actual implementation of punishment is as important as uniform provisions for punishment and emphasises the 'improved efficacy of penal provisions'.³²¹ Implementation is subject to the economic resources at the disposal of Parties; for some even incarceration costs too much.

International law makes little impact in creating global uniformity of punishment because it only provides a loose framework for punishment. The effort that was made to achieve uniformity of punishment in the 1988 Convention was, according to Sproule and St Denis, subject to two fundamental flaws, viz.: i) the hortatory nature of many of the

³¹⁸ *Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana 27 August-7 September 1990* UN Pub. Sales No. E.70.V.5 at chapter 21 section C.1.

³¹⁹ The history of the penalties for cannabis offences in Nigeria is illuminating. The amazing fluctuations seem to bear little relation to the international conventions - see generally Okagbue *op cit* at 18-20. The Dangerous Drugs Act, 1935, provided for a £1000 fine or ten years imprisonment or both for trafficking in cannabis. The Indian Hemp Decree no.19 of 1966 provided the death penalty or imprisonment of a minimum of 21 years for planting or cultivation of cannabis, death or imprisonment for a minimum of 15 years for its importation or sale, and death or imprisonment for a minimum of 10 years for its exportation, use and possession. The Indian Hemp Amendment Decree no.34 of 1975 reduced penalties so that cultivation, importation and sale of cannabis attracted not less than ten years imprisonment, there was a discretionary minimum sentence of ten years for exportation, and possession attracted a 200 dollar fine or 6 months in prison or both. The Indian Hemp Amendment Decree no.27 of 1984 again increased penalties to a minimum of 21 years imprisonment for planting, cultivating, selling importing or exporting and a minimum of 4 years imprisonment for possession. The National Drug Law Enforcement Agency Decree no.48 of 1989 provided for life imprisonment for trafficking in cannabis.

³²⁰ One indicator may be the heavier punishment meted out to international traffickers than to domestic traffickers, but a survey of legislation reveals that only 26 states out of 91 make such a distinction - see Wells *op cit* Appendix E.

provisions dictated by the diversity of legal systems; and ii) the uncertainty of the messages which the hortatory provisions send.³²² With respect to the former problem they question whether such provisions are appropriate in an international convention that is supposed to be establishing binding obligations, while with respect to the latter they comment that the language of the provisions may well be saying both that the international community is going to get tough with drug traffickers but that Parties are only going to get tough if it does not interfere with their entrenched notions of criminal justice. They ascribe these flaws to the political dynamic at the Conference - the need for delegations from states like Mexico to show their own governments that consumer states are being "forced" to assume partial responsibility for the international drug problem. Parties may of course go further than the provisions in article 3 with respect to punishment and punish users more severely,³²³ but they will not be acting in terms of their international obligations.

A further flaw in the punishment provisions is their generally ambiguous terminology. The distinction of the different types of involvement in trafficking from international to local would have made it possible for international law to be more responsive to the actual nature of the illicit traffic. While the drug conventions have been fairly successful at establishing a relationship between the drug offences of different states, a relationship necessary to make international co-operation possible, the lack of precision in their punishment provisions makes international co-operation in respect of punishment much more difficult. In principle, recognition of other Parties' punishment limits is essential.³²⁴ In practice, Parties to the conventions have avoided recognising other Parties' punishment limits for drug offences.³²⁵

³²¹ See Target 22, par. 271 - *Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control* (UN Publication St/Nar/14, UN Sales No. E.88.XI.1, New York, 1988) at 60-61.

³²² *Op cit* at 271-2.

³²³ In terms of article 24.

³²⁴ Meyer J 'The vicarious administration of justice: an overlooked basis of jurisdiction' (1990) 31 *Harvard ILJ* 108 at 116 points out, for instance, that when jurisdiction is taken on the basis of the *aut dedere aut judicare* principle, the state taking jurisdiction should not inflict a punishment greater than that imposed by the state where the offence was committed because: i) at the time of commission the offender did not know the criminal law which is now applied to his conduct; and ii) the state taking jurisdiction is in principle standing in for the state where the offence was committed.

³²⁵ For example, while section 20 of the UK's 1971 Misuse of Drugs Act allows the prosecution in the UK of someone who assists in or induces the commission of a drug offence in another Party to the 1961 or 1971 Conventions, the English courts have held that the maximum sentence under the corresponding law is irrelevant to the sentences passed in the UK (*R v Faulkner and Thomas* (1976) 63 Cr.App.R 295).

Bassiouni suggests that the way to overcome such problems is to attach to a comprehensive convention on drug control a proposed model statute that would set out punishment for the offences in detail and which could be adopted by each state according to its national legal system.³²⁶ The detailing of such a system would not be a simple task. It would involve a comprehensive analysis of punishment for drug offences globally. Many of the sacred cows of existing punishment provisions would have to be abandoned. For example, the common distinction made between users and suppliers in national legislation for the purposes of sentencing is not reflected in reality because traffickers are often users.³²⁷ Such neat solutions incorporated in international law require urgent re-examination.

Any criticism of the international approach to punishment as a whole must, however, look first at the policy of the system that makes provision for punishment. The major aim of punishment in drug related offences is deterrence. The system aims to punish offenders severely enough so that they will either stop consuming or supplying. But the continued thrust towards more and more severe punishment for traffickers indicates a desire for retribution as well, something which is not justifiable in terms of the stated aim of the system, viz.: suppressing illicit drugs. International law focuses on the offence, without consideration of the needs of the offender nor of the society in which he or she lives. Distinctions between repressive and therapeutic measures have been made in national law, but therapy is not well integrated into the sentencing process at the international level. The 1988 Convention, for example, lists aggravating factors but makes no mention of mitigating factors. International society has attempted to universalise the punishment of drug offenders by adequate (read severe) punishment. It may have achieved harmonisation, but if so, only very crudely. The provisions on punishment, having grown organically and in a reactive way, exhibit little coherence. What appears to be necessary is a coherent system of punishment that addresses the interests of both the offender, his or her society, the state of which he or she is a national, and the interests of international society. But before such a system is possible, or before a suggestion like Bassiouni's model statute can be implemented, there must be international consensus about what the punishment provisions are trying to achieve.

³²⁶ *Op cit* at 523.

3.4 Offences and penalties in conclusion

The international system has pursued international drug prohibition by pursuing the universalisation of drug offences and penalties, but this process has been resisted by states with different legal traditions and different political agendas. An identifiable system of offences and penalties is now recognisable in the domestic law of most states. In many states it is very similar but there is enough variation to conclude that harmonisation of the laws and practice of states is all that has been achieved. The ever growing impact of globalisation may slowly iron out the differences between legal systems so that they do not present an impediment to universalisation of drug offences and penalties, but the political question of what is the ultimate cause of the world's drug problem and who bears responsibility for it, will hold back universalisation and global prohibition, not in the realm of criminal grammar, but in its practical application.

³²⁷ See Henham R 'Criminal justice and sentencing policy for drug offenders' (1994) 22 *Int. Jnl of the Sociology of Law* 223.

CHAPTER FOUR: PROSECUTION

4.1 Introduction

This chapter, the first of two that examine procedural aspects of the illicit drug control system, explores provisions concerned with the prosecution of drug traffickers. Its major concern is the provisions in the drug conventions that set out the grounds for establishing jurisdiction over persons alleged to have committed the drug offences set out in the previous chapter. Jurisdiction and extradition are inextricably entwined in the drug conventions, thus this chapter also examines the provisions in the drug conventions for extradition of such alleged offenders. Finally, it examines the provisions in these conventions that deal with the general procedure to be followed in the prosecution of drug offenders. The chapter is thus concerned with the legal foundations necessary for national courts to entertain legal proceedings in respect of alleged drug offenders.

4.2 Jurisdiction and extradition

4.2.1 Introduction to jurisdiction over drug offences

Fundamental to the international drug control system is the establishment of criminal jurisdiction over drug offences and drug offenders. Establishing jurisdiction is the logical precursor of prosecution, adjudication and punishment when the alleged offender is within the state's custody, or of extradition followed by the normal criminal process when he or she is in the custody of some other state. States in their national drug laws prescribe the reach of these laws (prescriptive or legislative jurisdiction), their courts apply this legislative jurisdiction in individual drugs cases (judicial jurisdiction), and their drug enforcement arms enforce this legislative or judicial jurisdiction (executive or enforcement jurisdiction). The aim of this chapter is to examine exactly what international law in the form of the drug conventions says about the reach of national jurisdiction over drug offences, especially the extraterritorial reach of national jurisdiction, an issue Mann submits is exclusively determined by international law and

not by national interest.¹ It follows that if states reach beyond the boundaries prescribed by international law they engage in a wrongful exercise in jurisdiction. The boundaries of national jurisdiction are respect for the sovereignty and territorial integrity of other states.

In a state based international legal system, the exercise of criminal jurisdiction is ordinarily territorial and only extraordinarily extraterritorial.² When the offence occurs within the state's territory and the offender is taken into custody in that territory, the normal criminal process of that state will run its course. Problems occur, however, when the offence occurs extraterritorially, or the offender is in another state, or both. It is not surprising then that one of the aims of the drug conventions is to ensure that

[i]llicit traffickers do not escape prosecution and punishment solely on the technical ground of lack of local jurisdiction in the country in which they may be found.³

This aim exists because, absent the drug conventions, there is confusion over the establishment of extraterritorial jurisdiction in respect of drug offences, with a range of positions being adopted between the two extremes of those who argue that jurisdiction is strictly territorial and those who argue that a permissive rule exists allowing a state to exercise its power over drug offences perpetrated in the territory of other states. Civil law states tend to have broader jurisdictional principles allowing them to take greater extraterritorial jurisdiction while common law states are more restricted. Divergent domestic drugs policy means that states that want jurisdiction, do not appear to have it, and those that have it, do not want it.⁴ The result of different views on jurisdiction is that

¹ Mann FA 'The doctrine of jurisdiction in international law' (1964-I) 113 *Recueil des Cours* 9 at 10. In a later piece, 'The doctrine of international jurisdiction revisited after twenty years' (1984-III) 186 *Recueil des Cours* 19 at 20, Mann reiterates the co-terminacy of national jurisdiction with sovereignty and rejects the view espoused in the US that extraterritorial criminal jurisdiction is a question of the reasonable interests of states. The problem is obvious with respect to drug traffickers over whom the US may claim such jurisdiction on no other basis than its general interest in suppressing drug trafficking. Following Mann, a closer connection is required.

² The PCIJ made this clear in the *Lotus Case*: 'Now the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state.' (1927) PCIJ Reports Series A No.10.

³ See the 1971 *Commentary* at 346.

⁴ A good example of this situation is the prosecution of Dutch nationals for dealing in cannabis derivatives in the Netherlands by German courts, discussed by Puttler A 'Extraterritorial application of criminal law: jurisdiction to prosecute drug traffic conducted by aliens abroad' in Meesen KM (ed) *Extraterritorial Jurisdiction in Theory and Practice* (1996) 103-121. The problem is caused by the

drug offenders who find themselves in a state other than the one in which they committed their offence quite often escape prosecution and punishment.⁵ General reluctance to extend jurisdiction beyond the territorial is explained by the belief that prosecution in a jurisdiction other than that in which the offence took place is undesirable because no harm has been suffered in that jurisdiction and because effective prosecution will depend on overcoming language problems and problems with gathering evidence. By the same token it may prevent offenders for financial or other reasons from obtaining witnesses or evidence necessary for their exculpation.⁶

Yet extraterritorial jurisdiction over drug offences is possible within existing international legal principles,⁷ although the burden of proof lies with the state claiming or disputing jurisdiction,⁸ and it has also been suggested that establishment of such jurisdiction should not be unreasonable.⁹ The utility of these principles to a state is a function of the breadth of their scope of application in relation to the persons and conduct they cover. The legal validity of a state's reliance upon them, is primarily a question of the closeness, legitimacy and intimacy of a state's connection with the alleged offender and offence.¹⁰

"Subjective territoriality" allows a state to prosecute drug traffickers who operate extraterritorially but who complete one or more of the elements of the relevant offence within the territory of a state.¹¹ This latter requirement restricts the principle's

different drug prevention policies of the two neighbours. The Netherlands, following a policy of decriminalisation with respect to 'soft drugs' such as cannabis does not prosecute their supply, possession and use. Germany, by contrast, is obliged in terms of its domestic law to prosecute. German "drug tourists" cross the border and either consume the substances they purchase there or take it home, perfectly legally in terms of Dutch law, but clearly criminal once they enter German territory. But the German authorities do not stop at prosecution of offences within Germany. They apply for arrest warrants of known dealers in the Netherlands. The Netherlands will not extradite because of absence of double criminality, but sometimes the Germans obtain custody when the alleged offender enters German territory or they extradite them from other states. Puttler discusses the various grounds for extraterritorial jurisdiction and whether the German courts may rely upon them to prosecute these alleged offenders; see the discussion of these grounds below.

⁵ 1961 *Commentary* at 426.

⁶ 1961 *Records* vol.I at 123.

⁷ See on these principles generally Akehurst M 'Jurisdiction in international law' (1972/3) 46 *BYIL* 145 at 152-162; Bowett DW 'Jurisdiction: changing patterns of authority over activities and resources' in MacDonald RSJ and Johnston DM (eds) *The Structure and Process of International law* (1983) 555 at 558-564; Mann *op cit* (1964) at 82-94; and Oehler D 'Criminal Law, International' in Bernhardt R (ed) *Encyclopedia of Public International Law* 877 at 878-9.

⁸ Akehurst *op cit* at 167.

⁹ Blakesly CL 'United States jurisdiction over extraterritorial crime' (1982) *Journal of Criminal Law and Criminology* 1109 at 1112 citing section 403 of the Third Restatement of US Foreign Relations Law.

¹⁰ Mann *op cit* (1964) at 93.

¹¹ Puttler *op cit* at 106 comments that while no sufficiently close link can be established between a Dutch hashish dealer and German clients who buy from him in the Netherlands when he does not know or care

application, although it is available against offenders of any nationality. It is popular in practice.¹²

“Objective territoriality” (the “effects” principle) allows a state to assume responsibility where the effect of the drug offender’s extraterritorial action is felt by a state on its territory. The exercise of jurisdiction on this basis is available against all nationalities. However, open as this principle is to extravagant interpretation, it has been argued that its application should be limited to situations of actual rather than intended effects, particularly in the case of inchoate offences,¹³ and moreover, only to conduct which has a primary, direct and substantial effect on the state concerned.¹⁴ The determining issue for application will in each particular case be the effects of consumption of drugs involved on the individuals and society of the state claiming jurisdiction.¹⁵

The “protective principle” provides a valid ground for asserting extraterritorial jurisdiction if drug trafficking is construed as a threat to the economic and security

what they do, the situation would change and Germany would have jurisdiction if he intended to smuggle hashish into Germany and gave it to German nationals who smuggled it in for him because a constituent element of the crime of importing drugs, the bringing of the drugs into Germany, would take place within Germany.

¹² See Blakesly *op cit* (1982) at 1108-1132. For example, the US Anti-Drug Abuse Act of 1986 (18 USC sections 1956(a) and (c) and 1957(f)) criminalises any US banking transaction involving the proceeds of foreign drugs offences. At a more general level, article 693 of the French *Code de Procedure Penal* provides that any offence is deemed to have been committed in France when ‘an act compromising one of its elements is accomplished in France.’

¹³ Bernholz SA, Bernholz MJ, Herman JN ‘International extradition in drug cases’ (1985) 10 *North Carolina Jnl. of Int. Law and Commercial Regulation* 353 at 370-371 examine the US’s extension of jurisdiction over extraterritorial drug conspiracies through application of objective territoriality. They give as an example *United States v Ricardo* 619 Fed.2d 1124 (5th Cir. 1980), where the US District Court determined it had jurisdiction over defendants charged with conspiracy to import marijuana, even though the conspiracy took place outside the US and was thwarted before any marijuana was imported. The court ruled that US drug conspiracy laws had extraterritorial reach as long as the defendant intended to violate those laws and to have the effects occur within the US (at 1128-9). Blakesly *op cit* (1982) at 1145 argues that when harm is intended but no harmful effect actually occurs on the asserting state’s territory objective territoriality cannot be a basis for asserting jurisdiction. In other words, an inchoate offence, that remains inchoate, has no effects. Yet Akehurst *op cit* at 154 fn2 notes that many states have extended their jurisdiction over externally committed inchoate offences where the primary intended effect would have been felt within their jurisdiction had the offence been consummated. For example, in 1986 the US passed 21 USC section 959 (1986) extending its jurisdiction over foreign nationals exporting drugs to the US. Section 959(d) renders it ‘unlawful for any person to manufacture, or distribute a controlled substance ... intending that such substance be unlawfully imported into the United States ...’.

¹⁴ See Akehurst *op cit* at 154, Mann *op cit* (1984) at 34.

¹⁵ Proving deleterious effects upon which to base jurisdiction may be difficult. For example, Puttler *op cit* at 108 notes that Germany’s taking jurisdiction over Dutch cannabis dealers on the basis of the effects on the physical and mental health of German cannabis consumers is difficult because of the lack of conclusive evidence of physical effects and the controversy surrounding evidence of mental effects.

interests of a state. It has been used by some states against extraterritorial trafficking,¹⁶ and is available against any nationality, and even in situations where harm is only intended and no effect is felt on a state's territory.¹⁷ Puttler notes, however, that the principle may not be used to impose a state's drug policy abroad, that its purpose must be to safeguard the political independence, security or governmental functions of the asserting state, and that in reality the primary effect of even large-scale drug crimes is not to threaten the state in this way.¹⁸

Resort in principle to "nationality" ("active personality") to justify extraterritorial jurisdiction over a state's own citizens who commit any type of drug offence is common in civil law states but uncommon in common law states. An application of the general principle that a state may prescribe that its nationals abroad should not commit generally recognised criminal offences, nationality is obviously not available against foreigners.

¹⁶ Most national penal codes recognise the principle generally, but its specific application to drug offences is less common. The US Maritime Drug Law Enforcement Act, 46 USC section 1902, uses the wording 'specific threat to security' as a basis for extraterritorial jurisdiction. Blakesly *op cit* (1982) at 1147-1149 notes that in *US v Brown* 549 F.2d 954 (4th Circ 1977), where the defendant was convicted of a conspiracy to import heroin by army mail into the US from Germany, although jurisdiction was ostensibly based on an extension of territoriality, it was in fact based on the protective principle. Puttler *op cit* at 108 notes that the German Bundesgerichtshof (34 BGHSt 334, 339) has based jurisdiction over a Dutch cannabis dealer operating in the Netherlands on the protective principle. The court held that the dealer had violated German interests by having sold over many years a considerable amount of hashish to German nationals who had taken the drug to Germany to consume it or resell it.

¹⁷ See, for example, the *United States v Biermann* 678 F.Supp 1427 (1988) at 1445 where the US District Court held that the protective principle as contained in 46 USC section 1903 enabled the extension of US jurisdiction over foreign vessels carrying drugs where only the threat of harm to the US and not an actual harmful effect could be shown.

¹⁸ *Op cit* at 109. She notes that court decisions relying on this principle have not discussed whether external drug trafficking in fact threatened the security of the prosecuting state or its state functions. She comments at 110 in respect of the German courts' reliance on this principle to assert jurisdiction over Dutch nationals dealing in cannabis, that while sale of hard drugs followed by their import into Germany may arguably cause drug abuse and addiction of a considerable part of the population thereby corrupting the government or destabilising the social order, there is no evidence to show that sale of soft drugs will do so. Kallenbach C 'Plomo o plata: irregular rendition as a means of gaining jurisdiction over Colombian drug kingpins' (1990) 23 *NYU Jnl of Int. Law and Politics* 169 at 210 argues that this principle can be used to assert US jurisdiction over Colombian drug traffickers because of the violations of US borders, the poisoning of the US population and the full scale military effort required to combat drug trafficking, all of which threaten the US.

Nationality is used against drug criminals in practice,¹⁹ but is not as common as it appears.²⁰

“Passive personality”, justifying extraterritorial jurisdiction by a state over drug offenders because the victims of their actions are its citizens, is potentially available against offenders of any nationality.²¹ It has, however, not been commonly resorted to, because the circumstances in which the injury inflicted by the accused is of sufficient weight to justify the application of passive personality are unclear. Moreover, establishing such a connection where the abuser of drugs takes the substance voluntarily is difficult. It is usually resorted to only in circumstances when it is the only way for any state to assert jurisdiction.²²

Application of “universal jurisdiction” would allow all states to have jurisdiction over any drug offence committed anywhere at anytime by anyone,²³ even in situations where the domestic law of the state claiming jurisdiction did not outlaw the conduct in question and in spite of any extradition requests.²⁴ Universality would apply to drug offences if they were classified as international offences *stricto sensu*, that is, offences in international not national law.²⁵ Drug offenders would, like pirates,²⁶ have to be considered *hostes humanis generis*, the enemies of all mankind, because of their moral

¹⁹ For example, the US Anti-Drug Abuse Act of 1986, 18 USC sections 1956(f) and 1957(a) and (d), criminalise any transaction in proceeds knowingly derived from drug offences by an American person or entity outside the United States. In *Public Prosecutor v Gunther B and Manfred E* (1976) 71 ILR 247 the Austrian court extended its jurisdiction on the basis of the nationality principle in article 36(1) of the Austrian Criminal Code over two Austrian citizens caught in Bulgaria who had purchased hashish in Afghanistan and were returning with it by car to Austria.

²⁰ Surena AM in a panel discussion on the ‘International drug traffic’ (1990) 84 *American Society of International Law: Proceedings* 1 at 2 complains that ‘only a few states will prosecute their nationals for offences committed against the interests of a third state.’

²¹ Some states apply the principle generally (eg. German Penal Code section 7(1)), and some states don’t (eg. the US) - see Blakesly CL, Lagodny O ‘Finding harmony amidst disagreement over extradition, jurisdiction, the role of human rights, and issues of extraterritoriality under international criminal law’ (1991) 24 *Vanderbilt Jnl of Transnational Law* 1 at 24.

²² Law Reform Commission of Canada *Extraterritorial Jurisdiction* (Working Paper 37, LRC Canada, Ottawa, 1984) at 10.

²³ See generally Randall KC ‘Universal jurisdiction under international law’ (1988) 66 *Texas LR* 785-841.

²⁴ See Gilbert G ‘Crimes *sans frontières*: jurisdictional problems in english law’ (1992) 63 *BYIL* 415 at 423 fn61.

²⁵ Wise EM ‘The obligation to extradite or prosecute’ (1993) 1&2 *Israel LR* 268 at 269.

²⁶ See Fletcher A ‘Pirates and smugglers: an analysis of the use of abductions to bring drug traffickers to trial’ (1991) 32 *Virginia JIL* 233-264. At 263-264 he explores the analogy with piracy and shows the link between the interests and capacity of affected states and the internationalisation of drug offences. Like piracy, some kind of practical necessity and capacity for the policing and prosecution of drug trafficking exists. European states developed the international crime of piracy because of their shared need and capacity to protect their maritime trading interests, and so too have drug consumer states developed their

and practical condemnation. There is support for this position both academically,²⁷ in state practice,²⁸ and *de lege ferenda* in international law,²⁹ but there is also opposition.³⁰ The history of international drug control illustrates that the drug conventions did not crystallise a pre-existing customary international rule creating an international drug offence to which universal jurisdiction applied. It is unlikely that such a rule has grown up independently of the drug conventions. The only source for such an offence would be the drug conventions themselves.³¹ Thus it becomes a question of whether the drug conventions articulate the application of universality to the specified drug offences, obliging Parties to apply it and creating a model for the development of a subsequent state practice and *opinio iuris* that would embrace non-parties as well.

The application of "subsidiary universality"³² can be achieved through application of the *aut dedere aut judicare* principle to drug offences.³³ Today this

extraterritorial policing and prosecution of drug crimes because their social order is threatened by drug use and they believe supply interdiction is how it must and can be dealt with.

²⁷ See, for instance, Blum YZ 'Extradition: a common approach to the control of international terrorism and the traffic in narcotic drugs' (1978) 13 *Israel LR* 194 at 197; Bassiouni MC in *International Crimes: Digest/Index of International Instruments 1815-1983* (1985) at LVI; Chatterjee SK *Legal Aspects of International Drug Control* (1981) at 525. Mann *op cit* (1964) at 95 implies that the status of drug offences as international crimes comes from their being covered by treaties evidencing the general agreement of states to suppress them. See also the American Law Institute *Third Restatement of the Foreign Relations Law of the United States* (1987) sections 404 and 423.

²⁸ Section 6(5) of the German Penal Code reads: 'Irrespective of the law of the place where the offence was committed, German criminal law is applicable to the following offences committed abroad: ... (5) illicit traffic in narcotic drugs...'. The German Federal Supreme Court has held in the *Universal Jurisdiction over Drug Offences Case* (1979) 74 ILR 166 that section 6(5) bases jurisdiction for prosecution of illicit traffic in all kinds of controlled drugs on the principle of universality. In *DPP v Doot* [1973] AC 807 Lord Wilberforce noted *obiter* that the prevention of the narcotics trade falls under the principle of universality in international law (at 803D). In *US v Marino Garcia* 679 F.2nd 1373 at 1382 n.16 the US Court noted: 'It may well be that the time has arrived when the Congress of the United States should by appropriate legislation include drug trafficking in the same category as slave trafficking and piracy and authorise prosecution of drug trafficking on the high seas as offences against the Law of Nations ...'.

²⁹ Article 14 of the International Penal Law Treaty of Montevideo gave the state captor jurisdiction over drug trafficking. Although later erased, draft article 2 of the 1988 Convention stated that drug trafficking was an 'international crime against humanity' - see ECOSOC Res. 39/141.

³⁰ In the *United States v James-Robinson* 515 F. Supp. 1340 at 1344 n.6 (1981) the US District Court found that drug trafficking is not a crime justifying universal jurisdiction. See also Linke R, Epp JH, Kabelka E *Extradition for Drug-Related Offences* (1985) who state at 62 that drug offences are not yet recognised as offences to which universality applies.

³¹ Article 38 of the Vienna Convention on the Law of Treaties makes it clear that a rule set out in a convention can subsequently pass into custom. See also the *North Sea Continental Shelf Case* ICJ Reports 1969 at 3.

³² The term subsidiary universality was coined by Carnegie AR in 'Jurisdiction over violations of the laws and customs of war' (1963) 39 *BYBIL* 402 at 405. This form of extraterritorial jurisdiction is subsidiary not to other forms of jurisdiction, but to extradition. It is also sometimes referred to as the "representative or vicarious administration of justice".

³³ See generally Wise EM 'The obligation to extradite or prosecute' (1993) 1&2 *Israel LR* 268-287; Bassiouni MC, Wise EM *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International*

principle is applied to international offences *lato sensu*, offences of international concern which states are under an obligation, usually created by treaty, to prosecute. The principle functions to overcome problems with extradition in general but usually with the non-extradition of nationals, and holds that where an extradition request is rejected for whatever reason, the requested state is under a duty to assume jurisdiction itself and prosecute the alleged offender. The basic proposition does rely on the *aut dedere aut judicare* principle being an obligation on states to extradite first, and then if that is impossible, to prosecute.³⁴ It is dependant on the existence of double criminality.³⁵ Some states do make provision for its operation in their domestic law,³⁶ while others are less familiar with it. The principle has not always worked well in practice.³⁷ It has been criticised for overlooking the logistical and legal difficulties of prosecution outside the territory of the state where the crime is committed.³⁸ The requested state may be unwilling or unable to prosecute for political or legal reasons, and if it does prosecute, a

Law (1995) 1-74. They explain that the principle *aut dedere aut punire*, meaning extradite or punish, as formulated by Grotius in *De Jure Belli Ac Pacis* Book II, Chp XXI par IV(1) (1624) must be reformulated as *aut dedere aut judicare* to assume the offender's innocence.

³⁴ See Bassiouni MC 'Characteristics of international criminal law conventions' in Bassiouni MC (ed) *International Criminal Law: Volume One Crimes* (1986) 1 at 8-9 who submits that the choice between extradition or prosecution is the requested state's, but notes that the requested state is obliged to prosecute only if it validly cannot extradite. Wise *op cit* at 272 submits that the obligation to prosecute is not contingent on a request for extradition nor on an offer of extradition being refused.

³⁵ The offence must be punishable in both states and must not be open to more severe punishment in the requested state than in the requesting state.

³⁶ The principle is popular in Europe. Section 7(2) of the German Penal Code, for example, allows Germany to assert its jurisdiction to prosecute drug related conduct committed abroad. The requirements are that the law of the state where the offence took place must regard the conduct as a punishable offence, and the offender must not have been extradited to this state because no application had been made or extradition was not feasible although German law would usually permit such extradition.

³⁷ The US has had problems with the principle. Abramovsky A 'Extraterritorial abductions: America's "Catch and Snatch" policy run amok' (1991) 31 *Virginia JIL* 151 at 207 notes for example, that article 9(2) of the United States - Mexico Extradition Treaty (31 *UST* 5056) allows for the requested Party where it denies an extradition request to submit the case to its own authorities for prosecution provided they have jurisdiction. In drug consumer states, such jurisdiction is commonly based on nationality (as they are commonly civil law states). Abramovsky notes that 'this process has not worked well in practice because the US has often been disappointed by both the law of prosecution of the relator and the slowness of the Mexican legal process', a frustration which has lead to illegal and irregular rendition.

³⁸ Bowett *op cit* at 564. These difficulties include language problems and problems with getting evidence and witnesses from one state to another. A strong argument against the application of this principle to drug offences is that its operation will be intolerable if they vary from state to state; the range of criminal conduct would be too great for any person to comprehend and guide his conduct accordingly - see Akehurst *op cit* at 165 citing Brierly (1928) 44 *LQR* 154 at 161. Only globally uniform drug offences would alleviate this problem, and such uniformity does not exist. Splintering of prosecutions with some accused in the requesting state and others in the refusing requested state is also undesirable because no complete picture of the offence emerges to allow a court to attribute liability and penalties in an appropriate manner - see Prost K 'Breaking down the barriers: international co-operation in combating transnational crime' in *Souvenir Brochure of the International Conference on Global drugs Law* (1997) 44 at 52.

state may do so inadequately because its interests are not at stake and in doing so it may tax relations between it and the already disappointed requesting state.³⁹ Extradition appears to be preferable for practical reasons, yet Blum argues that such criticisms are not apposite if drug offences are regarded as universal threats and implies that states must simply make a greater effort.⁴⁰ In respect of drug offences, the drug conventions can be the only source of a duty to extradite or prosecute because as Clark notes, absent a treaty undertaking, by the nineteenth century most states and scholars accepted that there was no customary legal duty to extradite or to take legal action against an offender from another state.⁴¹ Although the adoption of the principle in an increasing number of treaties has led to greater attention being paid to its possible customary legal status and it thus being applicable to certain international offences apart from the specific treaties which embody it, such a conclusion remains not proven.⁴² Thus the issue is whether the drug conventions create such a duty. The opinion of many commentators that the drug

³⁹ Patel F 'Crime without frontiers: a proposal for an international narcotics court' (1990) 22 *NYU Jnl of Int. Law and Politics* 709 at 7201-721. Patel submits that intimidation of officials such as judges and enforcement officers is also a problem in some states, as is the lack of a serious commitment by certain states to stopping drug trafficking. She cites the examples of intimidation of judges in Colombia, and the lack of commitment by states such as Bolivia. Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 at 856 explains that most such prosecutions are unsuccessful unless senior officials of the requesting state show a strong interest in the foreign prosecution.

⁴⁰ *Op cit* at 199. In effect, he favours the classification of drug offences as international crimes and the application of universal jurisdiction, and supports prosecution rather than extradition in most cases.

⁴¹ Clark RS 'Offences of international concern: multilateral state treaty practice in the forty years since Nuremberg' (1988) 57 *Nordic Jnl of Int. Law* 49 at endnote 115; see also Swart B 'Refusal of extradition and the United Nations Model Treaty on Extradition' (1992) 23 *Netherlands YIL* 175 at 214; Wise *op cit* at 279.

⁴² Bassiouni MC, Wise EM *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) at 5. They note at 20 that the assertions about the customary status of the *aut dedere aut judicare* principle may take three progressively wider forms, viz.: i) it may be a customary rule with respect to a particular offence defined in a particular treaty (eg. the offence of importation in article 36 of the 1961 Convention); it may be a customary rule with respect to a whole class of international offences (eg. the drug offences in the drug conventions); or it may be a rule that applies to all international offences (including drug offences). Whatever the case, non-parties would be bound to observe the application of the principle, and the particular form would only affect the material scope of application to particular, in our case, drug offences. In practice, the authors' note at 21 that it is the latter broad categorical assertion which is most commonly advanced. The argument, put crudely, is that the duty flows out of the common interest that all states have in the suppression of international offences. It is a duty owed to the international community, the *civitas maxima*. This duty is reaffirmed by its consistent acceptance in treaties. The authors conclude at 68, however, that state practice does not support the customary status of the principle, and its customary status depends rather on the postulated existence of the *civitas maxima*. While Bassiouni supports the validity of this postulate, Wise does not. Their conclusion reflects the controversy surrounding this principle's customary status. In his earlier piece, 'The obligation to extradite or prosecute' (1993) 1&2 *Israel LR* 268 at 279-287 Wise concludes that there is not sufficient evidence of a consistent and uniform state practice in this regard (at 282). He is critical of those such as Bassiouni who argue for the existence of such a custom as being overly reliant on the authority of the *civitas*

conventions provide support for a movement toward some form of universality requires closer attention.⁴³

The focus then of this chapter is on the provisions of a jurisdictional nature in the drug conventions, in order to discover whether they oblige Parties to extend their establishment of jurisdiction beyond the territorial and if so to what extent. More elegantly put, it examines whether the conventions provide for universal jurisdiction or something less than universality. The extension of jurisdiction must flow from the conventions themselves because customary international law does not provide an effective means for the assertion of extraterritorial jurisdiction over drug offences due to the controversy and uncertainty surrounding the limits in customary international law of the rights of states to legislate with extraterritorial effect.⁴⁴ Before examining jurisdiction in the context of the conventions it is useful to briefly introduce the associated concept of extradition.

4.2.2 Introduction to extradition of drug offenders

Extradition is the legal process whereby the criminal justice system of one state gains access to witnesses and suspects from, or in, another state.⁴⁵ As was noted above, there is no general duty to extradite. Extradition of drug offenders is broadly regulated by the drug conventions, although it is based in practice either upon treaty or upon reciprocity. The drug conventions thus either modify existing extradition treaties or existing extradition legislation. The drug conventions are faced with the difficulty of laying down rules that will overcome the problems with extradition in modern state practice.

maxima to create a theoretically coherent system of international offences to which the principle *aut dedere aut judicare* applies, when in fact reality denies this.

⁴³ See Abramovsky *op cit* at 180; Blakesly *op cit* (1982) at 1141; Blakesly CL, Lagodny O 'Finding harmony amidst disagreement over extradition, jurisdiction, the role of human rights, and issues of extraterritoriality under international criminal law' (1991) 24 *Vanderbilt Jnl of Transnational Law* 1 at 35; Penney B in Panel discussion 'Drugs and small arms: can law stop the traffic?' (1987) 81 *American Society of International Law: Proceedings* 44 at 46; Kallenbach *op cit* at 211. The legal adviser of the United States State Department said in 1989: 'Certain forms of criminal activity have been subject to universal jurisdiction. ... [A]greements deal with international drug dealers and create an obligation on parties to prosecute or extradite these criminals ...'. Sofaer AD (Legal Adviser to the Department of State) before the US Congressional Subcommittee on Civil and Constitutional Rights, 9 November 1989, recorded in Leigh MN 'Contemporary practice of the United States relating to international law: territorial jurisdiction' (1990) 84 *AJIL* 725-729. Most of the commentators cited do not discriminate between subsidiary universality and universality *stricto sensu*.

⁴⁴ See Gilmore WC *Combating International Drug Trafficking: the 1988 United Nations Convention Against Illicit Traffic in narcotic Drugs and Psychotropic Substances* (1991) 10.

⁴⁵ See generally Bassiouni MC *International Extradition and World Public Order* (1974) at 1ff; for extradition in respect of drug offences see generally Linke et al *op cit*.

The primary impediments to the extradition of drug offenders are political in nature. In cases of concurrent jurisdiction, most extradition treaties recognise that the proper jurisdiction of the requested state is a valid ground for denying extradition⁴⁶ and states are generally reluctant to give up jurisdiction over persons within their territory. They may resist extradition as a matter of national pride because of the perception that it questions the integrity of their judicial system. States may also perceive foreign courts as being biased, either systematically because of the unfamiliarity of language, customs and procedures, or against their citizens in particular.⁴⁷ The refusal by many civil law states to allow the extradition of their nationals for constitutional reasons or because of their domestic law, is regarded as one of the major legal obstructions to extradition in drugs cases.⁴⁸ Many existing extradition treaties compensate for this and do not oblige states, including common law states, to extradite nationals.⁴⁹ But some states will not extradite nationals for other reasons, including the threat posed and the influence wielded by illicit drug cartels⁵⁰ and because extradition requests emanate mostly from consumer states perceived by the requested producer states as the real cause of the drug problem.⁵¹

⁴⁶ See, for example, article 7(1) of the 1957 European Convention on Extradition, 359 *UNTS* 273.

⁴⁷ Patel *op cit* at 718.

⁴⁸ Abramovsky *op cit* at 155 note 10 points out that this is a particular problem in the US's drug war with Latin American states because several of the latter refuse to extradite for constitutional or other legal reasons. He gives the example of Colombia where in 1986 the Supreme Court declared that the 1979 extradition treaty with the US was unconstitutional and unenforceable, but notes that in terms of the Colombian Court's decision in *In re Aravelo* 10 Ann. Dig. 329 (1942) such offenders could be prosecuted in Colombia under article 7 of its Penal Code.

⁴⁹ For example, in terms of article 9(1) of the 1978 US-Mexico Extradition Treaty, 31 *UST* 5056, 5059, neither state is obliged to extradite its nationals.

⁵⁰ The Colombian drug traffickers' war on extradition is well documented. See for example, Bin RM 'Drug Lords and the Colombian Judiciary: A story of threats, bribes and bullets' (1986) 5 *UCLA Pacific Basin LJ* 178-182. She describes how the *narcotraficantes* threat of "silver or lead" resulted in the death of sixty Colombian judges from 1982 and 1987, and how only twelve of one hundred and thirty extradition requests by the US were granted until in 1987 the Colombian Supreme Court declared the legislation ratifying the extradition treaty with the US unconstitutional. Colombia went so far in the early 1990s as to apply a government leniency programme allowing reduced punishment for suspects who help further drug enforcement, a prohibition on extradition, exemptions from photographs and further sentence reductions for good behaviour. Pablo Escobar, a major trafficker, was jailed in a customised jail when he surrendered in terms of the programme - see Gardner SA 'A global initiative to deter drug trafficking: will internationalizing the drug war work?' (1993) 7 *Temple Int. and Comparative LR* 287 at 304-305. In the post-Escobar era (he was killed in late 1993) Colombian officials called for legalisation, commented that the flow of drugs to the US was heavier than ever despite all the lives lost in the war on drugs, and tried plea-bargaining with major traffickers - *Time* 11 April 1994. Recent reports indicate that once again senior officials in Mexico and Colombia, for example, are seeking to end the drug cartels reign of terror 'by removing the threat of extradition to the US, and offering reduced sentences for traffickers who turn themselves in.' They believe that extradition of drug traffickers sparks the criminal violence and official counter violence backed by the US destabilises their countries - *The Guardian* 16 April 1997. Yet late in 1997 the Colombian President signed into force legislation permitting extradition of drug traffickers, with the exception of those already serving sentences in Colombian jails - *The Guardian* 17 December 1997.

⁵¹ Patel *op cit* at 718. See also ABA's Task Force 'Report' (1993) 27 *International Lawyer* 258 at 263.

Secondary obstacles to extradition are more technical. Most common law states require the existence of an extradition treaty to effectuate extradition, although the civil law practice of relying solely upon domestic law grounded upon reciprocity or comity is growing in popularity. A simple problem common with older treaties may be that the treaty concerned does not apply to drug offences. This is a direct result of following an enumerative approach to extradition in these treaties, that is, the listing of extraditable offences which is by definition limited and requires constant updating. This dilemma is avoided by the adoption of evaluative or eliminative approaches which applies extradition to all offences to which a maximum punishment such as imprisonment for more than a defined period, usually one year, applies in both Parties. Treaties that follow the eliminative method have the advantages of neither requiring constant updating to include new drug offences nor requiring restriction to serious drug offences as they are already restricted to serious offences by definition.

The general principles of extradition law may also be relied upon by states to refuse or challenge extradition once granted. These principles include the principle of specialty, that the extradited offender is to be tried only with the offence for which he is extradited and not surrendered to third states,⁵² and the principle of double criminality, requiring that the offence for which the offender is being extradited must be an offence in both states.⁵³ Double jeopardy may hamper extradition.⁵⁴ The political and fiscal

⁵² Kallenbach *op cit* at 175.

⁵³ See generally Gardocki L 'Double criminality in extradition law' (1993) 1&2 *Israel LR* 288-296. Bernholz SA, Bernholz MJ, Herman JN 'International extradition in drug cases' (1985) 10 *North Carolina Jnl. of Int. Law and Commercial Regulation* 353-382. Okera SY 'International extradition and the Medellin cocaine cartel: surgical removal of Colombian cocaine traffickers for trial in the United States' (1992) 13 *Loyola of Los Angeles Int. and Comp. LJ* 955 at 982-989 points out that in US law the doctrine of specialty does not relate to the formal correspondence of extradition request and charge, but to substantive correspondence. Yet new offences for which there is no corresponding offence in the law of other states will result in problems for extradition. The principle also requires that the elements that provide jurisdictional basis for the prosecution of the offence must be recognised in both states. In *Republic of France v Moghadam* 617 F. Supp. 777 (D.C. Cal. 1985) the US District Court in California denied France an extradition request when France's jurisdiction over the alleged drug offender was based upon French nationality. The court insisted in effect that French jurisdiction had to be based on subjective or objective territoriality, grounds for extraterritorial jurisdiction recognised by the US. Campbell AB 'The Ker-Frisbie doctrine: a jurisdictional weapon in the war on drugs' (1990) 23 *Vanderbilt Jnl of Transnational Law* 385 at 402 explains that, in addition, the rapid development of new drugs can also cause problems for double criminality as the new drugs are developed faster than extradition treaties can account for them, i.e. they may be included within the list of scheduled drugs in the requesting state but not in the requested state when the extradition request is made.

⁵⁴ See Linke et al *op cit* at 53ff. Double jeopardy, also known as the principle *non bis in idem*, means that once a criminal charge has been adjudicated upon by a court having jurisdiction to hear it, that adjudication is final and may be pleaded in bar to any subsequent prosecution for the same offence. While double jeopardy does operate in the international context through treaty law and its presence in extradition treaties means that requested states are able to refuse extradition requests if the subject of the request has

offence exceptions to extradition, where states refuse to extradite for what they consider to be political or fiscal offences, also cause problems.⁵⁵ The differences in extradition procedures are one of the greatest obstacles to international co-operation in drug control. Civil law states generally only require the issuance of a warrant of arrest from a judicial authority and a copy of the laws under which an offender is to be prosecuted to substantiate an extradition request, while common law states usually insist upon the requesting state presenting a *prima facie* case in their law before an extradition request will be granted. The latter approach has been troublesome for extradition from common law to civil law states as civil law states have simply been unable in many instances to generate the level of proof required.⁵⁶ The reverse is not true,⁵⁷ although to be fair, nationals of common law states are exposed to extradition while those from civil law states are not.⁵⁸ Other problems include, as Anderson points out, the fact that while most states regard Interpol's issuing of a red notice as an international warrant for arrest with the assurance that a request for extradition will automatically follow, and issue an arrest warrant immediately, some states still require further evidence to be presented before an arrest warrant will be issued. Such evidence may require the presences of witnesses, and as rogatory commissions are not common, the whole system can be slowed down dramatically.⁵⁹ Built, as the system is, upon respect for the sovereignty of

been tried and punished already, it does not appear that customary international law prohibits international double jeopardy. Some states prosecute their nationals for crimes committed abroad and for which they have already been convicted - see, for example, the cases of Germany's prosecution of its nationals for offences already tried by war crimes tribunals (*Lischka et al* reported in the *Times* 12/2/1980 - cited by Green LC 'International crimes and the legal process' (1980) 29 *ICLQ* 567).

⁵⁵ See Patel *op cit* at 729. The political offence exception applies to drug offences usually when such trafficking is connected to fund-raising activities in support of political activities, but Linke et al *op cit* at 27 reject this as a valid ground for refusing extradition. The fiscal offence exception usually applies to drug offences when they are classified as customs offences under domestic law. There are different ways around this problem including extradition for offences that are mixed in nature but not for those that are exclusively fiscal, but Linke et al argue that such offences are in reality drug offences and refusal to extradite would be counter-productive.

⁵⁶ On the disadvantages of the latter approach - it is time consuming and costly and has lead to the modern trend to reduce the standard - see generally Coggins P, Roberts WA 'Extraterritorial jurisdiction: an untamed adolescent' 1991 *CLB* 1391 at 1403; and Linke et al *op cit* at 41-45.

⁵⁷ Patel *op cit* at 728.

⁵⁸ For example, the insistence in many states that the requesting state must be represented at the extradition hearing by a legal practitioner from the requested state, and the refusal of the courts in many states to admit certain kinds of evidence such as confessions, searches or electronic surveillance, common in drug trafficking prosecutions in for instance the US, in extradition hearings - see Surena *op cit* at 5.

⁵⁹ Anderson M *Policing the World* (1989) 30-1. At 31 points out the importance of "letters rogatory" and "rogatory commissions". "Letters rogatory" are a form of introduction of an investigator seeking assistance in gathering evidence in a foreign jurisdiction to a competent legal authority. "Rogatory commissions" are vehicles by which the results of a foreign enquiry can be brought home by the requesting state and used as evidence in its courts.

criminal justice systems of each participating state, the international system must respect the procedural rules of each state relating to extradition. Some extradition treaties such as the 1957 European Convention on Extradition⁶⁰ have attempted to eliminate the differences in these procedures, but not every state is party to such a multilateral treaty. While states have taken domestic measures to iron out differences or problems in extradition,⁶¹ problems do still remain.

Another example of divergence in practice relates to the extradition of individuals who may face capital punishment.⁶² States that have abolished the death penalty usually refuse to extradite to countries where it remains a competent sentence for drug trafficking.⁶³ It has been suggested that this principle be applied to life and indeterminate sentences of imprisonment⁶⁴ and degrading forms of punishment such as corporal punishment,⁶⁵ and indeed it has been applied to severe fixed sentences of imprisonment for drug traffickers.⁶⁶ Linke et al argue, however, that the severity of sanctions involving deprivation of liberty should not be and is usually not accepted as a ground for refusing extradition.⁶⁷ They point out that excessively lenient punishment

⁶⁰ 359 UNTS 276; ETS 24.

⁶¹ In the UK, the Criminal Justice Act, 1988, c33, provides for a simple procedure of endorsing the foreign arrest warrant, without examination of the merits of the prosecution's case. This would dispense with the requirement of making a *prima facie* prosecution case, first in respect of the European Union and then in respect of other states when deemed appropriate.

⁶² See generally Roecks CR 'Extradition, human rights, and the death penalty: when nations must refuse to extradite a person charged with a capital crime' (1994) 25 *California Western ILJ* 189-234.

⁶³ Anderson *op cit* at 32. States may grant extradition conditional upon a guarantee that the death penalty will not be imposed, following, for example, article 11 of the 1957 European Convention on Extradition 359 UNTS 273. It is worth noting the principle laid down in the decision in *Ng v Canada* Comm. No. 469/1991, UN Doc. CCPR/C/09/D469/1991 (1993) where the UN Human Rights Committee held that Canada had breached its obligations under the 1966 International Covenant on Civil and Political Rights 999 UNTS 171 when it extradited Charles Ng, a British subject, to the US for trial for a capital offence without obtaining assurances that the death penalty would not be carried out. Applied to drugs related cases, the decision serves to bar the granting by states party to the 1966 Covenant of extradition requests where the possibility of execution exists in the requesting state and no guarantees are given that it will not be carried out.

⁶⁴ See fn12 to article 4(d) of the UN's 1990 Model Treaty on Extradition GA Res. 45/116 UNGAOR 45th Sess. UN Doc. A/Res/45/116 (reprinted 30 *ILM* at 1412). See also Sheleff L 'The "pennological exception" to extradition: on ultimate penalties, human rights and international relations' (1993) 1&2 *Israel LR* 310-338 particularly at 322-323.

⁶⁵ See the 1981 Inter-American Convention on Extradition.

⁶⁶ See, for example, the Quebec Court of Appeals refusal to extradite alleged drug trafficker Daniel Jamieson to the US state of Michigan where he would face a minimum sentence of twenty years imprisonment with no option of parole. It referred the matter to the Canadian Supreme Court (*United States v Jamieson* 93 CCC 3d 265 (Que. CA. 1994). Leeson J 'Refusal to extradite: an examination of Canada's indictment of the American legal system' (1996) 26 *Georgia Jnl of Int. and Comp. Law* 641 at 643 notes that the presiding judge ruled that sending Jamieson to Michigan would violate his human rights in terms of section 12 of the Canadian Charter of Rights and Freedoms which protects against cruel and unusual punishment. In Canada Jamieson's conduct would be punishable by five years imprisonment.

⁶⁷ *Op cit* at 33.

may also be an obstacle to extradition especially where the elimination method applies and the requesting Party has not put in place legislation allowing the punishment of serious drug offences with severe sanctions (a maximum penalty of imprisonment of at least one year).⁶⁸

Some problems which states attempting extradition face are purely practical. For example, enforcement agents in the requesting state often fear that corrupt officials in the requested state will alert the extradition target or manufacture "legal" grounds for refusing the request.⁶⁹

Given that all of the reasons for the malfunctioning of extradition apply to the burgeoning drug traffic, it is not surprising that certain states have turned to other methods to obtain the custody of alleged drug offenders. Nadelmann⁷⁰ explains that while extradition is popular with the United States because it avoids ineffective prosecutions and punishments by local officials (processes in which United States enforcement agents are unable to participate), extradition is also vulnerable to corruption hence the steadily increasing popularity of extraterritorial abductions⁷¹ and irregular renditions⁷² as a substitute for extradition.⁷³ Although not violative of international law

⁶⁸ *Op cit* at 34.

⁶⁹ Abramovsky *op cit* at 155 fn12 gives as an example an incident where corrupt Mexican officials allowed a target to bribe his way out of an airport after his jet had been surrounded by Mexican police.

⁷⁰ Nadelmann EA 'The Drug Enforcement Agency in Latin America: the ins and outs of working around corruption' (1989) 62 *Police Journal* 157 at 166-167.

⁷¹ The removal for trial of an alleged offender from another state without any consultation with responsible officials of that state's government.

⁷² The removal of an alleged offender from another state with its tacit approval or acquiescence.

⁷³ See generally Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 who at 857-882 provides an account of the evolution, institutionalisation and growing popularity of irregular rendition in the US. Abramovsky *op cit* at 151-210 describes in detail the granting of *in personam* jurisdiction following the Ker-Frisbie doctrine (*Ker v Illinois* 119 US 436 and *Frisbie v Collins* 342 US 519) to US courts over foreign defendants in drugs related cases in disregard of the method used to bring the defendant before court. Abramovsky notes at 156 that "catch and snatch" received the sanction of the US Justice Department in 1989. The most infamous of the string of drugs cases following the doctrine is the *US v Alvarez-Machain* 112 US 2188 (1992) where the US Supreme Court allowed the acquisition of jurisdiction over the offender despite his abduction, the fact that he was a Mexican citizen, the existence of an extradition treaty between the US and the asylum state Mexico, and the strong protests of the Mexican government at the violation of international law. The District Court had found that the abduction was a unilateral substitution for extradition which violated treaty law (*US v Caro Quintero* 745 Fed. Supp. 599 at 609). The Court of Appeals (946 F.2d 1466 (9th Cir. 1991)) had affirmed the finding that jurisdiction was improper because of Mexico's protest, but the Supreme Court reversed the decision, holding the abduction did not prohibit trial in the US for a violation of its criminal law. For a defence of US practice see Fletcher A 'Pirates and smugglers: an analysis of the use of abductions to bring drug traffickers to trial' (1991) 32 *Virginia Jnl Int. Law* 233 who argues at 256 that '[e]xtradition treaties do not exist to protect the sovereignty of the contracting states. They exist in respect of the sovereignty of the contracting states.' But extradition treaties do not protect sovereignty, general international law does, and it is the violation of international law which is crucial here. Interestingly, at 259 he cites the State Department

per se, an irregular rendition such as deportation is an unsuitable substitute for extradition because it is a unilateral act used to protect domestic public order rather than the result of bilateral agreement to surrender a fugitive, and it may expose the alleged offender to abuse without any of the protections available to him under an extradition treaty.⁷⁴ While unilateral abductions are not common,⁷⁵ they are not unknown, and aside from their potential human rights violations,⁷⁶ they are violations of international law because the abduction violates the sovereignty and territorial integrity of the asylum state which may lead to reprisals and to the discontinuance of international co-operation in international drug control generally.⁷⁷ Military action is the next absurd step when abduction fails.⁷⁸ Innovative international provisions increasing Parties' obligations in

position in 1989 that drug trafficking's threat to domestic security justifies action in self-defence permitting violation of territorial integrity under article 51 of the UN Charter. In other jurisdictions abductions and irregular renditions have been rejected as a basis for the founding of jurisdiction because they are regarded as an abuse of process - see, for example, the decision of the UK's House of Lords in *R v Horseferry Road Magistrates Court, ex parte Bennet* [1994] 1 AC 42. The decision in *Alvarez-Machain* is good for domestic law enforcement, bad for international relations and human rights.

⁷⁴ See Stein T 'International law and extradition relations between the United States and Germany' (1990) 31 *Harvard ILJ* 12 at 12-14.

⁷⁵ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 8.

⁷⁶ Bassiouni MC *International Extradition: United States Law and Practice* 2ed (1987) at 223-224 submits that abduction violates the human rights protected in the UN Charter, the 1948 Universal Declaration of Human Rights, 3 UNGAOR at 71, (article 3 - protection of life, liberty and security of a person, article 9 - protection from arbitrary arrest, detention or exile) and the 1966 International Covenant on Civil and Political Rights 999 UNTS 171 (article 9(1) - protection from arbitrary arrest). Kallenbach *op cit* at 211-213 argues that irregular rendition/ abduction does not violate these rights as they are guaranteed once the alleged offender is brought to court. His argument ignores the fact that the process of irregular rendition/ abduction itself is part of a process to which these rights must attach, but which by its nature it ignores. Lagodny O 'Legally protected interests of the abducted alleged offender' (1993) 1&2 *Israel LR* 339 at 345ff lists protection from the death penalty and inhuman treatment associated with it, intolerably severe punishment, possible torture, possible unfair trial and the violation of family relationships through refusal of jail visitation rights as rights protected by an extradition hearing in the requested state which are not protected in the case of an abduction. Certainly traditional protections such as double criminality are not available to the abductee, and nor is judicial review of the extradition process in the courts of the country in which he or she was situated.

⁷⁷ Abramovsky *op cit* at 194 and 195. Woltring HF, Greig J 'State-sponsored kidnapping of fugitives: an alternative to extradition?' in Atkins D (ed) *The Alleged Transnational Criminal* (1995) 115 at 119 report that a survey undertaken by Canada of other states reactions in the wake of the *Alvarez Machain* debacle reveals that states regard the use of abduction as a violation of their sovereignty and international law, and that they believe that the abducted persons should be returned and that the courts should either rectify such situations or decline jurisdiction.

⁷⁸ The US invasion of Panama is an example of the use of force to acquire jurisdiction over a drug trafficker. See generally Ellington SB 'United States v. Noriega as a reason for an international criminal court' (1993) 11 *Dickinson Jnl of Int. Law* 451-475. For a critical view see Boggis DB 'Exporting United States drug law: an example of the international legal ramifications of the "war on drugs"' (1992) 1 *Brigham Young University LR* 165; Landis KT 'The seizure of Noriega: a challenge to the *Ker-Frisbie* doctrine' (1991) 6 *American University Jnl of Int. Law and Policy* 571-607; Ma FYF 'Noriega's abduction from Panama: is military invasion an appropriate substitute for international extradition?' (1993) 13 *Loyola of Los Angeles Int. and Comp. LJ* 925-953. For a sympathetic view see Campbell AB 'The *Ker-Frisbie* doctrine: a jurisdictional weapon in the war on drugs' (1990) 23 *Vanderbilt Jnl of*

respect of extradition can overcome many of the problems that lead to states taking the law into their own hands. These provisions must, however, be limited to protect the operation of fundamental principles of extradition such as double criminality and specialty. Entrenched legal differences and the lack of a political consensus about responsibility for the drug problem dictates that they will also be subject to domestic limitation clauses. In the drug conventions extradition has to be a compromise between extension of the criminal law's reach within the structure of international co-operation and the necessity not to violate both established principles of international procedural justice and national sovereignty. Closer examination of the conventions' provisions will reveal their effectiveness as a tool for exercising jurisdiction over the illicit traffic.

4.2.3 Jurisdiction/extradition in the unamended 1961 Convention

4.2.3.1 General

In article 36(2) the 1961 Convention follows the basic scheme of the drug conventions with respect to jurisdiction: it invokes the territorial principle of jurisdiction, and then extends jurisdiction, either mandatorily or at the Parties' discretion, to make it possible for them to extradite or prosecute on the basis of the subsidiary universality principle of jurisdiction. Thus, while the Convention only urges extradition, it obliges Parties to take jurisdiction and prosecute offences committed extraterritorially, that is, the subsidiary universality principle partly urged, partly obliged.

Before commencing examination of article 36(2), it is important to recall that the Convention's provisions are subject to the primacy of the domestic law both through article 36(4) which insists that application of the penal law in article 36 is by means of domestic criminal law,⁷⁹ and through the opening paragraph of article 36(2) which subjects article 36(2) to 'the constitutional limitations of a Party, its legal system and domestic law'.⁸⁰ Chatterjee observes that these provisions mean that in practice 'the self-

Transnational Law 385 at 390-392. The invasion was justified by President Bush as self-defence but condemned as a violation of international law by the UN General Assembly in Res. 240, 44 UNGAOR Supp (No.49) (1989).

⁷⁹ Article 36(4) provides that: 'Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.' It appears that this provision serves as a limitation clause with respect to jurisdictional issues as these fall under the general term prosecution.

⁸⁰ The Indian delegate felt that this limitation clause rendered article 36(2)'s provisions 'pious hopes' while the legal adviser to the conference disagreed and stated that 'it placed on countries the obligation to

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execution of any of the provisions of Article 36 is an exception, rather than a rule.’⁸¹ Linke et al submit that the reference to domestic legal systems is indispensable because the Convention only touches upon a few aspects of extradition, and the legal systems of the Parties import the principles of extradition law such as double criminality.⁸² The primacy of domestic law on questions of jurisdiction is given explicit recognition in article 36(3) which provides:

The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

According to its author the purpose of this provision was to ‘make it quite clear that the provisions of the criminal law of the Parties would prevail on points of jurisdiction.’⁸³ The *1961 Commentary* responds that article 36(3) does not mean that the Parties are under no obligation to change their law in order to implement article 36’s provisions of a jurisdictional nature, pointing out that this would make provisions such as article 36(2)(a)(iv) dealing with the prosecution of offences committed extraterritorially entirely ineffective, something which the Convention’s authors could not have intended.⁸⁴ It suggests instead that article 36(3) merely emphasises the limitation on the obligation of Parties to implement provisions such as article 36(2)(a)(iv) already provided by the subjection in terms of the opening paragraph of article 36(2) of all its provisions to the domestic legal principles of the Party.⁸⁵ Linke et al try to give article 36(3) a more precise content. They submit that it is not intended to deal with the jurisdictional competencies of national courts or authorities, but rather with the territorial or extraterritorial jurisdiction of Parties under international law.⁸⁶ They argue that the major purpose of article 36(3) is to make it clear that the development of the detailed application of the obligations of particularly article 36(2)(a)(iv) is a domestic affair, while at the same time preserving the right of Parties to exercise rules of international jurisdiction either more extensive or more restrictive than those contained in the 1961

take various measures unless they were prevented from doing so by constitutional or legal difficulties’ - *1961 Records* vol.II at 243.

⁸¹ *Op cit* at 445.

⁸² *Op cit* at 12.

⁸³ Chilean delegate - *1961 Records* vol.II at 244.

⁸⁴ *1961 Commentary* at 439.

⁸⁵ *1961 Commentary* at 439.

Convention. While this allows Parties to exercise even greater extraterritorial jurisdiction, Linke et al note that it also allows Parties to restrict their jurisdiction to the territorial.⁸⁷ It is clear that reluctance by the Parties to the Convention to be bound to international jurisdictional provisions has lead to a multi-layering of escape clauses, and to a potential multi-layering of jurisdiction which in turn has lead to the escape of drug offenders from states reluctant to exercise jurisdiction, and to conflicts of jurisdiction between zealous Parties.

4.2.3.2 State jurisdiction over distinct offences in the 1961 Convention

Article 36(2)(a)(i) provides:

Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;... .

Chatterjee notes that this provision ‘on the one hand admits of the principle of territoriality, and on the other, gives various criminal activities a universal recognition.’⁸⁸ The provision is based on the principle of territoriality because it provides that each Party will be able to assert jurisdiction over drug trafficking offences committed within its territory. The provision recognises that the acts enumerated in article 36(1) are for the purpose of claiming territorial jurisdiction independent of one another. Thus it appears that if someone is, for instance, selling drugs in state A and has to transport them through state B to get to state A, he will be liable for prosecution as a drug trafficker in both state A and state B - in state A for selling and state B for transportation.

It has been argued, however, that this provision was not meant to oblige every Party through which drugs were transported from the state of origin to the state of destination to establish a distinct offence.⁸⁹ The *1961 Commentary* notes rather that this provision provides a solution to situations where a Party’s penal law defines a number of the offences in article 36(1) as parts of a single offence, say illicit traffic. For example, in certain Parties the brokerage of a drug may be an offence accessory to the principal

⁸⁶ *Op cit* at 12.

⁸⁷ *Op cit* at 12.

⁸⁸ *Op cit* at 436. A similar provision was included in article 4 of the 1936 Convention.

⁸⁹ Linke et al *op cit* at 54 referring to the *1971 Commentary*’s interpretation at 357 of the identical provision in article 22(2)(a)(i) of the 1971 Convention.

offence of sale of the drug, and the court competent to try the principal action - sale - may in terms of that Party's law be the only one having jurisdiction over the accessory action - brokerage. This provision would prevent an offender in such a situation from escaping prosecution on the basis that only an accessory part of the offence of trafficking had occurred within the particular Party's jurisdiction, because it obliges that Party to consider that accessory part of the offence as a distinct offence.⁹⁰

Yet it remains arguable that the provision may violate the double jeopardy principle or result in an unnecessary multiplication of charges out of the same offence.⁹¹ But as the *1961 Commentary* points out, the provision was neither meant to violate the latter principle, nor prescribe a particular method of dealing with the cumulation of offences, nor ensure the cumulative punishment of article 36(1) offences 'which form elements of a single crime of illicit traffic and are committed by the same person in different countries.'⁹² The purpose of the provision was to empower each Party to prosecute within its own jurisdiction any drug trafficker who operates in that jurisdiction, despite the fact that he or she may well have operated in the Party "next door", that is, it establishes territorial jurisdiction.⁹³ Nonetheless, the provision is included among those subject 'to the constitutional limitations of a Party, its legal system and domestic law', which means, as explained above, that a Party

is not required to consider offences enumerated in paragraph 1 as distinct crimes if committed in different countries to the extent that doing so would be incompatible with the prohibition of double jeopardy in its domestic law.⁹⁴

Multiple extradition requests in respect of one offender may also be a problem, but Linke et al submit that such conflicts can be avoided by allowing one state to proceed with all the main charges or by agreeing to re-extradition taking into account the need not to violate double jeopardy principles.⁹⁵ A further problem is that because the

⁹⁰ *1961 Commentary* at 431.

⁹¹ Bassiouni MC 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *1 International Criminal Law: Crimes* (1986) 507 at 519; see also Linke et al *op cit* at 54.

⁹² *1961 Commentary* at 431; see also *1961 Records* vol.II at 241.

⁹³ See *1961 Records* vol.II at 241.

⁹⁴ *1961 Commentary* at 430.

⁹⁵ *Op cit* at 9. The possibility also exists of transit states claiming jurisdiction on the basis of this provision and denying extradition, but Linke et al at 39 note that in practice there is a tendency to waive the claim to jurisdiction especially when a later extradition request to the transit state is possible.

provision allows many potential claims to territorial jurisdiction, it may be used as a reason for refusing extradition by the many states which are not permitted to extradite persons over whom they have jurisdiction. Linke et al argue that it was not the intention of the Convention's drafters to provide for an obstacle to extradition, and that in general concurrent jurisdiction is not inevitably a reason for refusing extradition, particularly when the requesting Party may be in a better position to prosecute, something recognised by the Convention which makes no provision for the refusal of extradition on the basis of territoriality.⁹⁶

Despite the official assurances of the *1961 Commentary*, it is noteworthy that when a similar provision was introduced in the draft 1988 Convention it was deleted because the earlier versions proved unworkable, their purpose was not clear and they amounted to a violation of the double jeopardy principle.⁹⁷

4.2.3.3 Recidivism in the 1961 Convention

Article 36(2)(a)(iii) reads:

Foreign convictions for such offences shall be taken into account for the purposes of establishing recidivism;... .

Article 36(2)(a)(iii)'s provision for the recognition of foreign judgements for the purposes of establishing recidivism also serves to extend jurisdiction beyond the territorial in the realm of punishment, but it is also subject to domestic limitation.

4.2.3.4 Duty to prosecute serious offences

Article 36(2)(a)(iv) reads:

Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.

⁹⁶ *Op cit* at 10.

This is a so-called prosecution provision. It involves firstly an obligation⁹⁸ on Parties to prosecute serious drug offences that occur within their territory, no matter what the nationality of the offender and apparently whether or not the offender is actually in that territory. This is a straight-forward application of territorial jurisdiction. The obligation applies to 'serious' offences which remain undefined but the qualification does imply that Parties are not under an obligation to punish minor offences such as personal-use offences that occur within their jurisdictions.

As an alternative to prosecution on the basis of territorial jurisdiction,⁹⁹ the second part of the provision obliges a Party which has apprehended the serious drug offender to prosecute him for his extraterritorial offence whether or not he is a national of that Party when it refuses to extradite him. This extension of jurisdiction is based on the *aut dedere aut judicare* principle. It is the most contentious of article 36's provisions on jurisdiction because states find it difficult to prosecute offences committed abroad, unless they have some connection to the offender or offence such as nationality, subjective or objective territoriality, the protective principle, or even passive personality, that enables the establishment of extraterritorial jurisdiction. The problem with this provision is that, apart perhaps from jurisdiction grounded on nationality,¹⁰⁰ it ignores the need for such a connection and applies the subsidiary form of universal jurisdiction. In other words, jurisdiction is grounded on the failure to extradite. In addition, however, Bassiouni and Wise note that the proviso in the opening paragraph of article 36(2)

⁹⁷ See the 'Expert Group Report' 1988 *Records* vol.I at 16. The Experts felt that a domestic limitation clause could not save them because it would render them inoperative.

⁹⁸ The operative term 'shall' obviously does not mean that the Parties are under an obligation to prosecute every single potential drug offence; their authorities retain the discretion to prosecute only if sufficient evidence is available to make a successful prosecution reasonably possible.

⁹⁹ The authors of the provision assumed that a preference had been given to territorial jurisdiction in recognition of the principle that the state in whose territory an offence was committed should have the first choice to prosecute, and that the Party in whose territory the offender was found should take proceedings only if the former Party had not asked for his extradition - see the remarks of the Hungarian delegate, 1961 *Records* vol.I at 125, and the explanation of the Egyptian delegate, 1961 *Records* vol.II at 247. However, the structure of the provision appears to make the options alternatives and nothing more, something also implied by the fact that the provision accepts that the requested Party can validly decline to extradite to a Party having territorial jurisdiction.

¹⁰⁰ Such jurisdiction can be implied through use of the term nationality, and because the rejection of extradition by the requested Party being 'in conformity' with its law in the second part of the provision gives preference to the jurisdiction of Parties over their own nationals as they are most likely to refuse extradition because offenders are their nationals.

subjecting this obligation to a Party's other laws makes it dependant on whether those laws permit the exercise of extraterritorial jurisdiction.¹⁰¹

Should the Party that refuses extradition decide to take jurisdiction, the Convention is not clear on whether it should apply its own law or that of the Party where the offence occurred. However, the legal advisor to the 1961 Conference stated that the choice would belong to the prosecuting Party and would depend on whether its law authorised the application of foreign laws.¹⁰²

The obligation in the second part of the provision is subject to two qualifications. The first is that the Party in whose territory the offender is found is only obliged to prosecute provided extradition to the state where the offence occurred is not acceptable to it.¹⁰³ The provision does not place any constraints on the reasons the requested Party finds extradition impossible.¹⁰⁴ The words 'application is made' do appear to insist that a formal extradition request must actually be made before the requested Party can take jurisdiction although the wording is ambiguous enough to leave the situation unclear when the Party in which the alleged offender is found wants to take jurisdiction but no application for extradition is made.¹⁰⁵ Indeed, Linke *et al* note that article 36 of the 1961 Convention does not provide for a strict obligation to request extradition at all.¹⁰⁶ It is clear that the rejection of extradition by the requested Party must be 'in conformity' with its law. The second part of the provision thus gives preference to the jurisdiction of Parties over their own nationals as they are most likely to refuse extradition precisely

¹⁰¹ *Op cit* (1995) at 14.

¹⁰² 1961 Records vol.I at 145-6.

¹⁰³ Linke *et al op cit* at 11-12 point out that the fact that extradition must in terms of the provision be unacceptable, means that a Party cannot free itself from an existing agreement to extradite by taking jurisdiction itself. At 40 they note that the necessity for a refusal to extradite narrows the general principle of subsidiary universality which does not always require the state with primary jurisdiction to make an application for extradition before the state with subsidiary jurisdiction may prosecute.

¹⁰⁴ Unlike article 8 of the 1936 Convention which provided for jurisdiction only if extradition fails because of a reason independent of the offence, such as lack of reciprocity, absence of diplomatic relations or the impossibility of extraditing a national.

¹⁰⁵ See Puttler *op cit* at 114. The relevance of her example of unwilling Dutch officials not requesting the extradition of one of their nationals from Germany in order to enable the German courts to establish jurisdiction, is obvious. Linke *et al op cit* at 11 argue that in reality there are situations where the taking of jurisdiction will be necessary even though no formal extradition request is made. See, for example, the *Drug Offences Jurisdiction Case* (1991) 86 ILR 550 where Austria took jurisdiction over an offence committed in Switzerland by an offender apprehended in Austria, despite the fact that Switzerland had not made a formal extradition request, on the basis that had such a request been made Austria would have had to refuse it as the offender was its national.

¹⁰⁶ *Op cit* at 8. They note that neither article 22(2)(a)(iv) of the 1971 Convention nor article 36(2)(a)(iv) of the 1972 Protocol change this position.

because the offenders are their nationals.¹⁰⁷ The *1961 Commentary* notes that the provision does not apply either to Parties whose domestic law does not permit extradition of nationals, or to Parties whose domestic law does but which simply choose not to extradite, or to extradition from non-parties.¹⁰⁸ The *1961 Commentary* opines, however, that to exclude such cases from the scope of the provision would not accord with its object and purpose which the *1961 Commentary* suggests is only to free a Party from the obligation to prosecute offenders if it is able to and does actually extradite them.¹⁰⁹

The second qualification on the operation of the second obligation under article 36(2)(a)(iv) is that the Party in whose territory the offender is found is also not obliged to prosecute him if he has already been prosecuted and judged, whether convicted or acquitted, in another state. This qualification avoids violation of the double jeopardy principle.¹¹⁰ Linke et al add that it would not be in the spirit of this provision if a Party refused extradition for the purpose of serving out a sentence.¹¹¹

The *1961 Commentary* attempts to shore up any holes in article 36(2)(a)(iv)'s obligation to extradite or prosecute by noting that even when Parties are precluded by their domestic law from prosecuting or extraditing, the spirit of the provision and the general obligations on Parties to collaborate in suppressing the illicit traffic in terms of article 4(b) and article 35(b) and (c) binds Parties not to allow their territories to be used as bases for the illicit traffic or as refuges for illicit traffickers, and requires them to expel or deport alien traffickers in these circumstances.¹¹²

Chatterjee notes that the obligation to prosecute extraterritorial offences is a 'rather bold step which proved to be unworkable in the 1936 Convention.'¹¹³ Chatterjee opines that this extension of extraterritorial jurisdiction reinforces the idea that the authors of the 1961 Convention intended to give 'international recognition to certain

¹⁰⁷ A point made by the *1961 Commentary* at 435. Linke et al *op cit* at 11 note that other reasons for declining extradition may include the fact that the requesting Party and requested Party are not bound by an extradition treaty and the requested Party requires such a treaty for extradition.

¹⁰⁸ *1961 Commentary* at 436.

¹⁰⁹ *1961 Commentary* at 436.

¹¹⁰ The *1961 Commentary* at 436 suggests that offenders who have been convicted abroad but who have not yet been punished should be either extradited or tried again. While extradition for punishment is good in law and policy, retrial would be a violation of the double jeopardy principle.

¹¹¹ *Op cit* at 55.

¹¹² *1961 Commentary* at 436.

¹¹³ *Op cit* at 438 referring to articles 8 and 9 of the 1936 Convention.

types of crimes.’¹¹⁴ In order to overcome potential problems with Parties that limit their criminal jurisdiction to territoriality not prosecuting drug traffickers who commit offences elsewhere, a limitation permitted by the opening paragraph of article 36(2),¹¹⁵ the *1961 Commentary* resorts to pointing out that such states do prosecute offences such as piracy and currency forgery no matter where they are committed, and then argues by analogy that the ‘deterioration of the international drug situation since 1961 when the Single Convention was concluded’ might help such Parties to get over their reluctance to prosecute drug offences committed extraterritorially.¹¹⁶ This is a plea for universal jurisdiction to be exercised over drug offences because of their seriousness. It argues that the domestic law safeguard clause in the opening paragraph of article 36(2) does not stand in the way of such prosecution because the domestic law of all states permits the trial of particularly dangerous crimes committed abroad among which must be included serious offences of illicit trafficking.¹¹⁷ The application of escape clauses to the provision indicates, however, that in 1961 international society was not prepared to go as far as the *1961 Commentary* would have liked.¹¹⁸ In a similar vein, Linke et al note that although article 36(2)(a)(iv) refers only to territoriality and subsidiary universality, article 36(3)’s subjection of all questions of jurisdiction to a Party’s criminal law implies that a Party is not prevented from exercising extraterritorial jurisdiction on some other basis such as nationality or universality, something they regard as important to ensure that serious drug offences do not go unpunished.¹¹⁹ State practice since 1961 indicates that while many states do not prosecute extraterritorial offences,¹²⁰ states do prosecute drug offences that occur extraterritorially, and rely generally on the Conventions to do

¹¹⁴ *Op cit* at 438.

¹¹⁵ Ironically, one of the major objectors at the 1961 Conference to the extension of jurisdiction extraterritorially was the US delegation which stated: ‘To prosecute a person [extraterritorially] would not be conducive to the best administration of justice and might prevent him, for financial and other reasons, from obtaining witnesses and evidence.’ The delegation went on to note that if the provisions on extradition were adequate the prosecution provision would be superfluous - *1961 Records* vol.I at 123. Ultimately, the prosecution provision was necessary because the extradition provision was not binding.

¹¹⁶ *1961 Commentary* at 435.

¹¹⁷ *1961 Commentary* at 435.

¹¹⁸ As a result of these safeguards, Clark *op cit* at 58 opines that although the provision looks like a universal jurisdiction provision, and universal jurisdiction is probably acceptable, ‘its exercise is far from obligatory.’

¹¹⁹ *Op cit* at 9.

¹²⁰ For example, neither the Canadian Narcotic Control Act RSC 1970 c. N-1 and the Food and Drugs Act RSC 1970 c. F-27 created an extraterritorial offence.

so¹²¹ or explicitly on article 36(2)(a)(iv).¹²² Some have gone so far as stating that the 1961 Convention's provisions generally support application of universality to drug offences.¹²³ But it seems that this development has been driven as much by states' own interests as by international law, and most of these states seem to be unwilling to go as far as application of subsidiary universality to drug offences, insisting that there should be some connection between themselves and the offender.¹²⁴ Indeed, the failure of article 36(2)(a) is that it does not expressly regulate and thus guide states in the muddled middle ground between strictly territorial jurisdiction and application of universality. This ground is occupied by many states unwilling to go as far as universality but intent upon dealing with extraterritorial drug offences that affect them in some way.

4.2.3.5 Provisions for extradition in the 1961 Convention

Article 36(2)(b) of the 1961 Convention provides:

It is desirable that the offences referred to in paragraph 1 and paragraph 2(a)(ii) be included as extradition crimes in any extradition treaty which has been or may

¹²¹ See, for example, the *Thailand Drug Offences (Jurisdiction) Case* (1991) 86 ILR 587 where a Danish court held that it had jurisdiction over a Danish national who committed drug trafficking from Thailand to the US partly on the basis that Denmark, Thailand and the US were all party to the 1961 Convention.

¹²² See, for example, the *Drug Offences Jurisdiction Case* (1991) 86 ILR 550 where the Austrian Supreme Court confirmed the conviction of an Austrian national for trafficking drugs in Switzerland on the basis of article 36(2)(a)(iv). It stated that in terms of the article Austria is obliged to prosecute the offender even though he was apprehended in Austria and provided that an extradition request from a foreign state had been rejected and the offender had not been prosecuted and convicted. The court noted that no such prosecution and conviction had occurred in Switzerland, and then held that any request by Switzerland for extradition would have to be rejected since the accused was an Austrian national (at 551-552).

¹²³ The German Federal Supreme Court in *Universal Jurisdiction over Drug Offences Case* (1979) 74 ILR 166, confirmed the conviction of Dutch national who sold cannabis in the Netherlands to Germans for resale in Germany on the basis that article 6(5)(b) of the German Criminal code establishing universal jurisdiction over drug trafficking offences accorded with Germany's obligations under the 1961 Convention. The Court noted that article 36(2)(a)(iv) appears to support subsidiary universality, but warned that 'it was not entirely clear that this is the case since liability to prosecution in the place where the offence was committed is not expressly made a precondition for prosecution in the state where the offender has been arrested.' The Court noted academic support for the application of universality in serious cases and that article 36(3) protected Germany's application of its own criminal norms, and concluded that international law did not in any event deny such application of universality (at 168-169).

¹²⁴ A good example is the prosecution of the Panamanian dictator, Manuel Noriega - see Ellington *op cit* at 451-475 commenting on *United States v Noriega* 746 F. Supp. 1506 (S.D. Fla. 1990). Although he never actually entered the US while involved in the conspiracy to import drugs with which he was charged, the Court found that his co-conspirators had and it considered him to have committed their acts within the US (at 1513-1514). It also found that the statutes he was charged with violating were intended to apply extraterritorially (at 1515), a finding supported by the fact that some specifically state that importation of drugs into the US is illegal which showed a clear legislative intent to apply them extraterritorially (eg. the Drug Abuse Protection Act, 21 USC section 952 (1984), 21 USC section 959(c) (1986)).

hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognised as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which the application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

This provision follows the pattern established in article 9 of the 1936 Convention, the most significant difference being that the words 'it is desirable that'¹²⁵ make it a recommendation. This explains why the 1936 provision is still operative for Parties to both Conventions that choose to allow it to remain in operation.¹²⁶ Earlier drafts of the provision had bound Parties to either include drug offences as extradition crimes in existing treaties or recognise drug offences as extradition crimes.¹²⁷ The Conference, however, recognising the difficulties states would have in accepting mandatory extradition of drug offenders, despite criticism¹²⁸ made it recommendatory and even added the proviso that it must take place in accordance with their law and they could

¹²⁵ The safeguard clause in the opening paragraph of article 36(2) is thus inapplicable here as the implementation of this provision is entirely at the discretion of the Party in any event - see the *1961 Commentary* at 430.

¹²⁶ In terms of article 44(2) of the 1961 Convention, article 9 of the 1936 Convention was terminated and replaced by article 36(2)(b) of the 1961 Convention as between Parties to the 1936 Convention which became Parties to the 1961 Convention, but article 9 continues to be in force in respect of those Parties to both Conventions which notify the UN Secretary General that they wish to continue to be bound by it. Article 9 reads:

1. The offences set out in Article 2 shall be deemed to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the High Contracting Parties.
2. The High Contracting Parties who do not make extradition conditional on the existence of a treaty or on reciprocity shall as between themselves recognise the offences referred to above as extradition crimes.
3. Extradition shall be granted in conformity with the law of the country to which application is made.
4. The High Contracting Party to whom application for extradition is made shall, in all cases, have the right to refuse to effect the arrest or to grant the extradition of a fugitive offender if his competent authorities consider that the offence of which the fugitive offender is accused is not sufficiently serious.

France (19/2/1969), Liechtenstein (31/10/1979) and Switzerland (23/1/1970) all made reservations keeping article 9 in force - see generally *Multilateral Treaties Deposited* (1997) at 283-284.

¹²⁷ Draft article 45(3), *1961 Records* vol.II at 17.

¹²⁸ *1961 Records* vol.II 242-243 (Mexico) and vol.I at 146 (UK).

refuse it if it were insufficiently serious.¹²⁹ Moreover, the provision does not oblige Parties that require an extradition treaty in order to effectuate extradition to conclude such a treaty.

The *1961 Commentary* explains that the provision recommends that illicit trafficking offences set out in article 36 of the 1961 Convention be included as extradition crimes in existing or future extradition treaties which already have been or may later be concluded between any of the Parties,¹³⁰ and recognised as extradition crimes between any of the Parties that do not make extradition conditional on the existence of a treaty or on reciprocity.¹³¹ The *1961 Commentary* notes that the recommendation does not apply to the following situations: Parties that do not require the existence of an extradition treaty but make extradition conditional upon reciprocity; Parties that do not make extradition treaty or reciprocity dependent but which unilaterally grant extradition to other Parties which do not comply with the recommendation;¹³² and extradition to non-Parties.¹³³ These lacunas prompt the *1961 Commentary* to suggest that all Parties should grant extradition to Parties and non-Parties alike in all cases where it is necessary in order to prosecute or punish major illicit traffickers.¹³⁴

Finally, the recommendation to include trafficking offences among extradition crimes is limited in two ways: first, the Party may refuse to arrest the offender or grant extradition where its authorities do not consider the offence to be 'sufficiently serious';¹³⁵ second, extradition must be 'in conformity with the domestic law' of the requested Party.¹³⁶

The extradition provision does illustrate, however, the necessity for uniform or at the very least substantially similar drug offences in every Party to overcome the hurdle

¹²⁹ See the discussion in the ad hoc committee on draft article 45, *1961 Records* vol.II at 241-2.

¹³⁰ Campbell *op cit* at 407 notes that many of the older extradition treaties of the US listed extraditable offences and failed to include drug offences within these lists. The *1961 Commentary* at 437 points out that the amendment of extradition treaties can be achieved by exchange of notes.

¹³¹ *1961 Commentary* at 437.

¹³² This is due to the fact that article 36(2)(b) recommends that the offences of the illicit traffic be recognised as extradition crimes 'as between any of the Parties' - *1961 Commentary* at 437.

¹³³ *1961 Commentary* at 437.

¹³⁴ *1961 Commentary* at 437.

¹³⁵ The provision does not specify what makes an offence serious enough to make it extraditable - see the remarks of the Greek delegate, *1961 Records* vol.I at 127. It is probable that a minimum period of incarceration is what is meant here.

¹³⁶ For example, the application by the requested state of its own statute of limitations to bar extradition.

of double criminality and make extradition possible.¹³⁷ In practice, in their post-1961 extradition treaties many states did not specifically include drug offences as extraditable offences, but relied on them being offences under both states' domestic laws.

4.2.3.6 The 1961 Convention's jurisdiction/extradition provisions considered

The 1961 Convention's provisions on jurisdiction and extradition lay heavy emphasis on the exercise of territorial jurisdiction over drug crimes, but they also allow, through the provisions on state jurisdiction over separate offences, recidivism, and mainly through the prosecution article, a tentative extension beyond the territorial toward the exercise of universal jurisdiction. However, as Linke et al note, the 1961 Convention does not provide for the extension of territorial jurisdiction except under the *aut dedere aut judicare* provision, leaving any other such extension to the Parties' national law.¹³⁸ Moreover, these provisions contain internal limitations and are subject to general limitations which render them all but non-binding. The recommendatory provision on extradition recognises, perhaps more explicitly, the hesitancy of the international community in 1961 to begin to see drug offences in the same light as offences such as piracy. The 1961 Convention's provisions give little or no direction on difficult issues such as concurrence of jurisdiction,¹³⁹ the basis for claiming extraterritorial jurisdiction, the duty to request extradition,¹⁴⁰ the priority of concurrent extradition requests and so

¹³⁷ Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 at 830 comments that efforts in the early 1970s to extradite Latin American drug traffickers were 'stymied by the fact that thirty-six treaties, including most of those with Latin American governments, made no mention of drug violations, having mostly been negotiated before World War I. Campbell *op cit* notes at 406 that many early US extradition treaties had included drug activities within their list of extraditable offences, but in such broad terms as to render the treaties ineffective. At 405 he notes that of the five new extradition treaties entered into by the US in 1984/5, only one specifically included drug offences as extraditable. The others defined an extraditable act as one punishable under the laws of both parties by incarceration for a minimum of one year. While correspondence of the purpose of the offence and not simply correspondence of the essential elements is at issue, correspondence of the elements is important. For example, when the offence for which extradition is being requested is more sophisticated than those contemplated by article 36(1) of the 1961 Convention correspondence may not exist. Bernholz et al *op cit* at 358-361 illustrate that the more sophisticated offences in US criminal law such as Continuing Criminal Enterprise (CCE) 21 USC section 848(b) (1982), while containing drug related conduct within them, go beyond the jurisdictional elements contained in national drug offences in other Parties derived from article 36(1) and are therefore not extraditable because they do not satisfy double criminality.

¹³⁸ *Op cit* at 63.

¹³⁹ Although, as Linke et al *op cit* at 65 point out, when more than one Party claims jurisdiction, although article 36(2)(a)(iv) does prioritise territoriality it does not prohibit extradition to other states such as the state of nationality on the basis of ordinary principles of extraterritoriality. It does not, however, give any guidance as to how such other claims would be ranked.

¹⁴⁰ Linke et al *op cit* at 65 note that the only option left to them in cases where no extradition request is made by a state having jurisdiction is to urge the detaining Party to offer extradition, and to base

on. Their resolution was left to particular extradition treaties, to general international law, to politically expedient processes such as deportation and expulsion, when the system did not achieve its purpose of ensuring the prosecution of suspected drug traffickers. The 1961 Convention's provisions were an inadequate response to the seriousness of the international drug problem and the particular problems of dealing with extraterritorial drug offenders.

4.2.4 Jurisdiction/extradition in the 1971 Convention

4.2.4.1 General

In its substantive provisions article 22(2) of the 1971 Convention is almost identical to article 36(2) of the unamended 1961 Convention which obviously served as a model for the later provision.¹⁴¹ The 1961 Convention's provisions were relied on because they had 'stood the test', the situation had to be avoided where offenders were treated differently according to the type of substance with which they were involved and Parties to both Conventions wanted to avoid having to enact separate legislation to regulate narcotics and psychotropic substances.¹⁴² Article 22(2) adheres to the basic scheme of the 1961 Convention. It provides for the prosecution of offenders by the Party in whose territory the offence was committed, and then extends jurisdiction in situations where the offender is found in a territory other than that in which the offence was committed by in subparagraph 2(b) urging the Party in which he/she is found to extradite him/her and obliging such Parties in terms of subparagraph 2(a)(iv), if extradition is impossible, to take jurisdiction and prosecute the offender.

As with the 1961 Convention, article 22's provisions on jurisdiction are subject to the primacy of domestic law. They are subject to:

a) the limitation clause in the opening paragraph of article 22(2) which reads:

Subject to the constitutional limitations of a Party's legal system and domestic law;

jurisdiction on the refusal to take up the offer, or if all else fails simply as a matter of expediency to expel the alleged offender to a state having jurisdiction.

¹⁴¹ The only difference being the wording of the sub-paragraph 2(a)(i).

¹⁴² See the statement of the Danish delegate, *1971 Records* vol.II at 32.

- b) the general limitation clause in article 22(5) which asserts that the 'prosecution' of drug offences shall be in conformity with the domestic law of the Parties; and
- c) to article 22(4) which provides:

The provisions of this article shall be subject to the provisions of the domestic law of the Party concerned on questions of jurisdiction.

This further limitation, which closely follows article 36(3) of the 1961 Convention, all but makes the Convention's obligations with respect to jurisdiction illusory. The extreme view is that without the Parties' assent no modification of their law on jurisdiction can take place.¹⁴³ Yet the *1971 Commentary* holds that this limitation does not mean that Parties are never required to change their law in order to carry out obligations like that in article 22(2)(a)(iv) to prosecute serious drug offences even if they are committed extraterritorially because that would render the provision ineffective, something that could not have been the intention of its authors. The *1971 Commentary* holds instead that article 22(4) frees Parties from the obligation to apply the rules flowing from article 22(2)(a)(iv)'s obligation to the extent that they are incompatible with its general concepts in the field of criminal jurisdiction.¹⁴⁴

4.2.4.2 State jurisdiction over distinct offences in the 1971 Convention

Article 22(2)(a)(i) reads:

If a series of related actions constituting offences under paragraph 1 has been committed in different countries, each of them shall be treated as a distinct offence;...

Substantively the same as article 36(2)(a)(i) of the 1961 Convention, the comments above apply equally here. The *1971 Commentary* notes that the operation of the limitation clause in the opening subparagraph of article 22(2) means that a Party need not treat each of such a series of related actions, even if committed in different countries, as a distinct offence to the extent that doing so would be incompatible with the

¹⁴³ See the Danish delegate's statement, *1971 Records* vol.I at 35.

¹⁴⁴ *1971 Commentary* at 368-9.

prohibition of double jeopardy in its domestic law.¹⁴⁵ The *1971 Commentary* states that the purpose of article 22(2)(a)(i) appears to be to give domestic courts territorial jurisdiction over offenders who dwell in that country in some cases in which they might otherwise not have it,

and in particular to ensure that such a country shall have territorial jurisdiction over every act of intentional participation in principal acts of offences committed abroad, even though in principle it assigns jurisdiction over accessory acts to the courts in whose districts the related principal acts were committed.¹⁴⁶

Thus if X brokers in state B the sale of drugs in state A, the criminal courts of state B may ordinarily have no jurisdiction over his conduct if it is regarded as accessory to the sale taking place in state A and the jurisdictional rule in state B is that the court that tries the principal conduct is the only court competent to try the accessory conduct. But if, under article 22(2)(a)(i) the brokerage and sale carried out in the two states are regarded as two separate offences, both states A and B would have jurisdiction over the conduct committed in its territory on the basis of territorial jurisdiction.¹⁴⁷

Despite this interpretation of this provision it has the potential to cause problems of double jeopardy, and as noted above in respect of the same provision in article 36 of the 1961 Convention, an identical provision to this effect in the draft 1988 Convention was dropped from the final version.

4.2.4.3 Recidivism in the 1971 Convention

Article 22(2)(a)(iii) reads:

Foreign convictions for such offences shall be taken into account for the purposes of establishing recidivism;... .

This provision also serves to extend jurisdiction in the broad sense including punishment because it tends to universalise punishment by obliging Parties to hold the previous convictions of drug offenders against them no matter where they were incurred.

¹⁴⁵ *1971 Commentary* at 356.

¹⁴⁶ *1971 Commentary* at 357.

4.2.4.4 Duty to prosecute serious offences

Article 22(2)(a)(iv) reads:

Serious offences heretofore committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which the application is made, and if such offender has not already been prosecuted and judgement given.

Article 22(2)(a)(iv) of the 1971 Convention, its prosecution provision, is identical to article 36(2)(a)(iv) of the 1961 Convention, and the comments made above apply equally here. Although couched as an obligation, the operation of this provision is limited. The *1971 Commentary* notes that the operation of the limitation clause in the opening subparagraph of article 22(2) means that a Party need not prosecute criminal acts abroad, particularly those which are not very serious, if its domestic law normally does not extend its jurisdiction extraterritorially.¹⁴⁸ Noting, however, as the *1961 Commentary* does in the same regard to the exercise of the principle of universality and noting in addition the applicability of the principle of protection as grounds for the extension of extraterritorial jurisdiction in respect of certain offences, the *1971 Commentary* submits that a Party could not avail itself of the protection of the domestic limitation clause in the introductory sub-paragraph of article 2(b) if the drug offence is very serious and the Party already extends its jurisdiction over other offences of 'equal gravity.'¹⁴⁹ This submission depends, of course, on the Parties accepting that drug offences are of equal gravity to offences such as piracy.

The provision firstly obliges Parties to exercise jurisdiction over nationals and foreigners who commit serious drug offences within their territory. It does not define what serious offences are, but implies that Parties are not under an obligation to prosecute non-serious offences. The *1971 Commentary* points out that this obligation assumes that the Party will be able to either arrest the offender within its territory or

¹⁴⁷ See the *1971 Commentary* at 357.

¹⁴⁸ *1971 Commentary* at 356.

¹⁴⁹ *1971 Commentary* at 361.

obtain his extradition from another state.¹⁵⁰ The *1971 Commentary* notes that even though the provision does not explicitly oblige Parties to obtain the extradition of an offender from abroad, it submits that Parties should in the spirit of the provision seek extradition in all cases where they are aware that the offender has not been prosecuted or sentenced or subject to alternative measures of treatment under article 22(1)(b) of the 1971 Convention and there is no prospect that the offender will be.¹⁵¹

The provision, secondly, as an alternative to extradition, obliges Parties to exercise jurisdiction over nationals and foreigners if they are found within the Party's territory even if they committed a serious drugs offence extraterritorially. The provision provides for that extension on the basis of the principle of nationality, but as it applies to foreigners as well, it relies almost entirely on the subsidiary principle of universality *aut dedere aut punire*, the obligation to prosecute where extradition is impossible.

The second obligation is subject to two conditions. The first is that the obligation to prosecute only exists 'if extradition is not acceptable in conformity with the law of the Party to which application is made.' The *1971 Commentary* assumes that this means that the requested Party is only relieved of the obligation to take jurisdiction if extradition was acceptable to it and has actually been carried out to the state where the offence took place or to the state of whom the offender is a national.¹⁵²

The second condition on the second obligation, the proviso that the obligation is only operative if the 'offender has not already been prosecuted and judgement given', upholds the principle against double jeopardy in such cases. The *1971 Commentary* submits that this proviso would also apply where the offender has been prosecuted and then instead of being punished has been subject to the alternative measures provided for in article 22(1)(b), but would not apply when the offender has been prosecuted, sentenced and has then absconded before serving his sentence.¹⁵³

¹⁵⁰ *1971 Commentary* at 362.

¹⁵¹ *1971 Commentary* at 362.

¹⁵² *1971 Commentary* at 362. At 363, based on the provision against manifest unreasonableness in interpreting conventions in article 32(b) of the 1969 Vienna Convention on the Law of Treaties, it also assumes that a Party which extradites the offender to a state which is not a party to the 1971 Convention would also be freed of its obligation to prosecute. At 363 it notes that the state to which the offender is extradited must have the jurisdiction to try him, or it would defeat the purpose of the provision.

¹⁵³ *1971 Commentary* at 363. Further on the question of the applicability of the proviso to sentencing, Chatterjee *op cit* at 484 argues that this proviso runs counter to the provision in article 22(2)(a)(ii) which makes it possible to take foreign convictions into account when establishing recidivism. The recidivism provision, however, relates to different sentences for different convictions, not the conviction and sentence which bar prosecution and sentence in terms of this proviso.

Finally, the *1971 Commentary* suggests that the spirit of the provision demands that a Party which can neither prosecute nor extradite an offender should not allow the offender to take refuge in its territory but should expel or deport him or her.¹⁵⁴

Like earlier provisions, article 22(1)(a)(iv) does not provide expressly for any ground of extraterritorial jurisdiction other than nationality and subsidiary universality. But recognition in the provision that not all states are able to take extraterritorial jurisdiction on these grounds or view drug offences as serious enough to take jurisdiction without their being some kind of nexus between them and the offender, would undermine the principle of subsidiary universality's application to drug offences which only requires non-extradition to ground extraterritorial jurisdiction. It seems clear that the author's of the 1971 Convention were not prepared to accept anything less, making the provision legally ambitious but practically certain to disappoint.

4.2.4.5 Extradition under the 1971 Convention

Article 22(2)(b) reads:

It is desirable that the offences referred to in paragraph 1 and paragraph 2(a)(ii) be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognised as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which the application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

Article 22(2)(b) of the 1971 Convention follows the approach of article 36(2)(b) of the 1961 Convention and the comments made in the latter's respect are equally applicable here. In simple terms, it provides that it is desirable that the drug 'crimes'¹⁵⁵ in article 22(1) and 22(2)(a)(ii) be included in extradition treaties as extraditable offences by

¹⁵⁴ *1971 Commentary* at 364.

¹⁵⁵ The term 'crimes' is used here in preference to offences apparently to denote the serious nature of these breaches because extradition is only granted in such serious cases - see the statement of the legal adviser, *1971 Records* vol.II at 45.

Parties that use extradition treaties in such circumstances, and be recognised as extraditable by Parties that do not require the existence of extradition treaties in order to extradite.

In spite of efforts at the 1971 Conference to make its application mandatory,¹⁵⁶ article 22(2)(b) is a recommendation.¹⁵⁷ Yet in spite of the optional nature of the provision, Parties have made reservations in its regard.¹⁵⁸

Article 22(2)(b) does not apply to Parties which do not require an extradition treaty but which make extradition conditional on reciprocity. Nor does it apply to the situation where a Party does not require the existence of an extradition treaty but is unilaterally willing to extradite offenders to other Parties that although they have the same general policy in respect of extradition do not extradite drug offenders.¹⁵⁹ The provision also does not appear to apply to relations with non-Parties.

Parties may refuse to follow the provision's recommendation when their competent authorities do not consider the offence for which the extradition request is being made to be 'sufficiently serious'. Unfortunately, 'sufficiently serious' is left undefined.

Bassiouni is deeply critical of the provision because it is only a recommendation and because of its escape clause. He comments:

Recognising the principle of "universality" by allowing any state wherein the offender may be found to prosecute for the offence as an alternative to extradition, it nonetheless only suggests the "desirability" to make it an extraditable offence. No wonder so few treaties contain such violations in their list of extraditable offences.¹⁶⁰

¹⁵⁶ See *1971 Records* vol.I at 98 and vol.II at 32-3. Unlike the 1961 Convention, the 1971 Convention makes no provision for the optional retention of article 9 of the 1936 Convention.

¹⁵⁷ As with the identical provisions in the 1961 Convention, the application of the limitation clause in the opening paragraph of article 22(2) to the provision in article 22(2)(b) is pointless as that provision is in its own terms only 'desirable'.

¹⁵⁸ Myanmar does not consider itself bound by article 22(2)(b) (20/6/1994 – *Multilateral Treaties Deposited* (1997) at 304); no other Parties objected to this reservation within 12 months in terms of article 32(3) so it has been deemed to be permitted.

¹⁵⁹ See the *1971 Commentary* at 365. The second lacuna is caused by the requirement that the offences must be recognised as extradition offences 'as between any of the Parties.'

¹⁶⁰ *Op cit* (1981) at 519.

4.2.4.6 The 1971 Convention's jurisdiction/extradition provisions considered

While extending their scope to include psychotropic substances,¹⁶¹ the 1971 Convention's provisions on jurisdiction and extradition are no stronger than those in the 1961 Convention. Largely based on territorial jurisdiction, they too extend jurisdiction beyond the territorial in a hesitant manner. Internal and general limitation deprives them of force. Although the 1971 Convention appears wedded to subsidiary universality over drug offences, in practice the international community was as unlikely in 1971 to move towards universality with respect to drug offences as it was ten years previously. The 1971 Convention provided little clear alternative direction to states struggling with the extension of jurisdiction extraterritorially. The inadequacy of its provisions demanded international action.

4.2.5 Jurisdiction/extradition under the 1972 Protocol's amendments to the 1961 Convention

4.2.5.1 General

The 1972 Protocol to the 1961 Convention stiffened the 1961 Convention's provisions on extradition. Article 14 of the 1972 Protocol replaced the weak provision in article 36(2)(b) of the 1961 Convention with a new, stronger, article 36(2)(b). The aim of the American sponsors of the amendment was to make drug offences automatically extraditable and thus to facilitate extradition between states whose bilateral extradition treaties did not mention drug offences or between states that did not have such treaties at all.¹⁶² The Israeli delegate explained that the

¹⁶¹ Thus, for example, article 2(3) of the 1974 US-Australia Extradition Treaty 27 *UST* 957 lists as extraditable offences 'offences against the laws relating to narcotics, dangerous drugs or psychotropic substances.'

¹⁶² The US initiated the process of amending article 36 through submission to the CND's 24th session of new provisions making extradition of drug offences mandatory along the lines of those contained in article 9 of the 1936 Convention and article 8 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 *UNTS* 105 - see *1972 Records* vol.I at 3-4. The passage of these amendments through the CND and the Conference was resisted on the basis that a multilateral convention dealing with drug control should not serve as the basis for extradition usually regulated by bilateral extradition treaties.

new provisions represented an important step in the multilateralisation of the modern international law of extradition, which was necessary in the light of the development of the resources of modern criminals.¹⁶³

Unsurprisingly, the amended article 36(2)'s provisions on extradition remain subject a number of limitation clauses, viz.: to the primacy of domestic law through the general limitation clause in article 36(4) and the limitation clause in the opening paragraph of article 36(2) which guarantees the existing rights of the Parties with respect to extradition. Thus, for example, Parties that do not in terms of their domestic law extradite their nationals, would not in terms of the amended article 36 be obliged to do so.¹⁶⁴ Moreover, article 36(3) provides that on questions of jurisdiction domestic criminal legal provisions are paramount.

4.2.5.2 The 1972 Protocol's new provisions for extradition

4.2.5.2.1 Drug offences deemed to be extraditable offences in existing extradition treaties

The new article 36(2)(b)(i) reads:

Each of the offences enumerated in paragraphs 1 and 2 (a) (ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them; .

A reaction to the failure to provide for extradition of drug offences in early bilateral extradition treaties and the continued exclusion of drug offences from new extradition treaties, paragraph (2)(b)(i) is an *ex lege* fiction that deems the drug offences in article 36 to be extradition offences for the purposes of all existing extradition treaties without the necessity of amending these treaties and compels their inclusion in all future extradition

¹⁶³ 1972 *Records* vol.II at 203.

¹⁶⁴ Brazil declared upon ratification of the Protocol that the amended article 36 did not oblige Parties 'with laws against extradition of nationals to extradite them.' (16/5/1973 - *Multilateral Treaties Deposited* (1997) at 295).

treaties.¹⁶⁵ Linke *et al* note that this automatic extension of treaty rights and obligations takes effect without the necessity for any declaration, notification or special agreement, pointing out that such an action would only have a declaratory effect.¹⁶⁶

In effect, the first sentence of the provision amends all bilateral or multilateral extradition treaties between or among the Parties to such treaties that are Parties to the 1961 Convention and which are in force at the time when extradition of the drug offender is requested.¹⁶⁷ The second sentence of the provision obliges Parties to include article 36 offences in any bilateral or multilateral extradition treaty concluded among them. Thus there is no obligation if one or more Parties to the extradition treaty is not a Party to the 1961 Convention.¹⁶⁸ However, the *1972 Commentary* points out that if the Parties to such a treaty were Parties to the amended 1961 Convention they would be obliged to treat these offences as extradition offences because these offences would be deemed under the first sentence of the provision to be included as extraditable offences in that 'existing' extradition treaty.¹⁶⁹ Extradition relations with non-parties to both the extradition treaty and the 1961 Convention are not covered by this provision.

The *1972 Commentary* suggests that only sufficiently serious violations of article 36 offences need to be deemed extraditable offences in any extradition treaty existing between the Parties to the 1961 Convention.¹⁷⁰ Linke *et al* point out, however, that Parties are free to declare less serious offences extraditable.¹⁷¹

The *1972 Commentary* notes that the amended article 36(2)(b)(i) operates subject to the limitation clause in the opening paragraph of article 36(2), but this does not mean that Parties are exempted from taking the necessary steps to carry out their obligation. However, the Parties would not be required to change their constitutions or take actions incompatible with the basic principles of their legal system or domestic law on the

¹⁶⁵ Article 36(2)(b)(i) closely follows the wording of article 8(1) of the 1970 Hague Hijacking Convention, and reproduces the substance of article 9(1) of the 1936 Convention.

¹⁶⁶ Linke *et al op cit* at 4-5. Existing extradition treaties that use the enumerative method should simply have the serious drug offences in article 36 added to that list, although Linke *et al* at 6 note that states may not agree on when a drug offence is 'sufficiently serious' to add it to the list. At 5 they argue that treaties that use the eliminative method would not have to change the general clause rendering any crime with a penalty of a certain severity extraditable because it would simply be assumed that these offences now included serious drug offences.

¹⁶⁷ See *1972 Commentary* at 79.

¹⁶⁸ The *1972 Commentary* at 79. The *1972 Commentary* submits that it would be in the spirit of the provision if the Parties to the amended 1961 Convention endeavoured to include article 36 offences in bilateral or multilateral extradition treaties to be concluded with such non-parties.

¹⁶⁹ *1972 Commentary* at 79.

¹⁷⁰ *1972 Commentary* at 79-80.

¹⁷¹ *Op cit* at 5.

matter.¹⁷² The *1972 Commentary* also notes that although not expressly stated in article 36(2)(b)(i), the other provisions of article 36(2)(b) make it clear that extradition need only be granted in conformity with the law of the requested Party.¹⁷³

In practice, Parties have found the legal fiction in the new article 36(2)(b)(i) a useful legal tool for updating old extradition treaties to include drug offences.¹⁷⁴

4.2.5.2.2 Extradition of drug offences where an extradition treaty is necessary but not in existence

The new provision in article 36(2)(b)(ii) reads:

If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated in paragraphs 1 and 2 (a) (ii) of this article. Extradition shall be subject to the other conditions provided by the law of the requested Party;

This provision does not impose a legal obligation on any of the Parties. It simply gives Parties that make extradition conditional on the existence of a treaty the option of considering the amended 1961 Convention as the legal basis for extradition if it receives an extradition request for a person who has committed any article 36 offence from another Party to the 1961 Convention with which it does not have an extradition treaty.¹⁷⁵ Thus extradition on this basis remains discretionary, and in terms of the second

¹⁷² *1972 Commentary* at 80.

¹⁷³ *1972 Commentary* at 80.

¹⁷⁴ In *Arnbjornsdottir-Mendler v United States* 721 F.2d 679 (9th Cir.1983) a binding but old US-Denmark extradition treaty was updated by the fiction in the 1961 Convention to allow an extradition to take place to Iceland. The US delegation to the 1988 Conference noted that the 1961 Convention has been very useful in supplementing old bilateral extradition treaties that do not allow the extradition of drug offenders. They gave as an example the current US-Costa Rica treaty which, although negotiated at the turn of the century, has been effectively updated because both states are party to the 1961 Convention and the 1972 Protocol to enable the extradition of more than 20 drug offenders between 1982 and 1988 - 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 50 fn3.

¹⁷⁵ In spite of its entirely optional nature, Cuba still declared that it only extradited on the basis of treaty (14/12/1989 - *Multilateral Treaties Deposited* (1997) at 295).

sentence of the provision requested Parties are free to subject the extradition to such legal conditions as they think fit.

This optional provision, which follows the wording of article 8(2) of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft is the provision that departed the most from extradition practice in 1972. The British delegation to the CND's discussion of the proposed amendments commented:

That provision had been included in the 1970 Convention to ensure that a hijacker of an aircraft would not escape being brought to justice by taking refuge in another country. The United Kingdom Government had agreed to that provision, making it clear that such an agreement represented a wholly exceptional departure from normal extradition practice. However alarming the problem of drug abuse might be, it could hardly be compared to the dangers to which the unlawful seizure of aircraft subjected innocent victims. It was necessary to make it clear that the United Kingdom would be most unlikely to take up the option ... if it were adopted by the plenipotentiary conference.¹⁷⁶

One of the central themes of the development of international drug control law is patent in the British delegate's concerns, viz.: general acceptance of the ever greater inroads into state sovereignty made necessary by law effective against the expanding drug problem is dependent on the perceived seriousness of the threat that illicit drugs present. In 1985, Linke argued that given the threat from serious cases of drug trafficking states should either take up this option or enter into extradition treaty relations.¹⁷⁷ But in 1972, there was still no consensus that the threat was sufficiently serious to warrant exceptional international legal provisions to deal with it.

4.2.5.2.3 Extradition of drug offences where an extradition treaty is not required

The new article 36(2)(b)(iii) provides:

Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences enumerated in paragraphs 1 and 2(a)(ii) of this

¹⁷⁶ 1972 *Records* vol.I at 47.

¹⁷⁷ *Op cit* at 6.

article as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party;... .

This provision¹⁷⁸ obliges Parties which do not require the existence of an extradition treaty to effect extradition to recognise drug offences as extraditable offences.¹⁷⁹ Linke et al argue, however, that the provision does not oblige Parties which extradite on the basis of reciprocity to provide in their laws and regulations concerning extradition for the extradition of all article 36 offences.¹⁸⁰ They submit that only a general possibility of extradition should be provided for 'sufficiently serious' drug offences punishable by imprisonment or other forms of deprivation of liberty, noting that this is in conformity with state practice which in principle reserves extradition for cases that really justify the measure. They do concede, however, that Parties are left free by the 1961 Convention to declare less serious offences extraditable.¹⁸¹ Linke et al note that although the words 'between themselves' make it clear that the provision only applies to Parties, it would be in the spirit of the convention if extradition was granted by Parties and non-parties to Parties and non-parties alike where it was necessary to ensure the prosecution and punishment of major illicit drug traffickers.¹⁸² Whatever the scope of the obligation, Chatterjee notes that just as in respect of subparagraph (ii), subparagraph (iii) of the new article 36(2)(b) ensures that 'both the recognition of an extraditable offence and extradition itself shall be subject to the conditions established by the law of the requested party.'¹⁸³ Linke et al submit that this provision envisages grounds for refusing extradition contained in a Party's substantive law.¹⁸⁴

¹⁷⁸ Based on article 8(3) of the 1970 Hague Hijacking Convention, and to a certain extent on article 9(2) of the 1936 Convention.

¹⁷⁹ Linke et al *op cit* at 7 note that this provision applies to all cases of extradition on a non-contractual basis. They note that although it is arguable that extradition in such situations is not subject to reciprocity because the 1961 Convention as amended does not mention reciprocity as a condition for extradition, it follows from general state practice and the conditions provided by the requested Party that it is always possible to invoke lack of reciprocity in order to refuse extradition. The unamended 1961 Convention in article 36(2)(b) mentions reciprocity, as does article 22(2)(b) of the 1971 Convention. They note, however, that reciprocity would exist in principle if both Parties to the extradition were Parties to the 1961 Convention as amended as both Parties would be under article 36's obligation to criminalise and recognise as extraditable serious drug offences.

¹⁸⁰ *Op cit* at 4.

¹⁸¹ *Ibid.*

¹⁸² *Op cit* at 7.

¹⁸³ *Op cit* at 439.

¹⁸⁴ *Op cit* at 10.

4.2.5.2.4 Limitations on extradition

The new article 36(2)(b)(iv) provides:

Extradition shall be granted in conformity with the law of the Party to which the application is made, and, notwithstanding subparagraphs (b) (i), (ii) and (iii) of this paragraph, the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

Sub-paragraph (b)(iv) does two things, viz.: it subjects extradition to the law of the requested Party; and grants a right of refusal of extradition to the requested party if their competent authorities do not consider the offence 'sufficiently serious'. With respect to the former condition, Linke et al submit that it envisages requirements of a procedural nature such as the production of documents and satisfaction of evidential tests such as the *prima facie* rule.¹⁸⁵ With respect to the latter condition, one of the major concerns of the Canadian delegation which objected to the provisions for mandatory extradition when the CND met to discuss them before the 1972 Conference appeared to be that it would make extradition of personal use offenders mandatory. The British delegation also complained that the amendment made no provision for the exclusion of trivial offences. These objections were among those that lead to the qualification that the offence must be considered sufficiently serious by the requested Party.¹⁸⁶ The criteria by which the competent authorities are to determine the degree of seriousness of the offence are not spelled out and this remains an area of domestic discretion.¹⁸⁷ However, Gross and Greenwald argue that the content of the qualification must on the basis of its negotiating history and extradition practice be considered finite, and note that it

... would not be possible for a Party to maintain in good faith that it was ... permitted [by this qualification] to refuse extradition of an individual otherwise

¹⁸⁵ *Op cit* at 10.

¹⁸⁶ 1972 *Records* vol.I at 47. Canada still reserved in respect of article 36(2)(b)(i)-(iii) (5/8/1976 - *Multilateral Treaties Deposited* (1997) at 295).

¹⁸⁷ See 1972 *Records* vol.II at 27-8 where the possibility of setting out such criteria was raised then dismissed as impractical.

liable to extradition who was charged with an offence that carried a penalty under its own laws of, for example, 10 or 20 years imprisonment.¹⁸⁸

4.2.5.3 The 1972 Protocol's jurisdiction/extradition provisions considered

In spite of the more extensive obligations with respect to extradition, Nadelmann notes that many governments were uncertain whether the language in the Protocol provided sufficient authority to extradite.¹⁸⁹ Indeed, the retention of overlapping domestic safeguard clauses so emphasises the subjective control of the extradition process by the requested state that it nullifies the purpose of the new extradition provisions in article 36(2)(b) almost completely. Yet even these protections were not enough for some Parties who made reservations with regard to it.¹⁹⁰ The material scope of article 36's obligations is not all that clear; it relates to the drug offences in article 36(1) and article 36(2)(a)ii) but does not distinguish between the extradition of serious offences as opposed to less serious offences, while it does not mention at all the extradition of offences associated with drugs such as drug connected violent crimes.¹⁹¹ Its provisions are also by no means all inclusive of states. Chatterjee notes that article 36 does not make provision for states that are willing to be unilaterally bound by the principle of extradition, although not on a treaty basis, but with or without any condition of reciprocity.¹⁹² The *1961 Commentary* makes the point that article 36's provisions for extradition do not cover extradition to non-parties.¹⁹³ An unfortunate consequence of the 1972 Protocol's elaboration of extradition was that narcotic drugs and psychotropic substances were no longer treated equally from the point of view of extradition. Although the Protocol's provisions did have some practical effect,¹⁹⁴ this point emphasises the piecemeal development of this area of the law.

¹⁸⁸ Gross NG and Greenwald GJ 'The 1972 Narcotics Protocol' (1973) 2 *Contemporary Drug Problems* 119 at 152.

¹⁸⁹ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 413.

¹⁹⁰ For example, India (14/12/1978 - *Multilateral Treaties Deposited* (1997) at 295).

¹⁹¹ Linke *et al* op cit at 8 argue that provision should have been made for the extradition of offences such as property crimes used to obtain drugs or drug related violence or drug related fiscal offences.

¹⁹² *Op cit* at 446.

¹⁹³ *1972 Commentary* at 437.

¹⁹⁴ Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 at 861 notes that omissions in existing bilateral extradition treaties were to some extent rectified by the provision in the 1972 Protocol allowing it to be the basis for extradition requests.

The 1961, 1971 and 1972 instruments can be seen as a slow and uneven progression towards an extension of jurisdiction and a facilitation of extradition. By 1972, it still could not be said that the drug conventions represented more than a very restrained attempt to put into place a system of universal jurisdiction for drug offences, probably because at an international level drugs were still not regarded as a sufficiently serious threat to warrant such a response. While the enactment of specialist drug legislation generally resulted in the expansion of national jurisdiction for certain drug offences committed abroad,¹⁹⁵ the attempts of states to apply the *aut dedere aut judicare* principle to drug crimes soured.¹⁹⁶ The impact of the early drug conventions on state practice was probably stronger with respect to extradition. New bilateral extradition treaties including drug offences as extraditable offences proliferated.¹⁹⁷ Yet bilateral relations appeared more functional than reliance on multilateral extradition provisions. Nadelmann comments:

[M]any governments were slow to ratify the convention and some were uncertain whether the language in the Protocol provided sufficient authority to extradite. Conversely, the negotiation of new bilateral treaties required the time and resources of a very small number of officials with experience in extradition matters.¹⁹⁸

By the early 1980's, extradition requests for drug offences had grown enormously.¹⁹⁹ States began to re-emphasise extradition with respect to drug offences, and the revision

¹⁹⁵ Cotic D *Drugs and Punishment* (1988) at 114.

¹⁹⁶ Nadelmann EA 'The role of the United States in the international enforcement of criminal law' (1990) 31 *Harvard ILJ* 37 at 70 gives as an example, the creation by US officials in 1975 of Operation JANUS, a systematic effort by the US government, confronted by growing numbers of violations of US drug laws by Mexican drug traffickers, to help Mexican criminal justice officials to vicariously prosecute drug traffickers for violations of US drug laws. He notes that in the late 1970s, Operation JANUS was phased out, because it had largely failed.

¹⁹⁷ The US, for example, concluded six bilateral extradition treaties between 1960 and 1969, but sixteen between 1970 and 1978 - see Fisher *op cit* at 366-7. Willingness to co-operate must to some extent have been influenced by the drug conventions.

¹⁹⁸ Nadelmann EA 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *NYU Jnl of Int. Law and Politics* 813 at 831.

¹⁹⁹ Barnett JR 'Extradition treaty improvements to combat drug trafficking' (1985) 15 *Georgia Jnl of Int. and Comp. Law* 285 at 286 notes that in the 1960s the number of extradition requests involving the US seldom exceeded twenty per annum. By 1978, however, the number reached one hundred, and in 1984 the US expected more than four hundred, approximately one third of which would relate to drug offences.

of antiquated bilateral extradition treaties was undertaken,²⁰⁰ because although the existing multilateral drug conventions filled in some of the gaps in the older bilateral treaties, they proved too limited in scope to avoid the general need for new extradition treaties.²⁰¹ Yet in spite of the new treaties, the difficulties with extradition of drug traffickers remained.²⁰²

4.2.6 The 1988 Convention's provisions on jurisdiction and extradition

4.2.6.1 Jurisdiction under the 1988 Convention

4.2.6.1.1 Introduction

Recognising the need for a more comprehensive approach to the establishment of jurisdiction over drug offences, the framers of the 1988 Convention attempted to provide it. Article 4 sets out the grounds upon which Parties can establish jurisdiction over article 3(1) offences. Although limited in scope to these most serious drug offences, its innovatory provisions encourage reluctant Parties to establish their criminal jurisdiction over these offences. At the 1988 Conference certain delegations pushed for an extension of jurisdiction beyond the territorial because they felt that extradition was not an effective tool in the fight against the global illicit drug traffic.²⁰³ In essence, however, because of divergence in opinion on the appropriate grounds for the establishment of jurisdiction, the 1988 Convention still follows the basic scheme of the earlier conventions by allowing for the obligatory assertion of territorial jurisdiction and then

²⁰⁰ Barnett *op cit* at 285-315 reports that the US concluded a number of new bilateral extradition treaties in 1984 with states with which it already had such treaties, mainly because of the need to include drug offences among the extraditable offences and to improve the operation of extradition with these states through the following measures, viz.: providing that inchoate and preparatory offences constitute extraditable offences; making provision for the avoidance of the requested state's statute of limitations; making provision for more stringent measures with regard to the extradition of nationals if legally possible; and clarifying extradition procedures, documentation and evidence requirements.

²⁰¹ Nadelmann EA *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993) at 411.

²⁰² See, for example, the 1979 Extradition Treaty between the US and Colombia, discussed by Kelley JP 'United States - Colombian extradition treaty: efforts to prosecute drug lords' (1990) 14 *Suffolk Transnational LJ* 162-182. Kelley notes that the Treaty became a key instrument in the US's bilateral drug enforcement strategy, even providing for the extradition of Colombian nationals if the alleged offence is punishable in both states and its consummation occurs in the US. But the chaotic events in Colombia caused by the campaign waged against the judiciary by the cartels inhibited the success of the treaty, with the treaty being declared unconstitutional in 1986 and 1987 and then being renewed by Presidential decree in 1989.

²⁰³ See, for example, the statement by Sweden on behalf of the Nordic states - 1988 *Records* vol.II at 118.

optional extension of jurisdiction. Article 4, entitled 'Jurisdiction', is two-tiered. The basic difference between article 4(1) and article 4(2) is that the former directs the establishment of jurisdiction on the basis of territoriality but includes extraterritorial jurisdiction on the basis of nationality and other unusual factors, while the latter contemplates the Party establishing jurisdiction because it finds the alleged offender, who may well have committed his offence elsewhere, within its extended territorial jurisdiction, and it refuses to extradite *inter alia* because of nationality and territoriality.

The jurisdiction provisions in the 1988 Convention recognise the primacy of domestic law. Article 4(3) provides:

This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

As significant, however, is article 2 entitled the 'Scope of the Convention', and most pertinently article 2(3) which provides:

A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Both these provisions involve the reservation of jurisdiction by a Party when other Parties may potentially want to exercise jurisdiction. The first provides that in those situations where the Convention allows the extension of a Party's jurisdiction such jurisdiction cannot exclude domestic criminal jurisdiction when it is being exercised by a Party according to its own law. The second provides that when a Party exclusively reserves jurisdiction for its own authorities in its territory then no other Party may exercise concurrent jurisdiction. It is a glaring omission in the 1988 Convention that while it anticipates the possibility of concurrent jurisdiction, it does nothing to resolve conflicts of jurisdiction. As the United States delegation points out the 1988 Convention 'does not resolve the inherent question of which Party's assertion of jurisdiction is preferred when there is an overlap of competing jurisdictions'.²⁰⁴

²⁰⁴ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations*

4.2.6.1.2 Mandatory jurisdiction based upon territoriality and analogous grounds

Article 4(1)(a) provides that each Party:

Shall take such measures as may be necessary to establish its jurisdiction over the offence it has established in accordance with article 3, paragraph 1, when:

- (i) The offence is committed in its territory;
- (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;... .

Article 4(1)(a) obliges Parties to establish jurisdiction over article 3(1) drug offences committed within their territory and on board vessels flying their flag or aircraft registered under their law. This is a standard exercise of territoriality coupled with a standard extension of jurisdiction to a state's ships and planes. The introductory wording of the provision obliges Parties to establish their jurisdiction, not to exercise it once it is established, an obligation reserved to article 6 on extradition and prosecution.²⁰⁵ The offender need not actually be located on the Party's territory or flag vessel or registered aircraft when it establishes its jurisdiction; the offender's location is only a question of whether the Party is able to exercise that jurisdiction. The provision makes no reference to the nationality of the offender; all offenders who commit article 3(1) offences within the territory, in its legally extended sense, of a Party, fall within its jurisdiction.

In order to establish the nationality of vessels and thus make the establishment of jurisdiction by the Party taking jurisdiction over its own vessels uncontroversial, article 4(1)(a)(ii) uses the expression 'flying its flag' in preference to 'registered'. Registration is an unreliable means of establishing the nationality of a vessel and an unreliable basis

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Senate Executive Report 101-15, 101st Congress, 1st Session at 34. The report explains that if X transports drugs from state A to state B, he commits an article 3(1) offence in state A (exporting) and in state B (importing). Both states must establish territorial jurisdiction, and the article does not give primacy to either one or the other's right to prosecute.

²⁰⁵ See generally the discussion in Committee I of the Conference where the 'exercise' of jurisdiction was deleted from the draft provision - *1988 Records* vol.II at 120-1.

for the establishment of jurisdiction because in practice the flag that a vessel is flying may not reveal its correct registration. A vessel flying one state's flag may well be registered in another state as many states allow vessels registered with them to fly the flags of other states. The 1982 United Nations Convention on the Law of the Sea²⁰⁶ provides in article 91(1) that the nationality of a vessel is that of a state whose flag it is entitled to fly. For the purposes of article 4(1)(a)(ii), however, a vessel is considered to belong to the state whose flag it flies and if that state is a Party to the Convention it is obliged to take jurisdiction over that vessel.²⁰⁷ The flag being flown is the relevant criterion in the matter of jurisdiction because it allows the assumption of a genuine connection between the state and vessel.²⁰⁸

The vessel must fly the flag of the Party which is establishing its jurisdiction or be registered as one of its aircraft at the time of the commission of the offence. If not, the Party will not have jurisdiction.

Article 4(1)(a) reflects state practice and thus does not require much alteration of Parties' domestic law.²⁰⁹

²⁰⁶ 21 *ILM* 261.

²⁰⁷ A suggestion at the 1988 Conference by the Jamaican delegate to the effect that article 4(1)(a)(ii) read a vessel 'entitled to fly its flag' was rejected - *1988 Records* vol.II at 119.

²⁰⁸ See the statement of the German Democratic Republic's delegate - *1988 Records* vol.II at 119. The grant of a flag of convenience is in international law not an administrative formality and does not mean that the state granting such flag is not obliged to guarantee that it possesses a genuine link with the vessel concerned - 'Report of the ILC on its Eighth Session' (1956) II *Yearbook of the ILC* at 279 cited in Nordquist, MH (ed) *UN Convention on the Law of the Sea: A Commentary* vol. III at 107. Vessels that fly the flags of states that they are not entitled to fly are considered stateless in terms of article 92(2) of 1982 United Nations Law of the Sea Convention. However, for the purposes of the establishment of jurisdiction in terms of the 1988 Convention vessels 'flying the flag' include those entitled to fly the flag and those not so entitled but which in fact are doing so. Parties to the Convention are in terms of article 4(1)(a)(ii) obliged to establish jurisdiction over such vessels. This leaves vessels not flying any flag in a curious position in that they are not covered by either article 4(1)(a)(ii)'s mandatory provision or article 4(1)(b)(ii)'s optional provision for the establishment of jurisdiction. The establishment of jurisdiction over such vessels is contemplated by the 1988 Convention as pointed to by the provision in article 17(2) which allows Parties interdicting such vessels to request assistance for that purpose. It is not, however, obligatory.

²⁰⁹ See Gilmore *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 10. For an example of the extension of jurisdiction to aircraft and ships see the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990. It provides in section 10 that dealing in drugs on board an Australian aircraft 'in flight' is an offence and defines 'in flight' in section 7. It provides in section 11 that dealing in drugs on board an Australian ship 'at sea' is an offence and then defines 'at sea' in section 8. Both the definitions of Australian planes in flight and of ships at sea extend beyond situations where the vehicle is still within a very broadly defined physical Australian territory, and are obviously intended to extend jurisdiction over offences committed on these vehicles outside Australia. See also Gilmore W 'Drug trafficking by sea: the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances' (1991) 15 *Marine Policy* 181 at 191.

4.2.6.1.3 Optional jurisdiction based upon nationality/habitual residence, authorisation over foreign vessels or the effects principle

Article 4(1)(b) provides that each Party:

May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3 paragraph 1, when:

- (i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;
- (ii) The offence is committed on board a vessel concerning which that Party has been authorised to take appropriate action pursuant of article 17, provided that such jurisdiction shall be exercised only on the basis of agreements referred to in paragraphs 4 and 9 of that article;
- (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.

Despite attempts during the drafting process to make article 4(1)(b)(i) mandatory,²¹⁰ Gilmore notes with interest that there is no obligation on states to establish their jurisdiction over extraterritorial drug offences committed by their nationals or habitual residents.²¹¹ Allowing it to remain optional has been criticised,²¹² but this does not mean that there is consensus that drug trafficking offences are different from other offences where international law renders the assertion of jurisdiction on the nationality principle obligatory.²¹³ Rather there is no consensus that the relationship of an offender and the country to which he belongs or in which he has habitual residence provides a justifiable

²¹⁰ See, for instance, the Nordic and Israeli amendments to draft article 2*bis*, 1988 *Records* vol.I at 108-9.

²¹¹ *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 10.

²¹² See Sproule DW and St-Denis P 'The UN Drug Trafficking Convention: An Ambitious Step' 1989 *CYBIL* 263 at 275.

²¹³ See, for example, article 6(1)(c) of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 27 *ILM* 668 at 676.

basis for jurisdiction. The provision recognises that while assertion of jurisdiction on the basis of the nationality principle may be acceptable to many civil law states, common law states are firmly wedded to the territorial principle.²¹⁴ It was recognised at the Conference that states whose legal systems are based strictly on the principle of territoriality find it difficult to establish extraterritorial jurisdiction over, for example, their own nationals. They were apprehensive about the difficulties involved in securing convictions for extraterritorial offences committed in a country whose procedure and rules of evidence were completely different from their own and they feared that acquittals would produce double-jeopardy bars to further prosecution. The Conference thus felt it better to rely on extradition to transfer the offender to the territorially competent state.²¹⁵ Nonetheless, some common law states have decided to take the option.²¹⁶ Habitual residence of the offender has also been included in article 4(1)(b)(i) as an optional ground for the establishment of jurisdiction. While some Parties treat habitual residents in the same way as nationals for extradition purposes, others treat them as aliens, and some do not know how to treat them as they do not recognise the concept. Sproule and St-Denis comment that different interpretations of habitual residence might lead to disputes between Parties.²¹⁷ Despite the optional nature of the provision as a whole, the Philippines has declared that it does not consider itself bound by it.²¹⁸

Article 4(1)(b)(ii) provides for the elective exercise of jurisdiction within the framework of the law enforcement scheme provided for in article 17. Article 17 provides

²¹⁴ Sproule and St-Denis *op cit* at 275 note that the refusal of common law states to support this as a mandatory ground was largely a response to the adamant refusal of civil law states to accept any provisions requiring the extradition of nationals.

²¹⁵ See 1988 *Records* vol.II at 121-122.

²¹⁶ See, for example, the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. The Explanatory Memorandum for the 1989 Bill which preceded the Act explains that the Bill was drafted so as to apply to Australian nationals apprehended in Australia who committed drug offences outside Australia that would be offences in Australia. Section 12 of the Act, entitled 'Dealing in drugs outside Australia', reads: '12. (1). A person is guilty of an offence against this section if: (a) the person engages, outside Australia, in conduct that is dealing in drugs; and (b) the conduct constitutes an offence against the law of a foreign country; and (c) the conduct would constitute an offence against a law in force in a State or Territory if it were engaged in by the person in that State or Territory. (2) A person may be charged with an offence against this section only if: (a) the person is present in Australia; and (b) if the person is not an Australian citizen: (i) no steps have been taken by the foreign country referred to in paragraph (1)(b) for the surrender of the person to that country; or (ii) proceedings taken by that country under the *Extradition Act 1988* have not resulted in the person being surrendered to that country.' Australia thus extends extraterritorial jurisdiction over nationals without the necessity of an extradition request and refusal, i.e. on the basis of nationality, but in respect of non-nationals on the basis of subsidiary universality.

²¹⁷ *Op cit* at 276. The Moroccan delegation expressed a reservation with respect to this provision - 1988 *Records* vol.II at 31.

²¹⁸ 7/6/1996 - *Multilateral Treaties Deposited* (1997) at 305.

for the consensual interdiction of a foreign flag vessel exercising freedom of navigation on the high seas. The agreements referred to in article 17(4) and (9) permit a Party that has received prior authorisation to board and search such a vessel, and to take suitable action upon the discovery of evidence of illicit trafficking. Article 4(1)(b)(ii) takes this process to its logical conclusion by allowing the interdicting Party to establish jurisdiction when a drug offence has occurred on the vessel without the necessity of having to establish a jurisdictional nexus between its territory and the offence.²¹⁹ Resort to article 17(4) to interdict a vessel is futile if a Party chooses not to take the option to extend its jurisdiction in terms of article 4(1)(b)(ii) as no criminal charge will eventuate. Gilmore notes that some states appear to be exercising the option.²²⁰ Article 4(1)(b)(ii)'s provision supplements earlier provisions for jurisdiction over drug trafficking offences at sea. The 1958 Convention on the Law of the Territorial Sea and the Contiguous Zone²²¹ provides in article 19:

The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship, save only

(d) if it is necessary for the suppression of the illicit traffic in narcotic drugs.

Article 27 of the 1982 United Nations Convention on the Law of the Sea²²² reproduces this provision but with the addition of 'psychotropic substances' to 'narcotic drugs'. Article 4(1)(b)(ii) extends a Party's potential jurisdiction to any part of the high seas.

Article 4(1)(b)(iii) is an attempt to prevent the importation of illicit drugs by giving Parties the option of establishing jurisdiction using the controversial effects or

²¹⁹ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 37.

²²⁰ See *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 11. He gives as an example the UK's Criminal Justice (International Co-operation) Act, 1990, c.5, sections 18-21 and schedule 3. In 'Narcotics interdiction at sea: the 1995 Council of Europe Agreement' (1996) 20 *Marine Policy* 3 at 6 he notes that the 1995 Council of Europe Agreement has, by obliging Parties to apply jurisdiction over offences on the vessels of other Parties in article 3(3), made a significant improvement on article 4(1)(b)(ii) of the 1988 Convention.

²²¹ 15 *UST* 1607.

²²² 21 *ILM* 261.

objective territoriality principle over conspiracies occurring outside their territory. Article 4(1)(b)(iii)'s operation is dependent upon the criminalisation in article 3(1)(c)(iv) of certain forms of inchoate conduct and complicity, although the latter obligation is subject to domestic limitation. Such offences, treated as principal offences in their own right, would usually fall under the jurisdiction of the Party in whose territory they were committed. However, article 4(1)(b)(iii) allows the optional extension of a Party's jurisdiction over these offences committed outside its territory, when those offences are committed with a view to committing an article 3(1) offence within its territory. Thus it allows Parties to establish extraterritorial jurisdiction over offences of participation and inchoate conduct when they are committed with the intent of committing principal offences inside its territory. As noted in the introduction to this chapter, the extension of the effects principle from actual to intended effects is logically difficult,²²³ but this is what article 4(1)(b)(iii) has done. The provision was probably intended only to apply to non-nationals of the Party using it because article 4(1)(b)(i) already caters for extraterritorial jurisdiction over nationals. The provision is a legal innovation requiring alteration of a Party's domestic law.²²⁴ Parties have responded positively.²²⁵

²²³ See Blakesly *op cit* (1982) at 1145.

²²⁴ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 12 notes that judiciaries in common law jurisdictions have been adopting a creative approach to jurisdiction to allow a greater reach to the criminal law over drug trafficking. He gives as an example the 1990 case of *Somchai Liangsiriprasert v United States Government* [1990] 2 ALL ER 866 where the Privy Council, in an appeal from Hong Kong, directed its attention to the common law rule relating to conspiracies carried out entirely abroad. Lord Griffiths, speaking for a unanimous Board stated: "Unfortunately in this century crime has ceased to be largely of local origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong [at 878]."

²²⁵ See, for example, sections 13 and 14 of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. Section 13, entitled 'Dealing in drugs outside Australia with a view to commission of an offence in Australia' appears to provide for application of objective territoriality both when there are actual and only intended effects. It provides: '13. A person is guilty of an offence against this section if the person engages, outside Australia, in conduct that is dealing in drugs with a view to the carrying out: (a) in Australia; or (b) on board an Australian aircraft in flight outside Australia; or (c) on board an Australian ship at sea; of a dealing in drugs that constitutes an offence against a law of the Commonwealth, of a State or of a Territory.' Section 14, entitled 'Conspiracy etc. outside Australia to commit an offence inside Australia' provides for application of objective territoriality when the external offence is inchoate or the conduct accessory. It criminalises the conduct of: '14. A person who, by conduct engaged in outside Australia: conspires, or attempts to carry out in a State or Territory; or (b)

4.2.6.1.4 Mandatory jurisdiction over alleged offenders found within a Party's territory when extradition is refused because of territoriality or nationality

Article 4(2) states:

Each Party:

(a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

(i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or

(ii) That the offence has been committed by one of its nationals;... .

Article 4(2)(a) provides that a Party must establish jurisdiction over a person who has allegedly committed an article 3(1) offence and who it finds on its territory, if it refuses an extradition request or would have done so had one been made.²²⁶ Article 4(2)(a) thus provides the jurisdictional basis for the obligation to prosecute or extradite in article 6(9), with which it must be read. However, unlike other international conventions²²⁷ which provide for universal jurisdiction any time that extradition is refused, article 4(2)(a) limits the application of the *aut dedere aut judicare* principle²²⁸ and thus the taking of

aids, abets, counsels or procures, or is in any way directly or indirectly knowingly concerned in, or party to, the carrying out in a State or territory of; a dealing in drugs ...'.

²²⁶ As Puttler *op cit* at 114 notes, it is important in situations where no request for extradition is made that article 4(2)(b) allows a Party to take jurisdiction when it does not extradite an alleged offender to another Party.

²²⁷ Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 13 notes that the 1988 Convention has adopted a less ambitious scheme in this regard as those adopted for hijacking and terrorism.

²²⁸ Contra Stafford D *International legal co-operation against serious crime: inter-legal systems issues impacting on international co-operation* (Unpublished Conference Paper, New Delhi Global Drugs Conference, 1997) who states at 1 that article 6 'imposes an absolute obligation, where a country refuses to extradite, for that country to submit the case to its competent authorities for the purposes of prosecution.'

jurisdiction to situations where the Party disallows extradition for specific reasons, viz.: 'when it does not extradite an offender found on its territory, or on board a ship flying its flag, or on an aircraft registered under its law, or because the offender is one of its nationals.'²²⁹ Should the Party's refusal to extradite be based on some other reason it will not be under an obligation to establish jurisdiction and may well decline from doing so in spite of the optional provision in article 4(2)(b). There is no blanket obligation to establish jurisdiction in the 1988 Convention, and by extension, no blanket obligation to prosecute when extradition is refused. In spite of pressure from, for instance, the Nordic delegations,²³⁰ and the general acceptance of universal jurisdiction by civil law states which already exercise extraterritorial jurisdiction over nationals (but do not extradite them), delegates to the 1988 Conference from common law states were not prepared to classify drug trafficking offences as falling under universal jurisdiction even in the subsidiary sense of the principle.²³¹ The British delegate to Committee I of the Conference explained:

Extradition ... had its part to play [in bringing drug traffickers to justice]. No country wished to become a safe haven for drug traffickers, but every country with the ability in its law to extradite persons had established certain rules and conditions for extradition. For instance, extradition was commonly barred where there was a previous acquittal or conviction, precisely because there could be no prosecution. In such cases there was no point in taking up the time of the prosecuting authorities to consider prosecution. The same applied when the reason for refusal to extradite was that there was no evidence. A blanket obligation to prosecute when there was no extradition would therefore be meaningless. The grounds for refusal had to be examined because they would demonstrate the prospects of pursuing the offender within a given system. The United Kingdom favoured extradition as a means of bringing criminals to justice. Its own criminal jurisdiction was founded on the offence being committed within its territory. She believed that the State where the crime was committed was by far the best place for a person to face trial, and the United Kingdom always favoured extradition in those cases and had no problem whatsoever about

²²⁹ Sproule and St-Denis *op cit* at 277.

²³⁰ See *1988 Records* vol.II 136.

extraditing its own nationals for that purpose. It therefore had no need to assume universal jurisdiction although it had done so in special cases of terrorism and hijacking. The United Kingdom did not, however, desire universal jurisdiction for drug trafficking, not because the offence was any less serious, but because the nature of the case load and of the individual cases was so different. It was through extradition and mutual legal assistance under the proposed convention that her country could improve its international contribution to combating drug trafficking offences. Requesting States would not thank the United Kingdom for failure to obtain a conviction in cases where it had not been able to extradite, if the result was that any State which later had an opportunity to prosecute was barred from doing so by the double jeopardy rule triggered by an acquittal in the United Kingdom. Those States which, as a matter of principle, did not extradite their own nationals invariably had jurisdiction on the basis of nationality. It was therefore logical for them to submit the case to their competent authorities for the purposes of prosecution. Those States could then deal with the evidential and procedural problems in the way provided by their own legal system, which presumably allowed extraterritorial prosecution of that kind. In the view of her delegation a universally applicable system of prosecution and jurisdiction could not be achieved through the Convention. The constitutional safeguards in the proposal of the Nordic countries ... did not help, because the issue at stake was not constitutional or legal principles but long-established criminal policy, which was unlikely to be modified and was not an obstacle to improved international co-operation in bringing drug traffickers to trial and securing their conviction.²³²

What this long extract makes clear is that unlimited universal jurisdiction in its subsidiary form over drug offences is rejected apparently not because drug offences are less serious than offences to which such subsidiary universality applies, but because the legal bars to extradition in common law states also operate to bar prosecution for extraterritorial offences in the same circumstances, and because the nature of the case load and of individual drug offences was so different from offences where mandatory

²³¹ See *1988 Records* vol.II at 136-140.

²³² *1988 Records* vol.II at 137.

subsidiary universality was applied.²³³ The central argument of supporters of extradition in preference to the establishment of extraterritorial jurisdiction was that trial in the place where the offence is committed best addresses the objective of bringing drug traffickers to justice because it is the place where the greatest harm flows from the criminal acts in question and the place where the best case can be made. The United States delegation concludes that

a realistic appraisal of the feasibility of prosecution in a state which has not gathered the evidence in a form and procedure admissible in its courts mitigates against successful prosecution in virtually every instance.²³⁴

In practice, prosecution by one Party of an offence committed in another Party is extremely difficult, a difficulty that undermines the whole rationale for applying universal jurisdiction to drug offences. It is arguable, however, that despite domestic procedural hurdles and the practical problems of extraterritorial prosecution a move to mandatory extraterritorial jurisdiction is justified by the massive growth in drug trafficking problem. It is arguable that territoriality coupled with extradition faces legal and practical hurdles of its own, and is manifestly failing to get to grips with the international dimension to the drug problem which failure serves to undermine all domestic efforts to suppress drugs. But case load is indicative that drug crime is not of the same practical nature as the crimes already subject to universal jurisdiction. It is so common that effective mandatory universal jurisdiction over it would imply a massive burden on Parties and the necessity for the restructuring and accommodation of all national criminal justice systems into a coherent international unit. As the United States delegate put it:

²³³ Echoing the UK's position, the US delegation also opposed such mandatory universal jurisdiction, noting that 'the nature of its domestic legal system prevented [it] from doing so in the present instance', and that the number of cases brought to trial under international conventions that did provide for such jurisdiction 'was infinitesimally [sic] small in comparison with the number of cases brought in respect of [drug] offences ...'. - *1988 Records* vol.II at 138.

²³⁴ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 35-36.

If all countries had the same legal system, then cases could be transferred from one country to another with the same facility as was currently enjoyed by drug traffickers in their movements.²³⁵

International society was not in that position in 1988.

Article 4(2)(a)(i)'s obligation on Parties to establish jurisdiction on the basis of the presence of the alleged offender on their territory when they have refused extradition because the offence was committed on their territory, or on a vessel flying its flag, or on an aircraft registered under its law, in effect reiterates article 4(1)(a)'s obligation to establish jurisdiction on the basis of this extended territoriality. In fact, article 4(1)(a) is a wider provision containing the former because neither a refused extradition request nor the presence of the alleged offender is required. Article 4(2)(a)(i) is saved from redundancy if one accepts the explanation by the Netherlands's delegation to Committee I that it is different from article 4(1)(a) because while the former provides for grounds for establishing jurisdiction, the latter deals with grounds for refusal of extradition and thus with the exercise of jurisdiction already established.²³⁶

Article 4(2)(a)(ii), however, is an advance over article 4(1)(b) because it obliges Parties to establish jurisdiction over their nationals when they refuse to extradite them because they are their nationals, while article 4(1)(b) only makes the establishment of jurisdiction over nationals optional. Thus the potential loophole left when a Party which is unwilling to extradite its nationals has not established its jurisdiction over extraterritorial offences committed by its nationals is closed by this obligation. Schutte argues that it also obliges Parties that have established jurisdiction over all the crimes of their nationals, to actually exercise that jurisdiction.²³⁷ The Philippines, assumedly in

²³⁵ 1988 Records vol.II at 138-9.

²³⁶ 1988 Records vol.II at 142. Schutte JJE 'Extradition for drug offences: new developments under the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' (1991) 62 *Revue Internationale de Droit Penal* 135 at 144 makes the same argument. He notes that while the 1988 Convention deals to a certain extent with the exercise of jurisdiction, it leaves it largely to domestic law as evidenced by provisions like article 3(11). He argues that the exception is article 6(9) where the exercise of jurisdiction in cases where extradition is refused 'is addressed by way of an obligation under international law.' Article 4(2) repeats article 4(1)'s reference to the establishment of territoriality and the flag because 'the exercise of such jurisdiction becomes an obligation under international law only in cases where a request for extradition from another Party ... has been refused.'

²³⁷ *Op cit* at 145.

reaction to this obligation, has declared that it does not consider itself bound by article 4(2)(a)(ii).²³⁸

4.2.6.1.5 Optional jurisdiction over alleged offenders found within a Party's territory where extradition is refused for reasons other than territoriality or nationality

Article 4(2)(b) provides that a Party:

May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.

What is contemplated by article 4(2)(b) is the optional establishment of jurisdiction by a Party which finds an alleged article 3(1) offender on its territory and then chooses to refuse an extradition request for its own reasons. Such reasons would in practice usually be other than those enumerated in article 4(2)(a). They could, for instance, include the fact that the alleged offender is facing the death penalty or a penalty more severe in the requesting Party than in the requested Party.²³⁹ Other reasons may be that the requested Party fears that once extradited the alleged offender will not in fact be prosecuted or perhaps will not be punished severely enough.

The provision is optional largely because common law delegations to the 1988 Conference would not accept anything closer to an obligation to establish subsidiary universality over drug offences other than the narrowly circumscribed provision in article 4(2)(a). Article 4(2)(b) exists because certain mainly civil law delegations, in the words of the Chairman of Committee I,

wishing to expand the scope of the principle *aut dedere aut judicare*, preferred that no specific relevant grounds for refusal of extradition be singled out as calling for application of that principle.²⁴⁰

²³⁸ 7/6/1996 - *Multilateral Treaties Deposited* (1997) at 305.

²³⁹ Factors contained in the original draft article 2*bis* or suggested as amendments thereto.

It is interesting that progressive common law jurisdictions such as Australia have made provision for the unrestricted establishment of extraterritorial jurisdiction over non-nationals on the basis of the *aut dedere aut judicare* principle.²⁴¹

4.2.6.1.6 The 1988 Convention's jurisdictional provisions in conclusion

The 1988 Convention's provisions on jurisdiction do not represent a massive departure from existing practice. They are an improvement over the jurisdictional provisions in the earlier conventions if only because they clarify jurisdiction over drug offences. They emphasise territoriality, and extend it on either an optional or very limited basis. They fail in two areas.

First, their most obvious failure is as Gilmore notes that they make no provision for ranking competing claims to jurisdiction, and customary international law provides no adequate solution either.²⁴² Article 4(1), for example, generally allows the potential exercise of jurisdiction by more than one Party at a time over the same offence. Potential jurisdictional conflicts abound. Second, they fail to resolve the conflicting approaches of civil and common law states to reliance on subsidiary universality for the prosecution of drug offences committed in other states. The result is a limited provision.

With respect to protections of individuals, the jurisdictional provisions of the 1988 Convention compare poorly to the earlier conventions' provisions. For example, while article 36(2)(a)(iv) of the 1961 Convention subjects jurisdiction based on subsidiary universality to the absence of double jeopardy, article 4(2) does not.²⁴³ Extension of the domestic criminal reach of states through international law should have been linked to express provisions for the protection of individual human rights.

²⁴⁰ 1988 Records vol.II at 140.

²⁴¹ See section 12(2) of the Australian Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990, which provides that Australia will establish jurisdiction over extraterritorial dealing in drugs in the case of non-nationals if '(i) no steps have been taken by the foreign country referred to in paragraph 1(b) for the surrender of the person to that country; or (ii) proceedings taken by that country under the *Extradition Act 1988* have not resulted in the person being surrendered to that country.' Thus it does not stipulate that the refusal to extradite must be based on the territoriality of the offence, and it does not apply to nationals who are covered by another provision. It thus leaves open the grounds for refusal to extradite the non-national.

²⁴² *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 12.

²⁴³ Puttler *op cit* notes at 114 that in the context of her example about German prosecution of Dutch drug traffickers, it would mean that the German court would not have to take into account any previous trial in the Netherlands or failing that any maximum sentence awarded under Dutch law.

4.2.6.2 Extradition under the 1988 Convention

4.2.6.2.1 Extradition under the 1988 Convention generally

The 1988 Convention, like the earlier conventions, relies on extradition as its chief device for acquiring the custody of drug offenders located in other states. Although the Convention's extradition provisions were developed in response to the growing drug traffic, in order to encourage state adherence to the 1988 Convention, they are not a major advance on the limited provisions of the 1961 and 1971 Conventions.²⁴⁴ More radical obligations once again failed to clear the hurdles of sovereignty, the protection of nationals and retention of discretion with regard to requests from politically suspect states.²⁴⁵ Thus article 6, entitled 'Extradition', reflects more of a desire to protect established principles in the field of extradition than a response to the perceived necessity of arriving at bold solutions to the problems of prosecuting drug traffickers.²⁴⁶ It follows precedents established in anti-terrorism conventions.²⁴⁷ It does not try to establish an extradition treaty that creates obligations to extradite but rather, like the earlier drug conventions and other suppression conventions, tries to make extradition possible using existing domestic legislation and existing or future bilateral and multilateral extradition treaties.

The 1988 Convention also follows the established pattern by subjecting extradition to domestic law or applicable extradition treaties. Article 6(5) provides:

Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

²⁴⁴ See the 'Expert Group Report', 1988 *Records* vol.I at 19.

²⁴⁵ 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 48.

²⁴⁶ Sproule and St-Denis *op cit* at 277-8.

²⁴⁷ For example, Article 8 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 105.

Article 6(5) reflects a cautious approach to extradition.²⁴⁸ Schutte submits, however, that on the principle of *pacta sunt servanda* it should not be seen as a way of invoking grounds of refusal which may have been recognised in a Party's domestic law but which have not been recognised by the applicable extradition treaty.²⁴⁹ In cases of extradition requests by Parties that still apply the death penalty, however, caution may be justified.²⁵⁰ Moreover, article 6(5)'s breadth allows Parties to subject extradition requests to the general principles of extradition, such as those of double criminality and specialty, which ensures respect for these procedural due process provisions, and may perhaps halt their erosion in state practice.²⁵¹ Schutte opines that it may also allow Parties to refuse extradition when an offence is not particularly serious.²⁵² His justification for this interpretation is that the domestic law of Parties recognises that there should be a certain measure of proportionality between the seriousness of the offence and whether it should be extraditable, and while proportionality was not that important with regard to offences such as hijacking, it may be different for drug offences. He also points out that this ground of refusal was expressly recognised in the earlier drug conventions.²⁵³ Article 6(5)'s waiving of international control over the domestic grounds for a refusal to extradite is limited to the extent that article 3(10) regulates the political and fiscal exceptions to extradition. Article 6(5) must be overridden by article 3(10) unless its conditions for refusal are part of the constitution or fundamental laws of the requested Party.

²⁴⁸ Draft article 4(5) made it clear that a requested Party would not be able to refuse extradition on the basis that a) the offender was its national, or b) if the offence was committed outside the territory of the requested Party but was intended to have or had effects within its territory, or c) if the offence was political in character. After pressure from states whose constitutions or domestic law precluded the extradition of nationals, states that rejected the effects principle and states that wanted to retain the political offence exception, these restrictions were dropped - see the 'Expert Group Report', 1988 Records vol.I at 19, 36-7.

²⁴⁹ *Op cit* at 139.

²⁵⁰ Sproule and St-Denis *op cit* at 279 fn58.

²⁵¹ Double criminality has been eroded by the prosecution of drug offenders in the US using the Continuing Criminal Enterprise Statute (CCE), 21 USC section 848(b), a unique offence made up of five separate elements. CCE as a single offence does not have a counterpart in Colombian law, even though the crimes that make up some of its five elements do - see Kelley JP 'United States - Colombian extradition treaty: efforts to prosecute drug lords' (1990) 14 *Suffolk Transnational LJ* 161 at 177-179. Kelley notes that drug traffickers extradited to the US under this statute claim that it is violative of double criminality because it is a uniquely American provision, but the US courts have decided that such prosecutions do not violate the principle because CCE prosecutions were within the contemplation of the Parties to the treaty, justifying this conclusion because of the importance of CCE prosecutions to the drug war (*US v Lehder-Rivas* 688 F.Supp 1523, 1527-8 (MD Fla 1987)).

²⁵² *Op cit* at 139-140.

4.2.6.2.2 The political and fiscal offence exception and grounds for refusing extradition

It is appropriate to discuss article 3(10), the 1988 Convention's political and fiscal offence exception provision, at this stage, because although it is a general provision directed at other forms of interstate co-operation and for that reason was left in article 3, it is usually associated with extradition co-operation.²⁵⁴ Article 3(10) provides

For the purpose of co-operation among the Parties under this Convention, including, in particular co-operation under articles 5, 6, 7, and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

This provision represents an attempt to limit but not extinguish the application of the political or fiscal offence exception to extradition in respect of the drug trafficking offences set out in article 3(1) (and to confiscation in terms of article 5, mutual legal assistance in terms of article 7 and general enforcement co-operation in terms of article 9). It is an attempt to ensure that Parties act in good faith.²⁵⁵ The political offence exception is still common in extradition treaties and in state practice generally,²⁵⁶ and has been used to foil drug related extradition requests.²⁵⁷ Attempts have been made in multilateral conventions to close the potential loophole for offenders whose offence is not of a political nature.²⁵⁸ Although there was resistance to the provision on the grounds

²⁵³ *Op cit* at 139.

²⁵⁴ See Sproule and St-Denis *op cit* at 272.

²⁵⁵ See the 'Review Group Report', 1988 *Records* vol.I at 65.

²⁵⁶ See generally Panel 'Extradition and the political offence exception' (1987) 81 *American Society of Int. Law: Proceedings* 467-483.

²⁵⁷ Okera SY 'International extradition and the Medellin cocaine cartel: surgical removal of Colombian cocaine traffickers for trial in the United States' (1992) 13 *Loyola of Los Angeles Int. and Comp. LJ* 955 at 965 fn80 notes that the extradition request of the Colombian Jorge Luis Ochoa on drug charges to the US from Spain was initially turned down by the Spanish *Audiencia Nacional* because of its 'political context'. The National Court noted that granting of the request could possibly aggravate Ochoa's situation because of 'political considerations'. These appeared to stem from the US's allegation that Ochoa was connected to alleged cartel trafficking activity in Nicaragua which connection the court found unconvincing, given the then prevailing animosity between the US and Nicaragua. He was eventually extradited to Colombia on a charge of illegally smuggling bulls.

²⁵⁸ The substance of Article 3(10), introduced by the Jamaican delegation, can be traced to the Commonwealth Scheme for the Rendition of Fugitive Offenders (1986) 4 *CLB* 1124, and the Scheme for

that it would prejudice the right of asylum and the protection of refugees, during the drafting stage there was considerable support for such a provision in the 1988 Convention.²⁵⁹ Many delegations to the Conference held the view that drug-related offences should not be considered to be political,²⁶⁰ because to do so would be to provide a legal shield for offenders and undermine not only extradition but the other forms of co-operation contemplated by the Convention. Rebel groups in the developing world that use drug trafficking as a source of funding may still argue that they have a legitimate claim to the exception, and especially so if they believe that supporting the supply of drugs to the developed world is simply one way of prosecuting a political struggle to undermine global capitalism.²⁶¹ Moreover, in state practice the political offence exception often does serve other purposes. Blakesly points out that

[t]he political offence exception often functions as a repository for human rights protections. It could be limited, if human rights protections were placed directly into extradition treaties.²⁶²

Yet the prevailing view seems to be that no drug or laundering offence under the 1988 Convention should be considered a political or fiscal offence.²⁶³

Mutual Legal Assistance in Criminal Matters within the Commonwealth (1986) 4 *CLB* 1118. See *1988 Records* vol.II at 59. Sproule and St-Denis *op cit* at 273 fn37 note that anti-terrorism conventions do not attempt to exclude the political offence exception, but that several international penal conventions do limit it through the principle *aut dedere aut judicare*.

²⁵⁹ See, for example, the 'Review Group Report', *1988 Records* vol.I at 61. In Committee I the French delegate put the case for those who supported the deletion of the provision by pointing out that it attempted to depoliticise drug offences, and that as such ran counter to French law which in article 5 of the 1927 Law on Extradition provides that no-one shall be extradited for a political crime or for political purposes, and by noting that the French Constitution provided for a right of political asylum - *1988 Records* vol.II at 57-8. The Nordic delegations 'did not accept any restriction on their absolute freedom to assess which offences were political or politically motivated' and reserved their position on article 3(10) - *1988 Records* vol.II at 169.

²⁶⁰ See the 'Expert Group Report', *1988 Records* vol.I at 19, 37.

²⁶¹ The obvious examples are M19 in Colombia and *Sendero Luminoso* in Peru. The US delegation interpreted article 3(10) to mean that 'if a Party recognises a limitation to its obligation to co-operate for offences committed for political reasons, such as drug trafficking to raise money for a political group, that limitation shall not apply.' See 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 32.

²⁶² Blakesly *CL Terrorism, Drugs, International Law and the Protection of Human Liberty* (1992) at 270.

²⁶³ See the opinion of experts in the 'Explanatory Report on the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime' in Gilmore WC (ed) *International Efforts to Combat Money Laundering* (1992) 192 at 224.

The fiscal offence exception is just as relevant as the political offence exception generally because when classified as offences against customs legislation drug offences are not regulated by the 1961 Convention, and may be excluded from extradition on the basis of the fiscal offence exception. The fiscal offence exception is also significant in the context of drugs related money-laundering.²⁶⁴ It was included in the Convention to deal with Parties that refuse to co-operate because of their perception that the problem is of a fiscal rather than of a criminal nature. It is thus of particular importance in respect of extradition for the offences in article 3 sub-paragraphs (1)(b) and (1)(c)(i). Many states still apply the fiscal exception,²⁶⁵ and many still classify drug offences in their domestic law as fiscal or customs offences.²⁶⁶ Sproule and St-Denis note that the most common form of this is the refusal by a requested state to provide access to financial records thus preventing the tracing of laundered funds.²⁶⁷ They question its necessity on the basis that any request for, for instance financial records, can only be made if there is a demonstrable link to the investigation or prosecution of article 3 offences in the absence of which co-operation can be refused.²⁶⁸

The provision in article 3(10) is not absolute. It is limited in a number of ways. The most important limitation is the 'constitutional' and 'fundamental domestic law' safeguard clause. The provision forces Parties to only use either the political or fiscal offence exception when fundamental breaches of its basic law would be involved. The United States delegation stated:

[T]he constitutional law of a few states requires that the courts of those states determine whether or not an offence is a political offence. At the insistence of those states, the paragraph is qualified It is understood, however, that the courts of those states will be guided by the principle contained in the paragraph

²⁶⁴ There was some resistance in the Review Group to the inclusion of the fiscal offence exception on the basis that it was not yet settled internationally that fiscal offences were non-extraditable - see the 'Review Group Report', *1988 Records* vol.I at 65.

²⁶⁵ The Commonwealth Extradition Scheme recognises this in clause 2(3) which specifically mentions fiscal offences as extraditable, but only where the requested state's law allows extradition, which implies that when the law is silent, fiscal offences are not subject to extradition.

²⁶⁶ Historically, the legal regulation of drugs has been carried out by taxing licit supplies and prosecuting those who supply without the relevant proof of taxation.

²⁶⁷ *Op cit* at 274.

²⁶⁸ *Op cit* at 274-5.

of not viewing Article 3 offences as political, politically motivated or fiscal offences.²⁶⁹

It is likely that in practice such Parties will treat each case on its merits.²⁷⁰ Another limitation on the article 3(10) exclusion provision is that it does not exclude the political offence exception where the request as opposed to the offence is politically motivated. Sproule and St Denis note:

Although most delegations were willing to support the notion that a drug-related offence should be punished notwithstanding that it was politically motivated (for example, to finance a liberation movement), few were prepared to concede that states should be required to co-operate when a request made pursuant to a Convention offence was only a cover to apprehend and persecute an individual for political reasons.²⁷¹

Article 6(6), a “non-discrimination” clause, is also designed to ameliorate article 3(10)’s attempt to restrict the availability of the political offence exception to extradition in drug trafficking cases.²⁷² It reads:

In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution and punishment of any person on account of his race,

²⁶⁹ ‘Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 32.

²⁷⁰ Sweden has made a declaration (22/7/1991 - *Multilateral Treaties Deposited* (1997) at 306) in respect of article 3(10) to the effect that its constitutional legislation on extradition implies that when deciding whether a specific offence is political, ‘regard shall be had to all the circumstances in each individual case.’

²⁷¹ *Op cit* at 273-4.

²⁷² The introduction of article 6(6) as a restriction on article 3(10) answers, to some extent, Schutte’s (*op cit* at 140) criticism that article 6(6)’s insertion is illogical. He argues that because the 1988 Convention is not an extradition treaty in its own right and relies rather on existing or future extradition treaties or domestic law, it follows that the conditions under which extradition is granted is governed by those treaties or that domestic law. The same criticism can be applied to article 3(10) itself.

religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.²⁷³

The Jamaican delegate to the 1988 Conference who proposed the provision stated that

even in the case of an offence not deemed to be political, the Convention should provide that if a requested State has substantial grounds to believe that action on its part would facilitate prosecution of a person on the grounds of his race, religion, nationality or political opinions, it might refuse to comply with the request for extradition.²⁷⁴

The key phrase in the provision is 'substantial grounds'. Although there is no guidance on what these grounds are and when they become substantial, it is assumed that there must be objective evidence in the practice of the requesting Party of a not inconsiderable prospect that the offender will be prejudiced because of his 'race, religion, nationality or political opinions' before an extradition request can be refused. The reference to 'judicial and other competent authorities', could be construed as meaning that the Parties are obliged to ensure that their judicial authorities are given the power to determine whether potential human rights abuses preclude extradition, and could at their option decide whether other branches of government were to be given this power.²⁷⁵

Considering the combination of limitations on article 3(10) it seems that Sproule and St-Denis are correct when they conclude that it is no more than a declaration of principle that will not have much practical effect.²⁷⁶

²⁷³ Early drafts of this provision attempted to exclude nationality as a ground for refusal of extradition, but this proved extremely unpopular at the Conference and eventually this initiative was dropped.

²⁷⁴ *1988 Records* vol.II at 167. Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 21 notes that provisions along these lines are present in the Commonwealth Scheme for the Rendition of Fugitive Offenders (1986) 4 *CLB* 1124, the 1977 European Convention on the Suppression of Terrorism *ETS* 90 and in the domestic extradition laws of numerous states.

²⁷⁵ However, the US delegation to the 1988 Conference interpreted this provision as giving Parties the full discretion to determine which branch of government was to make these kinds of decisions - *1988 Records* vol.II at 32.

²⁷⁶ *Op cit* at 274.

4.2.6.2.3 Extradition limited to article 3(1) offences

Article 6(1) reads:

This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

Article 6(1) which delimits the material scope of the article, restricts the operation of the Convention's extradition provisions to the offences in article 3(1). The 1988 Convention does not create extradition relations in respect of offences of use, possession or cultivation for personal consumption in terms of article 3(2). Article 6(1) avoids the direct limitation of extradition to offences that Parties consider 'sufficiently serious', the limitation found in the earlier provisions.²⁷⁷ It is a shortcoming of article 6(1) that it applies to all article 3(1) offences even if they are not serious while it does not apply to drug offences established by Parties outside of the terms of article 3(1), even if such offences are serious. This shortcoming is compensated for by the fact that most Parties will not extradite for trivial offences, that is, usually offences punishable by a term of imprisonment of less than one year. The fact that the offences must be 'established by the Parties' means that they must be established by both Parties, thus satisfying the requirement of double criminality.²⁷⁸ Article 6(5)'s provision that extradition remains subject to the conditions provided for by domestic law and applicable extradition treaties also serves to secure the principle of double criminality. Schutte points out that this principle may be required in respect of extradition of article 3(1) offences because the establishment of the offences set out in article 3(1)(c) are subject to the constitutional principles and basic concepts of the legal systems of each Party concerned, and thus may be enacted to different degrees by different Parties.²⁷⁹ Although article 6(1) updated

²⁷⁷ Mention was made in the Expert Group of the desirability of developing common standards concerning the criteria for drug offences to be considered sufficiently serious to justify extradition. Although finally abandoned because of their diversity and because they could serve as a further way of avoiding extradition, several thresholds of punishment were suggested to establish the seriousness of offences varying from deprivation of liberty for a maximum term of one year to at least two years. A minimum sentence of four months was suggested where extradition was requested in respect of a person already convicted. Relying on imprisonment itself as the mark of the gravity of an offence was considered dubious in spite of the fact that many bilateral extradition treaties defined extraditable offences as those punishable under the laws of both states by imprisonment for more than a stipulated period. See the 'Expert Group Report', 1988 *Records* vol.I at 35.

²⁷⁸ See the 'Review Group Report', 1988 *Records* vol.I at 64.

²⁷⁹ *Op cit* at 137. He gives as examples the different definitions in different legal systems of notions of attempt, conspiracy, facilitating and counseling under article 3(1)(c)(iv).

existing extradition treaties by extending their range to the “new” money laundering offences in article 3(1), it has through this link to article 3(1) offences been criticised by Patel for perpetuating the enumerative approach in the drug conventions’ extradition provisions, and thus being unresponsive to changes in the drug traffic and the offences designed to attack it.²⁸⁰ But the alternative would have been for the Parties to agree to be bound to enact and extradite offences falling within a very broadly defined catch-all offence, such as ‘illicit traffic’, which would almost certainly have presented double criminality problems in practice. The drug conventions both introduce and try to harmonise domestic drug law; Patel assumes that all Parties already have such law.

4.2.6.2.4 Article 3(1) offences deemed to be extraditable offences in existing extradition treaties and Parties obliged to include them as extraditable offences in future extradition treaties

Article 6(2) reads:

Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

Article 6(2) places two obligations on Parties.²⁸¹ First it provides for the legal fiction that the offences to which it applies shall be deemed to be extraditable offences for the purposes of existing extradition treaties between Parties. Second, it obliges Parties to include these offences as extraditable offences in any new extradition treaties concluded between or among them. Schutte points out the irrelevancy of this obligation to states that are party to existing extradition treaties or will become party to future extradition treaties that obligate extradition of all offences carrying a threshold prison sentence.²⁸² The scope of treaties following an eliminative approach will simply be extended in practice. Some states that follow an enumerative approach have, however, already

²⁸⁰ *Op cit* at 726.

²⁸¹ As an obligation it follows the example set in the 1972 Protocol and not the optional provisions in the earlier conventions.

²⁸² *Op cit* at 137.

adapted their practice to follow the approach laid down in article 6(2).²⁸³ Article 6(2) extends extradition generally, but this extension is particularly significant as a means for introducing article 3(1)'s newer economic offences into the scope of extradition treaties, when seen against the background of the practice of many states not recognising economic crimes such as money laundering as being extraditable in terms of existing bilateral extradition treaties.

4.2.6.2.5 The 1988 Convention to function as an extradition treaty

Article 6(3) reads:

If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

Article 6(3) applies to that minority of Parties that require in terms of their domestic law a treaty or legislative basis to grant extradition. It gives such Parties the option to use the 1988 Convention as a basis for extradition. It distinguishes between two different types of these Parties.

The first sentence of article 6(3) applies to Parties that have detailed legislation catering for the technicalities of extradition but require the existence of a bilateral or multilateral treaty to make extradition possible. For these Parties, article 6(3) adopts the common approach of providing that the Convention may serve as the basis for extradition when the Parties' extradition law depends on the existence of a treaty and

²⁸³ For example, the US allows the amendment of all existing bilateral extradition treaties to which it is party by multilateral treaties like the 1988 Convention in order to include new offences in the list of extraditable offences, and pursues a policy that includes drug and money laundering offences as extraditable offences in all future treaties to be negotiated - 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 50.

there is no such treaty. Although the provision is not mandatory,²⁸⁴ Parties have complied with it.²⁸⁵

The second sentence of article 6(3), which is an innovation not contained in other multilateral criminal law conventions, applies to those Parties that must have a treaty basis for extradition and which rely on the provisions of the treaty to provide guidance in respect of all its technical details. It obliges these Parties, if they intend using the Convention as the legal basis for extradition, to consider enacting the relevant enabling legislation as neither article 6 nor the 1988 Convention as a whole provide for such detail.²⁸⁶ It is only an obligation to appraise the necessity for such legislation, but must be done in good faith.

4.2.6.2.6 The obligation on Parties which do not require the existence of an extradition treaty for extradition to recognise drug trafficking offences as extraditable

Article 6(4) reads:

The Parties which do not make extradition conditional on the existence of a treaty shall recognise offences to which this article applies as extraditable offences between themselves.

²⁸⁴ Many delegations wanted a mandatory provision - see the 'Expert Group Report', *1988 Records* vol.I at 19. But as Sproule and St-Denis *op cit* note at 278 fn53, most common law states do not extradite in the absence of a treaty. They note that in Canada section 35(1) of the Extradition Act R.S.C. (1985) ch E-23 allows extradition without a treaty where so declared by proclamation. Due to this provision and the Canadian policy of selective extradition relations the Canadian delegation supported an optional rather than mandatory article 6(3). In Committee I the US delegation noted that it could not accept mandatory wording because it adhered to a policy that extraditions were agreed on a bilateral and not a multilateral basis - *1988 Records* vol.II at 99. The US made it clear in an understanding made upon ratification (20/2/1990 - *Multilateral Treaties Deposited* (1997) at 305) that it shall not consider the Convention as the legal basis for extradition of citizens to any country with which it does not have a bilateral extradition treaty. The permissive wording means that Parties requiring the existence of an extradition treaty for extradition can refuse to extradite to Parties with which they do not have an extradition treaty on the basis that they choose not to recognise the 1988 Convention as an extradition treaty, whereas Parties that do not require extradition treaties would in the same situation be obliged to extradite under article 6(4). But this is not the case if it is recognised that article 6(4) only obliges such Parties to create the conditions for extradition in their domestic law, and that they retain the discretion to extradite or not.

²⁸⁵ The UK, one of those states opposed to making the provision mandatory, complied with it by adding the 1988 Convention to the list of international instruments contained in article 22 of the Extradition Act, 1989, c.33, and by making the Extradition (Drug Trafficking) Order, 1991 (SI 1991 No.1701), that makes provision for extradition with respect to Parties to the 1988 Convention but with which no general extradition arrangements have been established.

²⁸⁶ See Schutte *op cit* at 139.

Article 6(4) applies to those Parties that do not recognise treaties as necessary for extradition, that is, that vast majority of states that rely on their national law as a basis for extradition or those which extradite on the basis of comity. It obliges them to recognise article 3(1) offences as extraditable. Schutte points out that this provision only requires these Parties to create the legal possibility of extradition but does not affect their discretion in granting or even dealing with an extradition request from other Parties.²⁸⁷ They have the same measure of discretion as the Parties covered in article 6(3).

Obviously this obligation only applies when both Parties to the request are Parties that do not require a treaty base for extradition. Parties which do not in their domestic law permit extradition without a treaty basis and do not wish to use the 1988 Convention as an extradition treaty in terms of article 6(3), should change their domestic law so as to permit ad hoc extradition for the simple reason that most states do not have extradition treaty relations with one another.²⁸⁸

4.2.6.2.7 Expediting and simplifying extradition

Article 6(7) reads:

The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

Article 6(7) urges Parties to explore the possibility of speeding up extradition processes and streamlining the evidentiary requirements insisted upon during these processes. Whether expediting extradition procedures necessarily includes the simplification of procedures such as the detailed identification procedures that some Parties apply to extradition is uncertain, but the application of the different verb 'simplify' to evidentiary requirements suggests that alteration of the procedural law is not anticipated. The simplification of evidentiary requirements does envisage their alteration and reduction. It

²⁸⁷ *Op cit* at 138. He notes that states which grant extradition entirely on the basis of their domestic law reserve for themselves the right to do so at their discretion. They cannot be called to account for how they do so under international law because their granting of extradition is not a question of international law.

²⁸⁸ Gilmore WC 'International action against drug trafficking: trends in United Kingdom law and practice through the 1980's' (1991) 17 *Commonwealth Law Bulletin* 287 at 291 points out that section 3(3)(b) of the 1989 UK Extradition Act, 1989, c.33, empowers the Secretary of State to make special extradition arrangements for particular cases with states with which there are no general extradition requirements.

is aimed primarily at the *prima facie* rule still applied in most common law jurisdictions which makes the granting of an extradition order conditional upon the requesting state presenting evidence of the same weight as that sufficient to justify the commission of the alleged offender to trial if the offence had been committed in the territory of the requested state.²⁸⁹ Gilmore notes that article 6(7) reflects the common view in civil law jurisdictions that common law requirements such as the *prima facie* rule make the process of extradition difficult and sometimes impossible.²⁹⁰ Co-operation in this regard can be achieved through, for example, the prosecuting authority in the requesting Party sending a record of the evidence and an attested declaration that in its opinion there is sufficient evidence to prosecute. But while more permissive evidentiary and procedural requirements for extradition would assist in the fight against drug trafficking, common law states fear that such relaxation would compromise their administration of justice, and are reluctant to alter their domestic legislation. In practice, Stafford notes that while recently many common law states have relaxed their strict rules governing the admission of evidence provided in support of an extradition request, some lowering the threshold, others abandoning it entirely, she still considers that these rules are an obstacle to effective international co-operation.²⁹¹

4.2.6.2.8 Ensuring the presence of the subjects of extradition requests at extradition proceedings

Article 6(8) reads:

Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and

²⁸⁹ Most common law states still insist upon this requirement. At the Expert Group Meeting it was suggested that a valid arrest warrant or an executory judgement of the requesting state should replace the requirement, but these proposals were rejected - see the 'Expert Group Report', 1988 *Records* vol.I at 20, 38 respectively.

²⁹⁰ See *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 2. He points to the allowance for the possibility of dispensing with the *prima facie* requirement in the Commonwealth Scheme for Rendition of Fugitive Offenders (1986) 4 *CLB* 1124 between members on the basis of bilateral agreements, and the gradual abolition of this requirement in the UK by the Extradition Act, 1989, c.33, as evidence of awareness of these problems. But in 'International action against drug trafficking: trends in United Kingdom law and practice through the 1980's' (1991) 17 *CLB* 287 at 290-294 he gives an idea of how slow this change is in the face of resistance to "extradition on demand" despite the official desire for increased extradition.

²⁹¹ *Op cit* at 3.

are urgent, and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.

The object of article 6(8) is to expedite the procedure for extradition of drug traffickers. It provides that the requested Party may take measures to ensure the alleged offender is actually available when these proceedings begin. The requested Party must be satisfied that the circumstances warrant such action and that they are urgent, and only need act in response to a request from the requesting Party. The specific measure mentioned is taking into custody, while the other measures remain at the Parties' discretion. The Party is left to decide how long the alleged offender will remain in custody if extradition proceedings become protracted and whether release will be granted in such situations. In effect, article 6(8) provides for provisional arrest prior to the presentation of the formal extradition request. It is open to abuse in that it does not specify what test must be satisfied before a suspect is to be taken into custody - the simple say so of the requesting state may be sufficient - and it does not specify how long the suspect can be held before being released if no request is forthcoming.

The provision relies on Parties' domestic law to set out such details as which authority may order the arrest, the length of time the person may be detained, and the possibilities of bail and or conditional release, as well as the right to legal assistance. This reliance is dangerous when domestic law may be totally inadequate.²⁹²

Part of the explanation for its sparseness of detail is that, as Schutte points out, article 6(8) is irrelevant when extradition treaties already exist between the Parties setting out rules governing provisional arrest, or when a state simply extradites on the basis of its domestic law as that law will govern provisional arrest.²⁹³ He suggests that article 6(8) is only relevant to those states that require a treaty basis for extradition and who are going to rely on the 1988 Convention as that basis and who in respect of provisional arrest, are going to rely on article 6(8).²⁹⁴

²⁹² See, for example, the complaint by Bassiouni MC in 'Extradition: the United States model' in Bassiouni MC (ed) *2 International Criminal Law: Procedure* (1986) 405 at 410 that someone can be held in the US for forty five days on the basis of a two line telex without the requesting state having to show probable cause.

²⁹³ *Op cit* at 142.

²⁹⁴ *Op cit* at 142.

4.2.6.2.9 The obligation to prosecute where extradition is refused

Article 6(9) provides:

Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

(b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

Article 6(9) is an *aut dedere aut judicare* provision - the Party who finds an alleged offender in its territory must either extradite or prosecute him - of a sophisticated kind. A crucial provision, it tries to reconcile an attempt to eliminate all the safe havens for drug traffickers created by legal limitations on their extradition and an attempt to prevent drug traffickers from profiting by possible conflicts of jurisdiction between Parties.²⁹⁵ It thus is not surprising that it is subject to the exercise by the requested Party 'of any criminal jurisdiction established in accordance with its domestic law'. Thus if the requested Party chooses not to respond to an extradition request but in its own right to exercise jurisdiction that choice overrides its obligation under this provision. On the other hand an extradition request may not actually be forthcoming; as with the earlier conventions the 1988 Convention contains no obligation to request extradition and the Party in whose territory the accused resides may be forced to look for some other basis to exercise extraterritorial jurisdiction. But Schutte warns against the implication that a Party is free to establish any kind of extraterritorial jurisdiction it chooses, and points out that the

‘right of states to establish and exercise national jurisdiction is by definition limited by rules and general principles of public international law.’²⁹⁶

Article 6(9) must be read with article 4(2) which provides for the establishment of jurisdiction when the alleged article 3(1) offender is found on the Party’s territory and it refuses to extradite. Both these provisions were the subject of long and tortuous debate in Committee I of the 1988 Conference. It is important to recall, however, that as article 4(2) does not lay down a blanket obligation to establish jurisdiction upon refusal to extradite, there can be no blanket obligation to prosecute under article 6(9). Article 6(9) is only a partial translation into legal obligation of the *aut dedere aut judicare* principle. The sequence of events contemplated by the combined obligations of the two articles is as follows: refusal to extradite, establishment of jurisdiction (mandatory or optional) and then prosecution (mandatory). Because the establishment of jurisdiction in article 4(2) is made mandatory or optional depending on the grounds for refusal to extradite, in article 6(9) that distinction is carried through even though in both situations prosecution is mandatory once jurisdiction has been established.

Article 6(9)(a) sets out the first part of the two part approach. It obliges a requested Party to prosecute an alleged offender where it refuses to extradite him because of one of the grounds set forth in article 4(2)(a), that is, where the requested Party is obliged to establish its own jurisdiction through territoriality or nationality. Schutte notes article 6(9)(a)’s wording makes it clear that the obligation to prosecute only arises when the another Party has in fact presented an extradition request which has been refused.²⁹⁷ The grounds in article 4(2)(a) obliging a Party to establish jurisdiction imported into article 6(9) as grounds for refusal of extradition are: first, when the offence was committed in its territory or on one of its flag-ships or registered aircraft, and second, when extradition is refused because the individual is a national of the requested state. Despite efforts before and at the Conference, there is no provision in the Convention obliging a Party to extradite its own nationals.²⁹⁸ The majority of states,

²⁹⁵ See Schutte *op cit* at 142.

²⁹⁶ *Op cit* at 143.

²⁹⁷ *Op cit* at 144.

²⁹⁸ The ‘Review Group Report’, 1988 *Records* vol.I at 66. Thus the reservation made upon ratification by Colombia (20/12/1988 - *Multilateral Treaties Deposited* (1997) at 303) to the effect that it is not bound by article 3, paragraphs 6 and 9, and article 6, because they contravene article 35 of its on Political Constitution which prohibits the extradition of Colombians by birth, is redundant. The US, in response to the Colombian reservation has declared (23/10/95 - *Multilateral Treaties Deposited* (1997) at 307) that it understands Colombia’s reservation as only applying to extradition of Colombian nationals by birth, and

many of them within the civil law tradition, were opposed to any provision, even a hortatory provision, for this purpose. Civil law states argued that their refusal to extradite their nationals is counterbalanced by their willingness to assert jurisdiction over their nationals wherever their location, and that in any event article 6(9) would ensure the prosecution of offenders.

The provision obliges the requested Party where it refuses to extradite for the above mentioned reasons to 'submit the case to its competent authorities for the purposes of prosecution'. Conference delegates appeared to be of the opinion that this meant that although a requested Party was obliged to submit the case to its competent authorities, these authorities retained the discretion not to prosecute if they felt that no case could be made against the alleged offender.²⁹⁹ In other words what is laid down here is an obligation to exercise jurisdiction and an obligation to submit for prosecution, not necessarily to prosecute; the formula preserves prosecutorial discretion in those Parties where it exists. Yet the provision has been criticised.³⁰⁰

Requested Parties are obliged to submit the case for trial if extradition is refused 'unless otherwise agreed with the requesting Party.' The Chairman of Committee I of the 1988 Conference explained that this 'would allow the two states concerned, after consultation between themselves, to decide that prosecution in the requested state was not the appropriate method of administering justice in the case in question.'³⁰¹ Although refusal of the extradition request will in the normal course of events trigger the prosecution of the offender by the requested Party, such consultation was felt necessary to avoid the requesting Party turning to illegal rendition of the offender if it felt strongly that it should prosecute him,³⁰² or to allow the requesting Party the option of waiting for

objects to extension beyond this category of persons. Despite their redundancy, Venezuela (16/7/1991 - *Multilateral Treaties Deposited* (1997) at 306) and Myanmar (11/6/1991 - *Multilateral Treaties Deposited* (1997) at 305) have made similar declarations/reservations to article 6 rejecting it as a basis for the extradition of nationals.

²⁹⁹ See for example the Jamaican delegate's statement - *1988 Records* vol.II at 146.

³⁰⁰ The Netherlands's delegate comments in *1988 Records* vol.II at 127 that 'International drug trafficking was unlike terrorism or hijacking in that the requested Party might decline to extradite a person and also wish not to submit the case ... to its competent authorities because it wished to track down the whole organisation of which the person formed a part. A requirement to submit the case to the competent authorities would end the person's usefulness to any investigation.'

³⁰¹ *1988 Records* vol.II at 131. The Expert Group felt that one instance where an alternative to the obligation to prosecute might be agreed upon was when the Parties decided instead to enforce a foreign sentence under article 6(10) - see the 'Expert Group Report', *1988 Records* vol.I at 38.

³⁰² See the Netherlands delegate's explanation, *1988 Records* vol.II at 131.

the alleged offender to move to another Party which might agree to extradition.³⁰³ For practical reasons such as co-operation in the supply of evidence, the requesting Party's support of the prosecution by the requested Party would be necessary. Agreement to waive prosecution rather than unilateral demands and refusals of prosecution is also a good idea against the background of a refusal to extradite based on territoriality or nationality.³⁰⁴ Gilmore notes, however, that this wording does not in any way prevent the requested Party from exercising jurisdiction in such a case, even if the requesting Party objects and does not provide that support.³⁰⁵ A Party is obliged to prosecute if an extradition request is made and refused on one of the grounds set forth in article 4(2)(a) without any necessity of the requesting Party actually asking for such prosecution or agreeing to it, which means that the provision to prosecute is mandatory.³⁰⁶ Moreover, the requested Party, because of the limitation clause in the opening sentence of article 6(9), retains the right to establish its criminal jurisdiction at any time and on any domestic grounds even if, as noted, no extradition request is made.

Article 6(9)(b) contains the second part of the extradite or prosecute provision in the 1988 Convention. Article 4(2)(b) permits but does not require Parties to establish their jurisdiction over serious drug trafficking offences 'when the alleged offender is present in its territory and it does not extradite him to another Party.' The reasons for the refusal to extradite are not laid down in article 4(2)(b), but it is assumed that they would be other than the potential establishment of jurisdiction because of territoriality or nationality set out in article 4(2)(a).³⁰⁷ Thus article 4(2)(b) anticipates the establishment of a broad jurisdiction by those Parties that choose to rely on it. However, when extradition is refused and the requested Party opts to establish jurisdiction, on whatever

³⁰³ Schutte *op cit* at 146 notes that this would be particularly apt where the person sought is a one member of a criminal organisation, the other members of which are standing trial in the requesting Party. The prosecution in isolation of the single member in the requested Party would be impractical and inappropriate in such a situation.

³⁰⁴ Schutte *ibid*.

³⁰⁵ *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 20. The provision does not make the obligation to prosecute or extradite subject to international agreement as to which Party is the most appropriate to try a specific case. Once provision is made for the obligatory prosecution of offenders where extradition is refused, conflicts of jurisdiction are bound to arise from which drug traffickers may benefit. While trial *in absentia* or simply waiting for the offender to return to its or another more co-operative Party's territory may present themselves as options to the requesting Party should it wish to pursue the matter, they would be subject to a double jeopardy bar.

³⁰⁶ This is in line with similar provisions in article 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 10 *ILM* 1151 and article 10 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 27 *ILM* 672.

basis other than territoriality and nationality, article 6(9)(b) obliges it to exercise its jurisdiction by submitting the case to its competent authorities for the purposes of prosecution³⁰⁸ ‘unless otherwise requested by the requesting state for the purposes of preserving its legitimate jurisdiction.’ The condition that the requesting Party must not have asked the requested Party to refrain from prosecution differs from that attached to article 9(6)(a) because it is dependant on a unilateral request by the requesting Party. A requested Party, if it chooses to exercise jurisdiction, cannot argue that it does so in terms of an international obligation if the requesting Party, which may have a much stronger case against the alleged offender, objects. Sproule and St-Denis note:

This provision, most strongly advocated by the United States delegation, is aimed at preventing the creation of so-called “double jeopardy havens” or countries that would knowingly or unwittingly advantage traffickers by trying and acquitting them or by imposing an excessively lenient sentence for offences over which a second country would not only have jurisdiction but would have a better case against the offender. Such action, by virtue of the rule against double jeopardy, would insulate the trafficker from potentially more severe punishment in the second country.³⁰⁹

The condition implies that the requesting Party may have a more legitimate jurisdiction than the requested Party not only in its own view but under international law.³¹⁰ It also means that jurisdiction based on territoriality and nationality is seen by international law as more legitimate than the other unspecified grounds of jurisdiction contemplated by article 4(2)(b) and used as a basis for the obligation of the refusing requested Party to exercise jurisdiction in terms of article 6(9)(b). In this way the 1988 Convention appears to recognise an order of priority of jurisdiction starting with territoriality and nationality.³¹¹

³⁰⁷ In fact, nationals and non-nationals would be treated alike under article 4(2)(b) and article 6(9)(b).

³⁰⁸ It is assumed that they retain prosecutorial discretion.

³⁰⁹ *Op cit* at 278-9.

³¹⁰ See Schutte *op cit* at 147-148.

³¹¹ Schutte *op cit* at 148 opines that this may be the beginning of a development of a balanced theory of jurisdiction in international criminal law which leads to a ranking of concurrent jurisdictional claims over certain offences.

Article 9(6)(b) provides a way of avoiding the double jeopardy rule,³¹² and may well be useful in other ways,³¹³ but Schutte criticises it precisely because of these supposed virtues.³¹⁴

Although article 6(9) is not particularly onerous, the Philippines has declared that it does not consider itself bound by it.³¹⁵

4.2.6.2.10 The obligation to carry out sentence where the extradition of a convicted offender is refused

Article 6(10) is an innovation that recognises that extradition is frequently sought not only to establish jurisdiction over alleged offenders, but to regain control over convicted offenders who have escaped. In an effort to avoid the difficulties associated with re-prosecution of the offender and potential disparity in his re-sentencing where an ordinary extradition request is made, refused, and the requested state assumes jurisdiction, it provides:

If extradition, sought for the purpose of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application by the requesting Party, consider the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

Article 6(10) focuses on the situation where a convicted offender escapes and returns to his country of nationality.³¹⁶ It provides that if extradition is refused, the requested Party

³¹² Sproule and St-Denis *op cit* at 278 fn56 note that attempts to avoid the rule by characterising the transport of drugs through several states as separate offences are unlikely to succeed given the interpretation of earlier drugs conventions.

³¹³ See Gilmore WC *Combating International Drug Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) at 21 referring to the Australian Explanatory Memorandum on the Crimes (Traffic in narcotic Drugs and Psychotropic Substances) Bill, 1989, (1989) at 7. He notes that Australia planned to use this provision as the basis for prosecution inter alia where an extradition request has been made but the offender has not been surrendered, for instance in the situation where the Attorney General decides that the requesting Party has not given satisfactory undertakings that the death sentence would not be imposed or carried out.

³¹⁴ *Op cit* at 147 fn11. He notes that in many cases the reason to refuse extradition constitute at the same time an obstacle to the requested Party's own exercise of jurisdiction, such as the absence of double criminality, prosecutorial immunity under the requested Party's law due to time limitations, double jeopardy, diplomatic status of the alleged offender, insufficiency of evidence etc.

³¹⁵ 7/6/1996 - *Multilateral Treaties Deposited* (1997) at 305.

must consider, but only if its law so permits, enforcing the remainder of the offender's sentence. The transfer of the sentence is subject to the law of the requested Party, but the enforcement of the transferred sentence would be subject to the conditions provided for by the law of the requesting Party. The provision is an innovation, and domestic limitation on the provision's obligation is understandable. The domestic law of the requested Party would have to be in a position to accept the enforcement of foreign sentences in order to apply the provision. In effect the provision requires the enforcement of foreign criminal judgements through the requested Party's appropriately amended legislation.³¹⁷ But as Schutte points out the whole scheme is conditional on that legislation being in place, on the extradition request being made and being refused, and on the requested Party choosing to enforce the sentence.³¹⁸

The provision is an attempt to close a loophole in the law although the enforcement of foreign criminal judgements is not well established. Its advantages are that it avoids jurisdictional conflicts, it assists a Party enforcing the sentence to avoid double jeopardy bars raised against retrial and avoids the difficulties associated with trial in a jurisdiction different from that in which the offence was committed.³¹⁹ The Netherlands delegate to the 1988 Conference denied that the provision was a way of introducing universal jurisdiction through the back door, and said that it dealt with cases where the requested Party asserted jurisdiction and refused extradition on the basis of nationality.³²⁰ Article 6(10) does not impose obligations on Parties that cannot adapt their domestic law to it. But wary Parties have reaffirmed that its application must be made in terms of their domestic law.³²¹ Some have declared that they do not consider themselves bound by it.³²²

³¹⁶ See generally the 'Expert Group Report', *1988 Records* vol.I at 38.

³¹⁷ For example, the Swiss Federal Law on Judicial Assistance in Criminal Matters, 1981, provides in section 94(1) for the execution of criminal judgements of foreign courts, but only if: i) the judgement is final and enforceable in the requesting state; ii) the offender is resident in Switzerland or charged there with a serious offence; iii) the offence of which the offender has been convicted is also an offence in Switzerland; and iv) the execution of the sentence is precluded in the requesting state. The Swiss Federal Office takes the decision as to whether to accept or reject such a request, but its decision must be confirmed by a court before execution is carried out.

³¹⁸ *Op cit* at 149.

³¹⁹ Netherlands delegate, *1988 Records* vol.II at 165.

³²⁰ *1988 Records* vol.I at 166.

³²¹ Colombia (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304) has declared that it will only apply the provision and execute foreign sentences if its constitutional and other legal norms are observed.

³²² The Philippines (7/6/1996 - *Multilateral Treaties Deposited* (1997) at 305).

4.2.6.2.11 Responsibility to conclude extradition treaties and agreements to enhance extradition

Article 6(11) provides:

The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition.

Whilst not an obligation, this provision is forcefully worded. Its authors intended it to encourage Parties to enter into extradition agreements that covered situations not contemplated by article 6.³²³ Schutte explains that it recognises that article 6 is not an extradition mini-convention, that it is reliant on existing and future extradition treaties or domestic extradition law as the case may be, and that this is why article 6(11) appeals to Parties to enlarge their existing extradition relations through bilateral and multilateral agreements to make extradition possible and where already possible, more effective.³²⁴

4.2.6.2.12 Prisoner transfer agreements

Article 6(12) provides:

The Parties shall seek to conclude bilateral and multilateral agreements, whether ad hoc or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

Article 6(12) is a permissive provision encouraging Parties to enter into prisoner-transfer agreements. Like extradition these involve the inter-state transfer of persons, but in this case of persons who have already received a criminal sentence which they have not completed.³²⁵ The aim of this provision according to its authors was to encourage states to be more favourably disposed to the extradition of their nationals because it guaranteed that their nationals would be returned to them for the serving of sentence, but the

³²³ See the 'Expert Group Report', *1988 Records* vol.I at 39.

³²⁴ *Op cit* at 149. The 1991 UN Model Treaty on Extradition UN GA Res. 45/116 provides a model.

³²⁵ This provision was largely the result of the efforts of western European delegations who have had a positive experience with the 1983 European Convention on the Transfer of Sentenced Persons *ETS* 112 - see generally Epp H 'The European Convention' in Bassiouni MC (ed) *2 International Criminal Law: Procedure* (1986) at 253-274 and appendices.

provision also applies in situations where the offender was located in the prosecuting Party.³²⁶ It also serves humanitarian purposes while enhancing the effectiveness of imprisonment through the avoidance of the problems associated with the incarceration of foreigners, problems particularly associated with foreign drug offenders as there are so many of them in foreign jails and so many of those require treatment and so on.³²⁷

The provision applies to individuals sentenced to imprisonment or other forms of deprivation of liberty for article 3(1) offences. Precisely what qualifies as a form of deprivation of liberty is not stated, but it would not apply to repugnant forms of incarceration such as confinement in a labour or re-education camp. The provision applies to the prisoners to be transferred back to 'their country'; it does not stipulate the legal relationship that they must have with this country. It is assumed that it includes nationals, citizens and perhaps habitual residents, but the position of other persons who enjoy some legal status in that country is unclear. Nor is mention made in the provision of the requirement of the prisoner's³²⁸ or state of nationality's consent. These matters, and others such as the duration of the sentence which qualifies and which state (sentencing or administering or both) may initiate transfer, have been left to be dealt with in the particular treaties.³²⁹

Schutte comments that as many of the offenders in foreign jails are there for drug related reasons, this provision is potentially of wide effect.³³⁰ Such prisoner transfers are taking place.³³¹

³²⁶ See the 'Expert Group Report', 1988 *Records* vol.I at 39.

³²⁷ Schutte *op cit* at 149 points out that foreign prisoners present special problems leading to differentiation in prison regimes due to their different nationality, different language, absence of relatives and friends, absence of a home when released etc.

³²⁸ Some delegations to Committee I, for example the Spanish delegation, strongly supported a provision requiring the consent of the prisoner, but it was decided to leave it to the Parties to individually decide on whether consent was required according to their own practice - 1988 *Records* vol.I at 111-113.

³²⁹ The treaty which the Expert Group had in mind is the 1983 European Convention on the Transfer of Sentenced Persons ETS 112 - see the 'Expert Group Report', 1988 *Records* vol.I at 39.

³³⁰ *Op cit* at 150.

³³¹ *The Economist* 14 June 1997 reports the return to the UK to finish her sentence of Sandra Gregory on 5 June 1997 from Thailand, where she had been sentenced to twenty-five years for drug-smuggling, and that the numbers of prisoners generally transferred back to the UK were rising, albeit slowly. Under the 1976 US-Mexico Treaty on the Execution of Penal Sentences 28 UST 7399, TIAS No. 8718 (in force 11/11/1977), 537 Americans and 920 Mexicans returned to serve sentences in their native states between

4.2.6.2.13 Related provisions

Article 8 of the Convention, discussed in the enforcement chapter, is also relevant in this context. It provides for the possibility of the transfer of criminal proceedings against article 3(1) offenders as a possible alternative to extradition when it is considered to be in the interests of justice.³³²

4.2.6.2.14 The 1988 Convention's extradition provisions in conclusion

Article 6 is only a moderate improvement on the extradition provisions in the earlier conventions. Sproule and St-Denis provide a litany of examples of its cautious nature when they state that the

political offence provision is essentially preserved; there is no obligation to extradite nationals; the principle of double criminality is preserved by the obligation of all parties to adopt Convention offences; the rules against double jeopardy and that of specialty are not derogated from by the inclusion of the domestic safeguard clause; and even the hortatory provisions included in earlier drafts that encouraged Parties to extradite their nationals have been removed.³³³

Under the circumstances, this was not unexpected. The Conference delegates were not *ad idem* about the fundamentals of extradition, never mind about innovations such as prisoner transfers. As the United States delegate to Committee I of the Conference pointed out, article 6 attempts to strike a balance between two different approaches to extradition, viz.: between states that do extradite their nationals and states that do not.³³⁴

The balance struck is an uneasy one. Compromised extradition provisions do not provide efficient methods for acquiring the custody of drug offenders and will not stop the trend towards illegal rendition of such offenders. The law enforcement agencies of certain influential states will continue to develop the *de facto* policy of acquiring custody

1977 and 1990 - Abramovsky *op cit* at 207. The 1991 UN Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released GA Res. 45/119 is obviously useful.

³³² This provision was included at the instigation of the Netherlands delegation who saw merit in co-operative measures such as those that set down in the 1972 European Convention on the Transfer of Proceedings in Criminal Matters *ETS* 73.

³³³ *Op cit* at 279-80.

³³⁴ *1988 Records* vol.II at 115.

irregularly or through abduction because international law is not functional in this regard. Colombia has made a declaration as follows:

Colombia declares that it considers contrary to the principles and norms of international law, in particular those of sovereign equality, territorial integrity and non-intervention, any attempt to abduct or illegally deprive of freedom any person within the territory of one state for the purpose of bringing that person before the courts of another state.³³⁵

The 1988 Convention's provisions, flawed as they are, do not sanction such methods. It was clearly the intention of the authors of these provisions that the surrender and acquisition of offenders must be accomplished exclusively in a manner that does not violate state sovereignty. Whether anything but the dismantling of the barrier preventing the extradition of nationals can protect the sovereignty of states in which major traffickers are present is debateable.

It is interesting that it is sovereignty that is the motivation for restriction of extradition. Protection of individual human rights is only incidental to protection of sovereignty. Individuals are objectified by the drug conventions extradition provisions; they are not granted rights of their own. International law leaves them to be protected, if at all, by a municipal law which it simultaneously pressurises into eliminating domestic legal impediments to co-operation.³³⁶ Yet alleged offenders may well face an unfair trial, torture or inappropriate sanctions in the requesting Party, a situation about which the requested Party may have little information and less concern. The content of the drug conventions certainly have not been influenced by the trend in international and national law to create new human-rights based, individual-oriented, bars to extradition.³³⁷ Extradition is a powerful weapon against drug traffickers, of which they are scared,³³⁸

³³⁵ Reservation upon ratification (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304).

³³⁶ For example, Stafford *op cit* at 4 argues that concerns with human rights abuse in foreign jurisdictions that underpin the application of strict rules in common law states in respect of extradition requests cannot be valid if punishments are uniform in requesting and requested states. But simple uniformity of punishments, does not guarantee the string of human rights protections unrelated to punishment that may be provided for in the requested state but not in the requesting state.

³³⁷ See Blakesly (1992) at 283 and fn514 where he gives as an example European legislation such as articles 697-726 of the 1988 Italian *Codice di Procedura Penale* based on the 1950 European Convention on Human Rights 213 UNTS 221.

³³⁸ Okera *op cit* at 968.

but it should be a weapon used justly, not unjustly, and international drug control law must catch up with general international human rights law in this regard.

4.2.7 Jurisdiction and extradition in conclusion

The drug conventions rely for jurisdiction on the principle of territoriality. They extend jurisdiction beyond the territorial cautiously. The issue is the breadth of that extension.

The potentially most expansive form of extraterritorial jurisdiction over drug offences is universal jurisdiction. Examination of the drug conventions reveal that they do not create an international drug crime to which universal jurisdiction applies. There is no express wording in the conventions creating international drug offences to which universal jurisdiction applies or requiring Parties to enact domestic legislation applying universal jurisdiction to drug offences, and no evidence in the preparatory documentation that such wording should be implied. It was not the intention of the authors of these conventions that they create international crimes and Parties to them do not generally regard these conventions as creating international crimes. These conventions were intended to create indirectly applied uniform national drug offences. They do not regulate the question of international jurisdiction other than to establish territorial jurisdiction and to set out conditions for the establishment of jurisdiction over extraterritorial offences in limited cases.³³⁹ They provide for the primacy of domestic law on criminal jurisdiction.³⁴⁰ Universal jurisdiction is unconditional, and unlimited by domestic law. Nor do the drug conventions assist drug offences to qualify as crimes in customary international law to which universal jurisdiction applies. Looking beyond the fact that it is controversial whether such a basis of jurisdiction exists in customary international law at all,³⁴¹ it is patent that the thesis that drug crimes are crimes in customary international law is simply not substantiated by state practice or *opinio iuris*. The drug conventions introduced new crimes to the world and cannot be said to have crystallised a rule of custom internationalising drug offences. Most states in their practice do not treat them as international crimes, and they do not believe them to be international crimes. With this level of support, to argue that they are obligations *erga*

³³⁹ See, for example, article 36(2)(a)(iv) of the 1961 Convention and article 4(2)(b) of the 1988 Convention.

³⁴⁰ See, for example, article 36(3) of the 1961 Convention and article 4(3) of the 1988 Convention.

³⁴¹ Puttler *op cit* at 110.

omnes or that they are *ius cogens* norms of international law is absurd.³⁴² The conventions themselves provide poor evidence of state practice or *opinio juris*. The reluctance of Parties to commit themselves on question of criminalisation and jurisdiction is borne out by the limitation clauses in the conventions making it clear that the crimes are to be defined according to domestic law and that participation in a convention cannot be interpreted as affecting a party's attitude on the issue of the limits of criminal jurisdiction as a question of international law. There are other factors undermining the formation of a custom relating to the crimes themselves. They are not sufficiently well defined in the conventions. Only certain drug offences are actually transnational and require international co-operation for suppression. While there may be international consensus about the criminalisation of some forms of conduct relating to drug trafficking,³⁴³ such as exporting or importing drugs, there is no consensus about others, such as conspiracy to export or import or, for that matter, conduct relating to "soft" drugs such as cannabis. Moreover, the way states view the effect of different weights of drugs being smuggled also injects uncertainty into the question of the status of a particular crime.³⁴⁴ This diversity of opinion is reflected in the domestic limitation clauses applicable to the more controversial forms of conduct criminalised in the drug conventions. The drug conventions recognise that drug offences may be transnational in nature and may require international co-operation for suppression, but to conclude that these offences are crimes in international law to which universal jurisdiction applies is to go too far. Whether these conventions, despite their limited effect, even serve as a clear basis for the development of such a rule, is controversial. Yet there is still support for universality. It is seen by some as a panacea. Bassiouni argues that its establishment across all states over drug offences would break down the vertical barriers that protect traffickers, and allow them to be completely suppressed.³⁴⁵ But he ignores the inherent danger in universality of infringement of sovereignty as it requires no connection

³⁴² *Erga omnes* obligations are obligations on all states because of the legal interest of all states in the substance of these obligations - see *in re Barcelona Traction, Light and Power Co. (Belgium v Spain)* 1970 ICJ 4 at 33, while *ius cogens* norms are peremptory norms of international law - see article 53 of the Vienna Convention on the Law of Treaties.

³⁴³ See Puttler *op cit* at 117 who states that while every state agrees that selling heroin is an international crime to which universal jurisdiction applies, the same is not clear in respect of sale of small quantities of hashish.

³⁴⁴ While some states view the weight of drugs as going to sentence, others view it as a way of distinguishing between serious and less serious offences.

³⁴⁵ See 'The International Narcotics Control Scheme' in Bassiouni MC (ed) *International Criminal Law: Crimes* (1986) 507 at 518.

between state and alleged criminal.³⁴⁶ It is not obvious whether states regard drug offences as being of such gravity that they threaten the international legal order to the extent that that order can afford to abandon the necessity of jurisdictional connection between criminal and prosecuting state. Before such a connection can be abandoned, it is submitted that an absolutely uniform drug crime and punishment regime would have to exist internationally, implying universal agreement on drug control policy. That is not presently the case.

Bassiouni has been an even stronger proponent of the application of the principle of subsidiary universality of jurisdiction to drug offences. He relies on the size of the threat posed by international drug trafficking and the elusive nature of its organisers to justify the application of the principle of subsidiary universality in national criminal legislation and the punishment of violators irrespective of their nationality or the place of their crime.³⁴⁷ There has been a gradual swing towards this point of view since 1936 and it has been incorporated in the drug conventions. Bassiouni and Wise have analysed the various types of *aut dedere aut judicare* provisions in international criminal conventions and concluded that such provisions in the drug conventions fall largely within the same conditional type (they appear to follow the 1929 Convention for the Suppression of Counterfeiting),³⁴⁸ which unlike unconditional later types such as that contained in the 1970 Hague Hijacking Convention, 'does not require the parties to be prepared to assert jurisdiction in every case in which an offender is not extradited.'³⁴⁹ This type of provision allows the Parties to have different approaches to the exercising of extraterritorial jurisdiction, and to choose not to exercise such jurisdiction even when they refuse extradition. It recognises that states may not want to extend jurisdiction extraterritorially in every case particularly with regard to crimes committed abroad by foreigners. Thus, for example, article 6(9) of the 1988 Convention provides that if extradition is refused on the ground of nationality, the refusing Party must submit the case for prosecution, but in the case of refusal of extradition of non-nationals, a Party is not obliged to establish extraterritorial jurisdiction. Only if it chooses to establish extraterritorial jurisdiction over non-nationals is it obliged to prosecute them if it refuses

³⁴⁶ The possibility of universal jurisdiction being used by the Germans to frustrate Dutch drugs policy was raised in Puttler *op cit* at 119.

³⁴⁷ *Op cit* (1986) at 521.

³⁴⁸ 112 *LNTS* 371 (articles 8 and 9). See also the 1950 Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others 90 *UNTS* 271 (article 9).

³⁴⁹ Bassiouni and Wise *op cit* (1995) at 12. See Wise *op cit* at 273-274.

to extradite them. Thus a Party's stance on extraterritorial jurisdiction conditions its application of subsidiary universality to drug offences. The duty to prosecute is subordinated to the Party's existing laws regarding extraterritorial jurisdiction. In trying to find out why this has occurred, it is best to go back to the early instruments. The 1936 Convention introduced the principle of subsidiary universality to the international illicit drug control system. This principle was to be adopted by national penal legislation to ensure that illicit traffickers would not escape prosecution because they were apprehended in a different state to the one in which the crime was committed. The 1936 Convention limited itself to the formulation of vague provisions accompanied by escape clauses in order to secure the adherence of states that would not accept stipulations different to their national law, but failed still to gain the necessary support to become effective. The 1961 Convention took over the extradition provision from the 1936 Convention but watered it down, and a weak provision resulted. In 1972, however, there was a reversion to the more stringent provisions of the 1936 Convention. Yet states continued to display a negative attitude towards implementation of subsidiary universality to drug offences.³⁵⁰ The 1988 Convention attempts to overcome this reluctance by bridging the fundamental gap between civil and common law states on jurisdiction and extradition.

The problems that the author's of the 1988 Convention faced are those of the legal capacity and willingness of states to establish and exercise jurisdiction over extraterritorial drug offences. Both civil and common law states are, absent international legal obligation, in most cases simply unwilling to establish extraterritorial jurisdiction over aliens with whom they have no greater connection than the alien's presence in their territory. They are, however, legally able, and usually, although not always, willing to extradite aliens. Nationals present a more complicated problem. Civil law states prefer to prosecute their nationals at home. They are usually able, although not always willing, to establish and exercise extraterritorial jurisdiction on the basis of nationality. Civil law states will usually not extradite their nationals, because in most cases they are constitutionally prevented from doing so. Common law states believe that drug offences for practical reasons should be prosecuted where they occur. They will not prosecute their nationals for offences committed abroad, but they will extradite their nationals. Civil law states that support an international no-hiding place policy for drug offenders

advocate the use of subsidiary universality for a number of reasons. They argue that it will oblige civil law states to establish and exercise extraterritorial jurisdiction over their nationals who commit extraterritorial drug offences when such states are reluctant or unable to invoke nationality as the basis for such jurisdiction, and are unable to extradite these nationals. The inviolability of the nationality exception to extradition will be respected, but the prosecution of extraterritorial drug offences achieved. Subsidiary universality is also held to be a solution to situations where a requested state, either civil or common law, is unwilling to extradite an alien for whatever reason. Common law states that support international drug control advocate the use of “universal” extradition; they oppose application of universal jurisdiction,³⁵¹ and support the extradition of all offenders no matter what their nationality. The *aut dedere aut judicare* principle becomes an area of contest; the common law states emphasise *dedere* at the cost of *judicare* and the civil law states emphasise *judicare* at the cost of *dedere*. The 1988 Convention is something of an awkward compromise between these two positions which tries to achieve the difficult task of obliging Parties if they don’t give up to prosecute and if they don’t prosecute to give up, but achieves neither particularly adequately because of the necessity of limiting both kinds of obligations in order to keep both groups happy. It protects the inviolability of the nationality exception to extradition, thus meeting the concerns of civil law states. And while it obliges Parties that refuse to extradite on the basis of nationality to establish jurisdiction and prosecute, it does not oblige them to establish jurisdiction over aliens if they refuse to extradite them. It thus meets the concern of the common law states opposed to unlimited subsidiary universality because they feel it is ineffective. What is left is a compromised legal instrument which may extend jurisdiction and extradition to a certain extent in respect of drug offences but certainly does not lead to an unqualified subsidiary universality based on treaty obligations, or for that matter a rule of customary international law derived from the

³⁵⁰ See Chatterjee *op cit* at 439.

³⁵¹ The US delegation to the 1988 Conference reported on the need to overcome any domestic hurdles to the extradition of US nationals because: ‘[i]n the view of the general US policy favouring extradition of nationals to the country where the greatest harm has been suffered because of the commission of criminal acts, and against creating “universal” jurisdiction, we believe it preferable to eliminate situations in which we cannot extradite our nationals rather than create jurisdiction to prosecute them because we cannot extradite them.’ - ‘Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 53.

treaties. While it may allow Parties to establish jurisdiction over extraterritorial drug offences, it does not oblige them to do so. As Schutte states:

It is to be stressed that the Convention does not contain the obligation to establish criminal jurisdiction on the basis of the so-called principle of universality, or any other rule of extraterritorial jurisdiction. In this respect, it has not followed the pattern of previous conventions in other areas of criminal law, such as the conventions on hijacking, hostage taking, other forms of terrorism, torture, etc. It has however, remained in line with the 1961 Single Convention on Narcotic Drugs, the 1961 Convention as amended by the 1972 Protocol and the 1971 Convention on Psychotropic Substances, which in their turn do not contain the obligation for States Parties thereto, to establish criminal jurisdiction over the offences covered by those instruments on the basis of universality.³⁵²

In practice, states still fail to either extradite or prosecute drug offences committed abroad,³⁵³ and they fail to enact the domestic legislation necessary to allow jurisdiction to be established on this basis. There is no great prospect for change. Civil law states, according to Nadelmann, 'neither anticipate nor desire any change in the rule against extradition of nationals',³⁵⁴ and it is unlikely that common law states are going to begin asserting extraterritorial jurisdiction on the basis of nationality *en mass*. As long as states are unwilling to make major alterations to their criminal justice systems, a compromised subsidiary universality seems unavoidable. But it also must not be ignored that many common law states, and particularly the United States, see themselves as the ultimate victims of drug traffickers and particularly of foreign drug traffickers, and they are unwilling to surrender the option of prosecuting such traffickers at home, hence their opposition to universal jurisdiction for drug offences and their support for universal extradition. By contrast, many major supply states are eager to protect their nationals and

³⁵² *Op cit* at 145.

³⁵³ Nadelmann *op cit* at 75 notes that the US officials still consider application of vicarious prosecution as contrary to US legal norms and, more to the point, unnecessary.

³⁵⁴ Nadelmann *ibid*. States like Myanmar have expressly reserved (11/5/1993 - *Multilateral Treaties Deposited* (1997) at 305) the right not to be bound by article 6 of the 1988 Convention in so far as its nationals are concerned. The growing popularity of the exception is the cause of some concern, especially when states do not assert jurisdiction either - see Stafford *op cit* at 4. Prost *op cit* at 52 notes, however, that previously unwilling states have recently allowed extradition of their nationals on condition that service of sentence is in the state of nationality.

through political pressure and sometimes out of fear are eager to retain their jurisdiction over drug traffickers who are their nationals and not to surrender them to consumer states. Thus the state of international drug control law in this area reflects the political state of affairs that underpins it. A no-hiding place from international law is not the priority of consumer states - their priority is a no-hiding place from their domestic law. And the producer states are still willing to provide such a hiding place in such circumstances, for a variety of reasons.³⁵⁵

What we are left with is a massively qualified “no hiding place” approach which is further qualified by the practical considerations of the quantity of state adherence to the conventions and by the quality of the implementation of their obligations by Parties. The existing international provisions provide, at best, for quasi-universality of jurisdiction and quasi-universality of extradition. In practice, drug traffickers are likely to slip between these two stools. All that is left to catch them are the provisions for extraterritorial jurisdiction in international law some of which like nationality, extended territoriality to ships and aircraft, and the effects principle are recognised by the drug conventions, while others like the protective principle are not. We can expect further unilateral development of these principles by states in their practice as they seek to establish legally justifiable connections between themselves and drug offences committed extraterritorially. Extravagant interpretation of these principles remains unchecked by the drug conventions. Customary international law provides no guide to the ranking of these principles where there are conflicts of jurisdiction. States are not likely to agree upon such ranking given that the interest of consumer states in the global supply reduction policy is not shared by producer states. The drug conventions have not intervened effectively into the area of extraterritorial jurisdiction over drug offenders by ensuring that most states recognise and rank the same connections between offender and state taking jurisdiction. Consensus on policy is a necessary precondition of a regulated and effective “no hiding place” approach to drug offences.

³⁵⁵ It is hard in this context to explain article 3 of the OAS Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences Doc. OEA/Ser.P/AG/doc.2916/92 rev.1, which in effect applies universal jurisdiction to money laundering offences.

4.3 General procedural provisions

4.3.1 Introduction

The 1961 Convention, 1971 Convention, and 1972 Protocol did not make any provision for the regulation of the procedure to be used by the Parties in the prosecution of drug offenders, other than provision for the establishment of jurisdiction and extradition. However, in response to the perceived gravity of drug offences, the 1988 Convention intervenes into the procedural law of Parties. Article 3 directs the criminal justice systems of the Parties when prosecuting drug offences to curtail administrative discretion in dealing with offenders and to take steps to ensure that offenders are prosecuted. These provisions are limited because they relate to the criminal procedure of the Parties, an area of domestic law not usually the subject of international modification. Indeed, article 3(11) makes it clear that these provisions are not self-executing. It provides that:

Nothing contained in this article shall affect the principle that the description of offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

4.3.2 Plea-bargaining

Article 3(6) of the 1988 Convention states:

The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximise the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

This provision was included in the Convention to ensure that Parties that make use of the technique of plea-bargaining do not abuse the discretion vested in the prosecutorial arms

of their criminal justice system to undermine the deterrent effect of drug related penalties.³⁵⁶ Sproule and St Denis chart the history of article 3(6) thus:

This paragraph was first proposed by Mexico. Mexico complained that soft treatment, often in the form of “plea-bargaining” in consumer countries, undermined international efforts to reduce the demand for illicit drugs. Common law states such as Canada and the United States countered that, apart from being fundamental to their legal systems, prosecutorial discretion provides an inducement for the little fish offender who is prepared to co-operate in the ensnarement of the “big fish” trafficker only if promised concessions such as the reduction of his sentence.³⁵⁷

Plea-bargaining can undermine the enforcement of drug laws and their deterrent effect on traffickers or users whether they are potential offenders, offenders not yet in custody or offenders already in custody. Thus article 3(6) provides that Parties shall endeavour to ensure that plea-bargaining and other forms of prosecutorial discretion are exercised to maximise the effectiveness of law-enforcement measures in respect of article 3 offences and to maximise the deterrence of the commission of article 3 offences. The exact scope of ‘discretionary legal powers’ in article 3(6) remains undefined, but they can be taken to mean

such discretionary acts as dismissal of criminal action, diminishing of charges, their modification, transaction regarding the reduction or modification of sanction, concession of immunity or any other form of bargaining.³⁵⁸

³⁵⁶ See Sproule and St-Denis *op cit* at 271. Guidelines in respect of prosecutorial discretion had been recommended at a number of international expert meetings, eg. European Seminar of Non-Prosecution organised by the Helsinki Institute for Crime Prevention and Control, affiliated with the UN, 22-23 March 1986.

³⁵⁷ *Op cit* at 271 fn33. See also the substantially similar sentiments of the Colombian delegate, 1988 *Records* vol.II at 49. The Mexican delegate defended his position as follows: ‘[He] said it should be borne in mind that there were great numbers of dealers selling drugs to consumers, whereas the organisers were far fewer in number. He knew that the bargaining technique was favoured in some countries, but statistics he had seen showed that the technique was used generously and in a manner that was not always justified by the need to apprehend and prosecute the major criminals. It was sometimes used because there were not enough courts to try all the offenders arrested, or not enough prisons to hold them. The result was that battalions of dealers went back to the streets to deliver drugs to consumers.’ - 1988 *Records* vol.II at 49. The Mexican proposal would have done away entirely with plea-bargaining for drug offences. - 1988 *Records* vol.I at 90.

³⁵⁸ See the Statement of the Philippines delegate, 1988 *Records* vol.II at 62.

The provision appears to hit both the traditional plea-bargain in which a prosecutor and defence counsel agree to have the defendant plead guilty to a lesser charge in return for foregoing the right to a trial, and the practice in some common law states³⁵⁹ of enforcement agents arresting or threatening prospective informants and then offering them a deal in exchange for co-operation in making a case against other traffickers ("flipping").³⁶⁰ Such a deal may involve not proceeding with the arrest or arranging with the prosecutor to drop charges, and thus may involve the co-operation of a prosecutor or judge. The provision is also wide enough to be applied to the granting of bail.³⁶¹

Compliance with the compromise obligation in article 3(6) will restrict what is regarded by enforcement officials as one of the most important sources of drugs intelligence available. Although the provision fetters prosecution policy, the degree to which it does so is uncertain. The most logical method for ascertaining the degree to which the discretion should be curtailed in a particular case would be to weigh up the interest in the prosecution of the particular individual against the interest in the supply of intelligence he or she offers to provide. It has thus been argued that the Parties' discretionary legal powers are wider with respect to the prosecution of use offences under article 3(2) as opposed to illicit drug trafficking offences under article 3(1),³⁶² apparently because Parties do not have as much interest in the prosecution of users as they have in the prosecution of traffickers.

It seems unlikely that this provision will have any real impact, as it will be monitored almost entirely by the same officials who use plea-bargaining and prosecutorial discretion. Indeed, use of plea-bargaining continues unabated.³⁶³

³⁵⁹ Such deals may be illegal in civil law states where they violate the 'rule of compulsory prosecution' requiring prosecution of anyone known to have committed an offence. Nadelmann *op cit* (1993) at 218 notes, however, that police in many European states now openly pursue such practices, and laws have been altered accordingly - see section 31 of the German Narcotics Law.

³⁶⁰ See Nadelmann *op cit* (1993) at 215.

³⁶¹ The understanding of the US delegate, *1988 Records* vol. II at 57.

³⁶² See the statement of the Netherlands delegate - *1988 Records* vol. II at 30, where he points out that the Convention already adopts a softer approach to the punishment of simple possession in article 3 paragraphs 4(d) and 11. The Netherlands made a reservation to this effect upon signature and upon acceptance (8/9/1993 - *Multilateral Treaties Deposited* (1997) at 305), the latter pointing out that it only accepts article 3(6) insofar as it accords with Dutch criminal policy and legislation.

³⁶³ Ellington *op cit* at 472 notes that during Manuel Noriega's trial the prosecution granted some type of immunity or leniency to twenty of the testifying drug dealers. In the BCCI case, charges were dropped against the corporation under a plea-bargaining agreement and the BCCI paid \$14 million in drug forfeiture money, something criticised by the US Senate Foreign Relations Committee's Subcommittee on Narcotics and Terrorism as 'merely turning over the profits of drug trafficking to the federal

4.3.3 Statutes of limitation

Article 3(8) of the 1988 Convention continues:

Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

Article 3(8) obliges Parties to ensure that statutes of limitation are not used to provide a means for offenders to avoid punishment. It envisages two situations, viz: Parties have a qualified obligation to (a) establish a 'long' statute of limitations period for the commencement of article 3(1) prosecutions, and (b) an even 'longer' statute of limitations period where the alleged article 3(1) offender has evaded justice. The word 'long' indicates that the drafters of the Convention had in mind an 'extensive time limit',³⁶⁴ but just how 'long' remains unspecified. The establishment of a 'longer period' is designed to discourage the flight of offenders from the administration of justice whether within or between territories of Parties. This provision does not imply the complete abandonment of statutes of limitation.³⁶⁵

As noted, the Parties' obligation is qualified. The inclusion of the wording 'where appropriate' sugared this particular legal pill for most delegations because it appears to render the provision hortatory.³⁶⁶ This conclusion differs from that of the chairman of Committee I who felt the words did not offer

government' in exchange for the ending of criminal liability - see Clutterbuck R *Drugs, Crime and Corruption* (1995) at 112-113.

³⁶⁴ See the understanding of Committee I, *1988 Records* vol.II at 57.

³⁶⁵ Colombia has made it clear in a declaration (10/6/1994 - *Multilateral Treaties Deposited* (1997) at 304) that it understands that the provision 'does not imply the non-applicability of the statutory limitation of penal action.'

³⁶⁶ See Sproule and St-Denis *op cit* at 271. The 'Expert Group Report', *1988 Records* vol.I at 16 notes that resistance to the provision because its introduction of a special prescription for a particular category of offences was not compatible with their legal systems led to the introduction of the escape clause.

Parties the opportunity of not fulfilling the obligations established by the paragraph; the qualification was merely intended to take account of cases where no improvement of the existing national measures was required.³⁶⁷

The provision is presumably inapplicable if a Party either does not have a statute of limitation on drug offences or at all. For such Parties the decision to proceed or not will presumably be made on a case by case basis taking into account practical considerations such as the availability of witnesses and evidence and the reasonableness of the chance of conviction. It is not clear whether 'establish' means the creation of new legislation where Parties do have either general or specific drug offence statute of limitation provisions. The Netherlands' delegate to the Conference did not feel that satisfaction of the provision required a change in its relevant legislation dealing generally with statutes of limitation on serious offences.³⁶⁸

4.3.4 Presence of alleged offenders and offenders at court

Finally with regard to general procedure article 3(9) provides:

Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

The original draft article 2(8) included the extra sentence:

³⁶⁷ See *1988 Records* vol.II at 58.

³⁶⁸ See *1988 Records* vol.II at 30. See also the statement of the Austrian delegate and Barbadian delegate to similar effect. The Netherlands made a reservation to this effect upon signature and upon acceptance (8/9/1993 - *Multilateral Treaties Deposited* (1997) at 305), the latter pointing out that it only accepts article 3(8) insofar as it accords with Dutch criminal policy and legislation. The US applies a five year statute of limitations for non-capital drug offences, and considers this period, together with provisions to suspend the running of the limitation period when an indictment is filed (18 USC section 3282), where a person flees justice (18 USC section 3290), and to allow evidence to be obtained from abroad (18 USC section 3292), to be sufficient to meet its obligations under article 3(8) - see 'Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances' from *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* Senate Executive Report 101-15, 101st Congress, 1st Session at 31.

In this regard the Parties shall bear in mind the large sums of money available to traffickers when setting bail.³⁶⁹

The Group of Experts that examined the draft deleted the sentence because there was disagreement about whether bail should be available at all for article 3(1) offences, and if it were available whether its granting should be regulated by the Convention or remain entirely a domestic concern.³⁷⁰ What remains of the provision is restricted to an obligation to ensure a person charged with or convicted of an article 3(1) offence is present at 'criminal proceedings', the exact nature of such proceedings being left undefined, but only if the offender is found in the territorial jurisdiction of the Party.³⁷¹ The Parties are obliged to take 'appropriate measures' to ensure the alleged offender's presence at proceedings which assumedly means arrest and/or detention, and the refusal of bail if there is no reasonable prospect that he or she will attend trial. It appears that the criminal proceedings mentioned include prosecution by the Party in which the offender is found or extradition proceedings following a request by any Party which wishes to prosecute the offender for an article 3(1) offence.³⁷² It is, however, important to note that the provision has an in-built limitation clause, as the measures have to be 'consistent' with the Party's 'legal system'.

4.3.5 Procedural provisions in conclusion

The few paragraphs in article 3 of the 1988 Convention reviewed above regulate areas of domestic law and practice that have come under international scrutiny because they appear to represent weak links in the chain of procedure following the arrest of drug offenders, weak links that present opportunities for alleged offenders to escape prosecution and or conviction. Practices like plea-bargaining are emblematic of the interface between crime and enforcement, and their regulation is problematic because it frustrates enforcement. Hence the weakness of these provisions. In addition,

³⁶⁹ See *1988 Records* vol.I at 4.

³⁷⁰ See the 'Expert Group Report', *1988 Records* vol.I at 16.

³⁷¹ The scope of draft article 2(8) was not limited to the territorial jurisdiction of the arresting Party. The Expert Group restricted its scope, because some states could not accept a universal scope of application - see the 'Expert Group Report', *1988 Records* vol.I at 16.

³⁷² The draft article contained a clause which obliged a Party to ensure the presence of offenders not only at criminal proceedings but also for the purposes of extradition. The clause was deleted - see the 'Expert Group Report', *1988 Records* vol.I at 16 - but there is nothing in the wording of article 3(9) to indicate that criminal proceedings are limited to the Party's domestic criminal proceedings.

international intervention into procedural regulation is still generally undeveloped, and further development is reliant on harmonisation in other areas of law.

4.4 Conclusion

This chapter has examined the procedural provisions of the drug conventions. Its focus has been upon the grounds for establishing jurisdiction over drug offences and the provisions for extradition of offenders, but it has also examined the few procedural provisions in the 1988 Convention. In essence, what this examination has revealed is the patchy and incoherent international legal regulation of the legal foundations necessary for national courts to entertain legal proceedings in respect of alleged drug offenders. This incoherence is not surprising given the gradualist evolution of these provisions in reaction to the need to establish effective measures against drug offenders wherever they may be. However, the biggest obstacle to the creation of a coherent system has been national sovereignty and the related problems of attempting to overcome domestic differences in law and practice. The existing system represents some progress towards a global system of control over drug offences. But progress is being held up by major hurdles such as the non-extradition of nationals in civil law states. The latter represents not only a difference in legal approach, but also serves to disguise the unwillingness of certain states to co-operate in pursuit of drug offenders due to the lack of a shared conception of who is responsible for the drug problem.

